CLASS ACTIONS: THE RIGHT TO OPT OUT

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" 'If you wish to study a *granfalloon*,
Just remove the skin of a toy balloon.' "[1]

The class member's power and duty to exclude himself from a class action originated as a simple procedural device to prevent post-trial one-way intervention and to impose binding effect on the member. But this procedural "right to opt out" implicates more complicated relationships to individual autonomy, attorney authority, and ultimately of judicial power to act on behalf of groups. The emergence of this new right has also revealed that there are many alternative procedural models which the legislature and courts may employ to administer group rights, and that the choice between even slightly different models significantly affects lawyers' strategies and the substantive values at stake. This Article traces the history of the right to opt out, identifies related alternative procedural models, and restates the relationship of the right to opt out to fundamental legal concepts which it implicates. The author concludes with a number of observations concerning current and future issues involving the right to opt out.

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1. K. VONNEGUT, JR., CAT'S CRADLE 68 (Dell ed. 1970) (quoting Bokonon to distinguish a "karass," that is, an organized team that does God's will, from a false karass, or "granfalloon").

I. INTRODUCTION[2]

A. Kansas City Sidewalk *and* Dalkon Shield: *Mass Disaster and Products Liability*

On the evening of July 11, 1981, two suspended "skywalks" over the

2. A restatement of Rule 23 of the Federal Rules of Civil Procedure may be helpful to the reader. *See infra* appendix at 83-84. This rule, entitled "Class Actions," was rewritten in 1966 to require four prerequisites in subdivision (a): the so-called (1) "numerosity"; (2) "commonality"; (3) "typicality"; and (4) "adequacy of representation" requirements. In addition, a class action must also satisfy the standards of Rule 23 (b)(1) where, in the absence of the class action, separate actions would (A) establish incompatible standards of conduct for the party opposing the class, or (B) would practically prejudice the interests of class members not made parties; or the standards of Rule 23 (b)(2), where injunctive or declaratory relief would be appropriate with respect to the class as a whole; or the standards of Rule 23 (b)(3), where common questions predominate and the class action is superior to other available methods for the fair and efficient adjudication of the

lobby of the Hyatt Regency Hotel in Kansas City, Missouri collapsed during a dance, killing 114 and injuring 212 others.[3] Plaintiffs filed, in federal and state courts, approximately 150 individual actions for wrongful death and personal injury.[4] Actions filed in Missouri federal district court, were based upon diversity jurisdiction against the hotel and others involved in the construction of the skywalks.[5] The two sets of state and federal cases each were consolidated for discovery and the respective courts appointed plaintiffs' committees.[6] A federal plaintiff then moved to certify her action as a class action.[7] In *Kansas City Skywalk I*,[8] over the objection of a plaintiff intervenor and of some defendants, Judge Scott Wright certified the federal actions as a class action under Rule 23(b)(1) of the Federal Rules of Civil Procedure,[9] designated four non-Missouri plaintiffs as representatives, and appointed Irving Younger, who was plaintiff's counsel in one of the other individual actions, as lead class action counsel.[10] After Judge Wright rejected a request for certification under 28 U.S.C. section 1292(b),[11] counsel for other individual plaintiffs immediately appealed under 28 U.S.C. section 1291 and also sought mandamus in the United States Court of Appeals for the Eighth Circuit, claiming that the trial judge had no power to certify the actions as a class action under Rule 23(b)(1).[12] While the appeal was pending, plaintiffs' attorneys continued to attempt to settle their individual cases.[13] In a two-to-one decision, the Eighth Circuit

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controversy. In class actions maintained under Rule 23 (b)(3), Rule 23(c)(2) requires that notice must be given to the class member (A) that the court will exclude him if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

3. *In re* Federal Skywalk Cases, 93 F.R.D. 415, 419 (W.D. Mo.) (hereinafter cited as *Kansas City Skywalk I*), *rev'd*, 680 F.2d 1175 (8th Cir.), *cert. denied sub nom.* Stover v. Rau, 51 U.S.L.W. 3355 (U.S. Nov. 9, 1982) (hereinafter cited as *Kansas City Skywalk II*). This number injured includes only those requiring hospitalization or treatment at hospital facilities. 93 F.R.D. at 421. The actual number of those suffering compensable injury may be far greater in that an estimated 1500 to 2000 people were present in the hotel lobby when the skywalks collapsed. *Id.*

4. *Kansas City Skywalk I*, 93 F.R.D. at 419. The suits claimed an aggregate of compensatory damages exceeding one billion dollars, and punitive damages exceeding 500 million dollars. *Kansas City Skywalk II*, 680 F.2d at 1187.

5. *Kansas City Skywalk II*, 680 F.2d at 1177.

6. The state and federal courts also appointed joint state-federal plaintiffs' liaison committees and made substantial progress on recovery. *Id.* at 1177-78.

7. *Id.* at 1178.

8. 93 F.R.D. 415 (W.D. Mo.), *rev'd*, 680 F.2d 1175 (8th Cir.), *cert. denied sub nom.* Stover v. Rau, 51 U.S.L.W. 3355 (U.S. Nov. 9, 1982).

9. *Kansas City Skywalk II*, 680 F.2d at 1178-79. The class was certified pursuant to Rule 23(b)(1)(A) as to issues of liability for compensatory and punitive damages, and pursuant to Rule 23(b)(1)(B) as to issues of liability for, and amount of punitive damages. *Id.* at 1179. It is important to note, however, that the district court order allowed individual plaintiffs to settle their compensatory claims, but prohibited them from settling their punitive damages claims. *Kansas City Skywalk I*, 93 F.R.D. at 428.

10. *Younger v. Kansas City Bar*, Nat'l L.J., Feb. 8, 1982, at 1, col. 1. The court appointed other plaintiffs' counsel as assistant class action counsel. *Id.*

11. This section grants jurisdiction of appeals of otherwise nonappealable orders if the trial judge certifies that the order involves a controlling question of law and that immediate appeal may materially advance the litigation.

12. *See Younger v. Kansas City Bar*, *supra* note 10.

13. *Unsettled Over Settling*, Nat'l L.J., June 14, 1982, at 2, col. 1. While the appeal was pending, the trial judge removed Professor James Jeans as assistant class action counsel for his objecting to the settlement process. *Id.*

in *Kansas City Skywalk II*[14] took jurisdiction and reversed Judge Wright's order on the grounds that the order certifying the federal class action constituted an injunction against pending state court proceedings in violation of the prohibition contained in the anti-injunction statute,[15] and also constituted an appealable order granting an injunction within 28 U.S.C. section 1292(a).[16]

The Eighth Circuit did not reach the merits of Judge Wright's decision that these personal injury and wrongful death actions, arising from a common mass disaster, could be certified as a class action under Rule 23(b)(1). Trial Judge Wright's rationale had been that under Rule 23(b)(1)(A), individual suits for compensatory and punitive damages would create a risk of inconsistent results to the defendants. He further found, under Rule 23(b)(1)(B), that individual punitive damage suits would as a practical matter impair the class members' ability to protect their interests because the defendants might lack sufficient funds to pay all punitive awards. Additionally, there was doubt under Missouri law whether a single defendant can be liable for more than one award of punitive damages, and in light of this potential unfairness to multiple victims, counsel representing more than one victim would also have an ethical problem deciding which suit to bring first.[17] Circuit Judge Heaney, dissenting from the majority opinion in *Kansas City Skywalk II*, agreed with Judge Wright's certification under Rule 23(b)(1)(B)[18] but would have modified the class order to allow individuals to settle punitive damage claims as well, with a credit to the defendants in the event of a class-wide punitive damage award.[19]

Judge Heaney also added his own rationale supporting certification that: (1) in the interest of the claimants, the compensatory and punitive damage class action would speed compensation, reduce and more fairly allocate costs, and aid the smaller claimant; (2) in the interest of judicial resources, the class action would allow one management and trial; (3) in the interests of the multiple defendants, the relative contribution issues between the defendants could be finally decided; (4) because of due process, and in the absence of offensive collateral estoppel under Missouri law, the class action was the best way to achieve finality between plaintiffs and defendants; (5) the insurance and other funds available for punitive damages were a potentially limited fund; and (6) the claimants' interest in individual control, due process, and right to jury trial, did not prohibit a class-

14. 680 F.2d 1175 (8th Cir.), *cert. denied sub nom.* Stover v. Rau, 51 U.S.L.W. 3355 (U.S. Nov. 9, 1982).

15. 28 U.S.C. § 2283 (1976).

16. *Kansas City Skywalk II*, 680 F.2d at 1180.

17. *Id.* at 1179.

18. *Id.* at 1187. Judge Heaney, however, agreed with the appellants that Rule 23(b)(1)(A) did not authorize a class action as to compensatory and punitive damage liability on the grounds that the defendants would be subject to incompatible standards of conduct. *Id.* at 1187 n.8. (Heaney, J., dissenting). In contrast to Judge Wright's opinion, Judge Heaney would allow certification of both the compensatory and punitive liability claims under Rule 23(b)(1)(B), since the liability for punitive damages is dependent upon a finding of liability for compensatory damages. *Id.*

19. *Id.* at 1185.

wide assessment of punitive liability and damages.[20] Significantly, Judge Heaney also urged that the reversal order did not preclude the trial judge, upon remand, from recertifying the actions as a (b)(3) class action.[21] Such a certification, thought Judge Heaney, would accord the members the right to opt out under Rule 23(c)(2) and thereby negate any impermissible injunction against their pending proceedings in state courts.[22]

Without citing the case, Judge Heaney proposed a result substantially similar to that reached by a United States District Court of California in the products liability cases involving personal injury claims arising from the use of the "Dalkon Shield" intrauterine device. In *Dalkon Shield I*,[23] Judge Spencer Williams certified a nationwide (b)(1)(B) class as to punitive liability and damages,[24] and a statewide (b)(3) class as to compensatory liability and damages.[25] The Ninth Circuit in *Dalkon Shield II*,[26] however, reversed both of these certifications, and on remand left little

20. *Id.* at 1185-86. Judge Heaney also found that these justifications for the (b)(1) class also satisfied the exceptions to the Anti-injunction Act. *Id.* at 1191-92.

21. *Id.* at 1184.

22. *Id.* Editor's Note: It was subsequently reported that on remand, federal trial judge Wright apparently certified the action as a (b)(3) action, but before the federal opt-out exclusion date, the state court entered a class certification and settlement. This prompted the federal class plaintiff to move for a contempt citation against the defendants, on the grounds the state court class settlement was a ruse to scuttle the federal class action and constituted an unauthorized communication with federal class members. The ultimate results were parallel federal and state class settlements. Nat'l L.J., Jan. 24, 1983, at 3, 26. It was orally reported to the author that the state court opt-out date was set to precede the federal court opt-out date.

23. *In re* Northern Dist. of Calif. "Dalkon Shield" IUD Prod. Liab. Litig., 521 F. Supp. 1188 (N.D. Cal.) (conditional certification), 526 F. Supp. 887 (N.D. Cal. 1981) (hereinafter cited together as *Dalkon Shield I*), *rev'd sub nom.* Abed v. A.H. Robins, 34 FED. R. SERV. 2d 646, — F.2d — (9th Cir. 1982) (hereinafter cited as *Dalkon Shield II*). Judge Heaney, however, would fashion a result somewhat different from that reached by Trial Judge Williams who, in *Dalkon Shield I*, certified two separate classes, one a (b)(1) class nationwide as to punitive, and the other a (b)(3) class statewide as to compensatory damages. *See infra* note 24.

24. 521 F. Supp. at 1193. Comparing the net worth of the defendant company against the potential amount of punitive damages that could be levied against the defendant, the court found that the amount of punitive damages far exceeded the defendant's net worth. Consequently, a "limited fund" for punitive damages was available and class certification was justified to prevent an inequitable distribution of punitive recoveries from this limited fund. Because the punitive damages issue was certified under Rule 23(b)(1)(B), the notice requirements of Rule 23(c)(2) were not appliable. *Id.* at 1193. However, the court directed that notice should be given to all plaintiffs in litigation pending in state or federal court or to those who had given notice of claims to the defendants or their insurers. *Id.* at 1194. This notice was required to be furnished to all new litigants or claimants arising throughout the life of the punitive damage class action. The court also directed that the costs and efforts of mailing this notice were to fall upon the defendant manufacturer. *Id.*

25. The *Dalkon Shield I* court certified a second federal class action under Rule 23(b)(3), this one concerning liability issues including, among others, defective design strict liability allegations. *Id.* at 1194-95. The class certification pivoted on the fact that the costs of litigation would be reduced through a class action device, as well as on the fact that several key witnesses would be willing to testify in one class action suit, whereas they might not be able to testify in all the pending individual suits. *Id.* at 1194. Similarly, the possibility of delay in allowing separate actions induced the court to certify the class. *Id.* at 1194-95. Finally, the Northern District of California was found to be a suitable forum for the litigation. Over 150 Dalkon Shield cases were pending there at the time of certification, and the court had already tried one of the individual actions. *Id.* at 1195.

The *Dalkon Shield I* court proposed to bifurcate the trial as to the issues of liability and compensatory damages. Similarly, the issue of causation would be bifurcated from the liability action because of the variance of individual factors upon that issue. *Id.* at 1194. Once findings of fact and conclusions of law were made with respect to the various liability issues relating to the

room for Judge Williams to resurrect any partial class certification under Rule 23(b)(1) or a limited issue subclass certification under Rule 23(b)(3). The Ninth Circuit opinion disagreed with the lower court as to the application of most of the standards in Rule 23, including the prerequisites in subdivision (a).[27] The Ninth Circuit did acknowledge that there could be a case where a limited insurance fund and the defendant's projected bankruptcy from multiple claims[28] would justify imposition of a (b)(1)(B) class, but the proof in the record failed to establish such a case.[29] The Ninth Circuit also acknowledged that perhaps a sufficiently common issue of liability might emerge later to allow a limited subclass certification under Rule 23(b)(3), but as the record stood, the diversity of individual *Dalkon Shield* claims against differing defendants, and the inability to try proxi-

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Dalkon Shield, individual damage cases would be sent back to their original courts and tried separately for each plaintiff. *Id.*

The class formed to determine liability was limited only to California federal plaintiffs, to avoid choice of law and state court opt-out problems. Because the final liability decision in the class action would be binding on all members remaining in the class, the court directed that notice be given in the same fashion as that articulated in the nationwide punitive damages class action. Because of these limitations on the scope of the class, the court deemed the action manageable within the standards of Rule 23(b)(3). *Id.* at 1195.

Because this constituted only the initial order to certify the nationwide punitive damage class and the statewide liability class, the court delayed framing the specific common liability issues to be determined in the statewide action. *Id.* at 1195-96. The court indicated that subclasses might later be framed as to certain questions such as adequacy of warning, where different groups of plaintiffs had been subjected to varying warning labels. *Id.* at 1194 n.16.

26. 34 FED. R. SERV. 2d 646, 656, — F.2d —, — (9th Cir. 1982).

27. Commonality of punitive damages liability under the laws of 50 states was doubtful, although possible. In the absence of an eager plaintiff and counsel, and since many claims were against differing defendants, typicality was difficult to satisfy and adequacy of representation of each interest almost impossible. The Ninth Circuit repeated the analysis of the Rule 23(a) prerequisites once in relation to Rule 23(b)(1) and once in relation to Rule 23(b)(3). *See infra* note 30.

28. The nexus between a (b)(1)(B) class suit based upon the projected deficiency in funds of the defendant, and the actual bankruptcy of the defendant is shown by the Chapter 11 petition in reorganization of Manville Corporation. By filing the petition, Manville was able to freeze the status of more than 16,500 suits against Manville arising from asbestos-related illnesses over the last 20 years. Plaintiffs' lawyers predictably challenged that Manville filed the petition in bad faith. Meanwhile, Manville is seeking federal legislation to bail the company out of the claims. Dallas Times Herald, Aug. 27, 1982, at A1, col. 4. Manville Corporation also filed damage suits in the amount of $5 billion against its insurance carriers, claiming that they wrongfully denied coverage for asbestos-related lawsuits, thereby forcing Manville to file for bankruptcy. *Id.*, Aug. 28, 1982, at C11, col. 2.

The Chapter 11 bankruptcy stay against litigation was issued on August 26, 1982 and was supposed to be lifted after 30 days unless a bankruptcy judge held a hearing. Meanwhile two courts ruled that the bankruptcy stay in favor of Manville is not grounds for staying the actions against co-defendants. Nat'l L.J., Oct. 4, 1982, at 26, col. 4-5.

29. In the *Dalkon Shield* cases, the essential difference between the trial judge and the Ninth Circuit as to a "limited fund" was a difference both in the present proof of the degree of projected future prejudice to other members' claims if the existing individual actions were not certified as a (b)(1)(B) class, and in the availability of alternative legal devices to control seriatim punitive damage awards. The trial judge was satisfied by speculative affidavits that absentees' claims "may" be prejudiced, whereas the Ninth Circuit restated the existing precedent to mean: "Rule 23(b)(1)(B) certification of mass tort actions for compensatory or punitive damages [is prohibited] unless the record establishes that *separate punitive awards inescapably will affect later awards*." *Dalkon Shield II*, 34 FED. R. SERV. 2d at 650, — F.2d at — (emphasis added). The Ninth Circuit further required that this standard be satisfied and supported by proof after a hearing as to the defendant's assets, insurance funds, and settlement data. *Id.* at 651, — F.2d at —. But the court also later notes "[a] class action . . . is not the only way to protect a defendant from unreasonable punitive damage." *Id.* And, "separate early punitive damages awards need not inescapably affect later awards," *id.* at 656, — F.2d at —, thereby indicating the standard may be an illusionary one to satisfy because it is implied there are other unspecified ways to control seriatim punitive awards.

mate causation on a class basis as to some issues indicated that test cases were a better alternative for the present.[30]

The *Dalkon Shield II* opinion does not exactly present a fair test for the rejection of class actions in products liability cases. Unlike the *Kansas City Skywalk* litigation, no one stepped forward to be the class action counsel, and on appeal, the appointed class counsel had attempted to resign.[31] Thus, the *Dalkon Shield I* opinion,[32] although now reversed, presents the most current restatement of the arguments for (b)(1) and (b)(3) class actions in products liability litigation.[33] Because *Kansas City Skywalk II* did not reach the merits of the class certification order, relying instead on the anti-injunction statute, the opinions of Trial Judge Wright and dissenting Circuit Judge Heaney also present compelling arguments for the use of class actions in mass disasters. Unless further rebutted, these proposals have begun a significant development in the law of class actions.[34]

The *Kansas City Skywalk* and *Dalkon Shield* cases dramatically illus-

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30. *Id.* at 655-56, — F.2d at —. "We do not preclude further consideration by the district court of motions to certify a more limited class or subclasses under Rule 23(b)(3)." *Id.* at 656, — F.2d at —.

As for the Rule 23(b)(3) standards, the Ninth Circuit acknowledged two federal court certifications of "mass tort" (b)(3) class actions that involve products liability and numerous injuries caused by individual products over a long period of time. *See In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762 (E.D.N.Y. 1980); Payton v. Abbott Labs, 83 F.R.D. 382 (D. Mass. 1979) (Massachusetts "DES" daughters case). The Ninth Circuit did not disapprove these decisions but gave a long list of practical distinguishing features and noted that both cases recognized that neither causation nor damages may be determined in class proceedings. *Dalkon Shield II*, 34 FED. R. SERV. 2d at 653, — F.2d at —.

In *Dalkon Shield II*, the commonality prerequisite in Rule 23(a)(2) might be met as to some liability issues but the trial court's promise to select "typical" (a)(3) subclass representative cases could not be delivered because of the variety of claims against differing defendants, and the consequent requirement of Rule 23(a)(4) "adequacy of representation" would be mooted because the other California plaintiffs intended to opt out. Although some liability issues could be treated on a class basis as "predominate," nevertheless Robins' overall liability under some theories cannot be proved *"unless each plaintiff also proves that Robins' breach of its duty proximately caused the particular injury."* *Id.* at 655, — F.2d at — (emphasis added).

Thus, while a class trial could possibly provide "superior" efficiency in reducing cost of trial time and expert witnesses as to some issues, the savings here were negligible when measured against the alternative of individual trials and follow-on settlements. In addition, under the Rule 23(b)(3)(A)-(D) standards the California liability claimants had a strong interest in controlling prosecutions of their separate actions and in light of their hostility to the class certification, class management would be difficult, and opt-outs probable. *Id.* at 656, — F.2d at —.

31. 34 FED. R. SERV. 2d at 655, — F.2d at —. After the trial court indicated that it would certify a class action, one defendant, A.H. Robins, moved for class certification of the (b)(1)(B) class, but on appeal opposed class certification of the (b)(3) class. *Id.* at 647, 648 n.2. — F.2d at — , — n.2. Some defendants in the *Kansas City Skywalk* litigation neither opposed nor supported the (b)(1) certification, and by at least not opposing it, perhaps did not waive any interest they might invoke in avoiding adjudication of inconsistent obligations against them within Rule 23(b)(1)(A). 93 F.R.D. at 423-24.

32. *See supra* note 24.

33. The *Dalkon Shield II* opinion includes a comprehensive catalogue of federal court products liability class actions to date, 34 FED. R. SERV. 2d at 651-53, — F.2d at —, and includes two granting certifications. *See supra* note 30.

34. Professor Arthur Miller, who wrote a brief in favor of class certification in the *Kansas City Skywalk* cases, makes the valid point that there is a substantial difference, for class action purposes, between the mass tort such as *Kansas City Skywalk*, where individual causation of injuries is not put in issue, and a products liability case like *Dalkon Shield* where individual use of the product and causation of damages are variable with each consumer. Legal Times, Sept. 6, 1982, at 32.

trate the potential power of a Rule 23(b)(1) or (b)(2) class certification in personal injury litigation. Traditionally this form of class device for administering individual monetary claims has been available in Title VII back pay cases,[35] and in securities litigation,[36] but has been relatively unavailable in areas such as products liability,[37] antitrust,[38] and environmental pollution.[39]

Rule 23(b)(1) or (b)(2) certification raises significant questions. If a class certification is made under Rule 23(b)(1) or (b)(2), the rule is silent and does not expressly require notice to the class and does not create a right of the members to exclusion.[40] Therefore, unless the judge exercises discretion to order notice and to grant the right to exclusion, or the judge allows intervention, the (b)(1) or (b)(2) certification imposes lay representation and counsel on the class members and may deny them significant procedural choices which could be exercised through autonomous control of their individual actions. Significantly, but not directly acknowledged,[41] the imposition of the mandatory class device also alters existing attorney-client relationships in respect to the attorneys' power to earn fees through conduct of discovery, trial and settlement of their individual clients' claims.[42] When is the preemption of class members' ordinary procedural

35. Rosen, *Title VII Classes and Due Process: To (b)(2) or Not to (b)(3)*, 26 WAYNE L. REV. 919, 930 n.46 (1980).

36. In securities litigation, the equivalent to a (b)(1) class suit may more often appear as a shareholder derivative suit on behalf of the corporation under Rule 23.1. Kennedy, *Securities Class and Derivative Actions in the United States District Court for the Northern District of Texas: An Empirical Study*, 14 HOUS. L. REV. 769, 803 (1977). To illustrate, Judge Hubert Will of the Northern District of Illinois in King v. Kansas City S. Indus., Inc., 56 F.R.D. 96, 97 (N.D. Ill. 1972), *appeal dismissed*, 479 F.2d 1259 (7th Cir. 1973) was faced with an action brought both as a shareholder derivative action under Rule 23.1 and a shareholder class action under Rule 23(b)(3). By reasoning that the Rule 23.1 derivative action would in this case approximate the same objectives of deterrence and disgorgement of unjust enrichment to the corporation without the expense and complexity of individual shareholder identification, notice, and award distribution, Judge Will concluded that the shareholder derivative action was "superior" to the Rule 23(b)(3) class action under the standard set forth in Rule 23(b)(3). *See id.* at 101-02. However, a shareholder class suit may be certified under Rule 23(b)(1). Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1340 n.9 (9th Cir. 1976) (dictum).

37. 3A L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY ¶ 46A.02[3][c] (1982) (Rule 23(b)(1) not ordinarily available). *See* Comment, *Products Liability Class Suits for Injunctive Relief under Federal Rule 23*, 47 FORDHAM L. REV. 49, 72-73 (1978) (arguing Rule 23(b)(2) may be made the basis of a products liability class suit); Note, *Class Action in a Products Liability Context: The Predomination Requirement and Cause-in-Fact*, 7 HOFSTRA L. REV. 859 (1979).

38. Where antitrust monetary relief is sought for a class, the normal response is to certify, if at all, under Rule 23(b)(3). *See, e.g.*, Brown v. Cameron-Brown Co., 92 F.R.D. 32 (E.D. Va. 1981); Note, *Substantive Policies and Procedural Decisions: An Approach to Certifying Rule 23(b)(3) Antitrust Class Actions*, 31 HASTINGS L.J. 491 (1979). *But see* Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 900 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977) (antitrust challenge to league's rules certified as (b)(1)(A) and (b)(1)(B) action but not as (b)(2) action because substantial damages were also claimed); Reynolds v. National Football League, 584 F.2d 280, 283-84 (8th Cir. 1978) (if there is a choice between (b)(1) and (b)(3) certification, (b)(1) should be used "in order to avoid inconsistent adjudications or a compromise of class interest").

39. *See* Denbeaux, *Restitution and Mass Actions: A Solution to the Problems of Class Actions*, 10 SETON HALL L. REV. 273, 302 (1979).

40. *See supra* note 2.

41. The practical difference between operating under plaintiffs' committees and a class action counsel appointed by the court is only indirectly alluded to in the *Kansas City Skywalk* opinions, but dominates the newspaper reports. *See supra* notes 10, 13.

42. The interest of attorneys in obtaining fees from individual members is legally irrelevant to the class question. Rather, what is relevant is the members' interest in reducing individual

rights (and indirectly the judicial intrusion into individual attorneys' relations to their clients) justified by the procedural goal to administer group remedies efficiently on a unified basis or by other policies of the substantive law? The answer to this question is of obvious importance in situations which raise large individual monetary tort claims, such as the *Kansas City Skywalk* and *Dalkon Shield* cases, where individual plaintiffs' lawyers are eager to control their own client's cases.[43]

B. Miner v. Gillette: *Small Claims Cases Distinguished*

However, in small claims cases, it may seem highly speculative, and even hypocritical for defendants to ask this same question,[44] concerning the justifications for override of class members' rights in circumstances where common sense indicates that the class members themselves and lawyers, other than the class attorney, are in fact largely indifferent to the litigation of the class members' rights outside of a class remedy. However, even in such small claims cases the theoretical question is of great practical importance because the recognition or nonrecognition of the rights of the class members to notice and to opt out essentially defines the legal relationships between the class members and the plaintiff, the defendant, and the court. The answer to the question therefore has impact on almost every aspect of administering the class action remedy, such as the costs to maintain it, the size of the class, discovery, counterclaims, settlement, and the very practical matter of finality of judgment.[45]

Miner v. Gillette Co.[46] illustrates. There the Supreme Court of Illinois, on interlocutory appeal, authorized a plaintiff to maintain a national, multistate small-claim consumer class action to consider claims of deceptive practices and breach of contract in connection with the defendant's national sales promotion of its "Cricket" cigarette lighters.[47] The majority opinion found that nonresident class member minimum contacts with Illinois were not necessary, "(1) if plaintiff adequately represents the nonresident parties and (2) if notice can insure the class of its constitutional

attorneys' fees by sharing the cost of one class action attorney. However, this general, fee-sharing justification for class treatment should not be used to answer the more subtle question of power raised when the judge must decide whether to impose a mandatory class action over a permissive one: when should the judge substitute his own judgment for that of the individual class members, to decide the question whether the class action attorney will in fact more adequately represent the interests of the class members at a lower cost than individual attorneys representing the individual interests? Absolute opt-out leaves the power of choice in the members; denial of opt-out places this power in the judge; conditional opt-out shares the power.

43. It is important to note in the *Kansas City Skywalk* cases that although some defendants did not object in the trial court, major defendants opposed class certification on appeal. *Kansas City Skywalk II*, 680 F.2d at 1177 n.3. In the *Dalkon Shield* litigation Robins moved to certify a plaintiff punitive damages class under Rule (b)(1)(B), but on appeal opposed certification under Rule (b)(3). *Dalkon Shield II*, 34 FED. R. SERV. 2d at 648 n.2, — F.2d at — n.2.

44. *See infra* note 101, and accompanying text.

45. If one lawyer will rise to champion the small claim class, it is always possible that a second lawyer, private or public, concurrently or at a later date, will repeat, even though the class members may be indifferent at both times. As in chess, the powers of the pawn may seem insignificant but cumulatively define the game between the players.

46. 87 Ill. 2d 7, 428 N.E.2d 478 (1981), *cert. dismissed*, 51 U.S.L.W. 4013 (1982).

47. The opinion does not state the value of each claim, but it is reasonble to assume each claim did not exceed $25.00 and was probably much smaller.

opportunity to be heard and protect each member's option to choose not to participate."[48] The Illinois Supreme Court indicated that individual opt out notice will be required,[49] thereby triggering the issue whether opt out notice is sufficient to overcome lack of traditional personal jurisdiction over the nonresident members of the plaintiff class.[50] The United States Supreme Court granted certiorari,[51] and heard argument,[52] but then dismissed the petition for want of jurisdiction because there was no final judgment.[53]

A comparison of the small claims consumer class in *Miner* with the large claim products liability class in *Dalkon Shield* and the mass tort class in *Kansas City Skywalk* shows significant differences. While Rule 23 makes no express distinction, the small claims class suit is often dynamically different from the large claim class suit, in relation to the role of other attorneys, the alternative remedies available to the class members,[54] and the shifting strategies of the plaintiffs' and defendants' attorneys.[55]

C. *Rule 23 as a General Exception to the Norm of Individual Litigation*

Of course "small" and "large" claim class suits are relative, and many class cases involve an array.[56] Rule 23 does not, and realistically cannot,

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48. *Id.* at 14, 428 N.E.2d at 482.

49. *Id.* at 15, 428 N.E.2d at 482-83.

50. The dissent argued that other prior multistate class actions have based jurisdiction on power over common funds or other minimum contacts of the members and that in this case there is no special Illinois nexus which would justify an exception ousting other states' jurisdiction. *Id.* at 22-24, 428 N.E.2d at 486-87 (Ryan, J., dissenting). *See infra* note 204-13 and accompanying text.

51. 50 U.S.L.W. 3802 (U.S. Apr. 5, 1982) (81-1493).

52. 51 U.S.L.W. 3377 (U.S. Nov. 10, 1982) (81-1493).

53. 51 U.S.L.W. 5013 (U.S. Dec. 6, 1982) (81-1493).

54. Even in a large claim case, the proof of liability may be so complex that no one plaintiff and attorney can undertake it. This was one reason the district court gave for (b)(3) certification in *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 790 (E.D.N.Y. 1980). The cost of proving liability on different claims is highly variable, so that the potential recovery amount necessary to make an individual claim viable, even for purposes of seeking settlement, varies with each case. *See* Kennedy, *supra* note 36, at 827 n.199 (reporting one securities lawyer's rule of thumb at the time was at least $2,000 in damages to take a claim and $10,000 to go to trial). *See also* Duval, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience II*, 1976 AM. B. FOUND. RESEARCH J. 1273, 1293-95. Based upon an empirical sample, the estimate is made that but for the availability of Rule 23, half the antitrust treble damage class actions would not otherwise have been brought because not enough was at stake, and that at the very minimum, ten to twenty thousand dollars in pre-trebled damages on an individual antitrust claim may not be enough to sustain a serious effort by a competent attorney. *Id.*

55. Because in small claims cases the defendant may often be the one who first raises, and is benefited by, an objection (that (b)(1) or (b)(2) class certification will improperly override the rights of the class members), the court has a problem slightly different from that in large claim cases. The problem is that the court, by being solicitous to accord to the class members individual procedural rights, as a practical matter may impose such costs and management problems as to destroy any effective remedy for the class as a whole. Conversely, bypass of members' individual rights in pursuit of efficiency and cost saving, at the urging of the plaintiff's lawyer, may produce a class litigation satisfactory to the subjective interests of the named plaintiff and the plaintiff's lawyer, and perhaps even to the defendant, but not necessarily to individual class members.

56. The *Kansas City Skywalk* cases involve not only large claims for wrongful death but also smaller claims for minor physical and psychic injury. Indeed, one argument Judge Heaney advanced for class certification was that the smaller claims can be less costly, and more effective, if represented as part of a group rather than individually. *Kansas City Skywalk II*, 680 F.2d at 1185-86 (Heaney, J., dissenting).

fully address all the criteria by which to resolve the questions concerning the appropriate procedural rights of class members either in small, large, or mixed cases arising in various substantive areas of the law. Instead, Rule 23 attempts to state neutral procedural standards whose main objectives are to guide the decision process to resolve whether an action or issue should be maintained on a class basis, thereby creating an exception to the traditional norm of individual litigation.

Because class certification creates an ad hoc judicial entity,[57] it is important to clarify the procedural rights of the members in that entity.[58] Rule 23, however, only partially and indirectly mandates specific rights of the class members; much more is left to the discretion of the judge. This Article sets forth different procedural models which judges may create with respect to the procedural rights of the class members and restates criteria and legal corollaries which are implicated whenever the court chooses, through a variety of devices, to override the class member's right to opt out in order to reach the goal of efficient unitary group adjudication.

II. THE BIRTH OF THE RIGHT TO OPT OUT

A. *The 1938 Class Actions Now Restated As "Mandatory," "Partially Mandatory" and "Permissive"*

The 1938 Rule divided class actions into three conceptual categories,[59] which as a matter of procedure were designed to correlate with the substantive res judicata impact on the class members.[60] These categories were in legal slang then known as the "true," the "hybrid," and the "spurious."[61] However, for our present purpose of analyzing the as-yet unborn "right to opt out,"[62] we can now retroactively coin a different set of functional phrases to describe these same categories in relationship to this newly defined right. Thus the "true" class action, from the perspective of the member's right, was what we might now rename a "compulsory" or "mandatory" class action in that the member had no right to opt out of the action.[63]

Similarly, the "hybrid" class action was a "partially mandatory" action in that the member's interests would be bound to the extent of the disposition of property or a fund within the jurisdiction of the court, but

57. Sosna v. Iowa, 419 U.S. 393 (1973).

58. *Cf.* Note, *Membership Rights in Nonprofit Corporations: A Need for Increased Legal Recognition and Protection*, 29 VAND. L. REV. 747 (1976).

59. *See infra* notes 63-64, 71.

60. There were distinctions other than res judicata impact, but for purposes here, the important aspect is the description of res judicata impact on members.

61. *See infra* notes 63-64 and accompanying text.

62. Slang for "power-duty to exclude." *See infra* note 71.

63. "Thus the 'true class suit' is one wherein, but for the class action device, the joinder of all interested persons would be essential. This would be the case where the right sought to be enforced was joint, common, or derivative." 3B J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 23.08, at 23-2505 app. (2d ed. 1982) (reprinted from 1938 edition) [hereinafter cited as 3B J. MOORE]. Both the majority and Judge Heaney in dissent in *Kansas City Skywalk II* use the term "mandatory" class action and give as an example Reynolds v. National Football League, 584 F.2d 280 (8th Cir. 1978).

otherwise the member's interest would not be bound.[64] As to some claims and interests, in effect the members could not opt out of the class action; they were bound; the class was "partially mandatory" as to the property or fund.[65] As to other claims and interests, class members were not bound; the class members implicitly had the right to "opt out," although this implicit right was probably exercised by not intervening to assert a claim;[66] the class was in effect "partially mandatory" and "partially permissive." This concept may seem inconsistent with our modern notions substantially abandoning quasi-in-rem jurisdiction.[67] But to an earlier system, this concept of "partially mandatory" was compatible with some res judicata systems governing limited appearances.[68] The concept also remains compatible with traditional bankruptcy[69] and admiralty systems[70] distinguishing between in personam and in rem claims. As shown by *Kansas City Skywalk I* and *Dalkon Shield I*, the concept has continuing viability through the judicial declaration of a "partial class action" under Rule 23(b)(1) as to limited issues—in these cases, punitive liability and damages.

The third 1938 category, "spurious," was from the perspective of the members, "permissive," as opposed to "mandatory" or "partially mandatory" in the sense that the judicial declaration of such a class was merely an invitation to members to intervene at their option.[71] A class member was not bound unless he gave affirmative consent. In short, the former "spurious" was an "opt-in" "permissive" form of class action in respect to the procedural mechanism and the free choice and consent of the member.

B. *Two Models of the 1938 Permissive Class Suit: Pre-Trial versus Post-Trial One-Way Intervention and the 1966 Solution*

In the case of plaintiff class actions, the third category, "spurious" (now renamed as "permissive opt-in"), gave rise to two significantly different models. The majority model was pre-trial intervention by class mem-

64. 3B J. MOORE, *supra* note 63, ¶ 23.09[2], at 23-2571 app. (reprinted from 1938 edition): "[T]he rights of the members of the class were neither joint nor common; they were several. In addition . . . there was, in lieu of joint or common interests, the presence of property which called for distribution or management."

65. *Id.* ¶ 23.10 app. *See, e.g.*, Dickinson v. Burnham, 197 F.2d 973 (2d Cir. 1952), *cert. denied*, 344 U.S. 875 (1952) (court imposed constructive trust to disgorge secret profits made in violation of fiduciary duty, in favor of shareholders; court could make final distribution of fund and order barring claims of those who had not filed claims under theory that the action was hybrid).

66. A creditor not filing a claim in a liquidation proceeding could pursue his own claim outside the proceeding. 3B J. MOORE, *supra* note 63, at ¶ 23.11[4] app. (reprinted from 1938 edition); Note, *Recurrent Problems in Actions Brought on Behalf of a Class*, 34 COLUM. L. REV. 118, 136 (1934).

67. Shaffer v. Heitner, 433 U.S. 186 (1977).

68. Cheshire Nat'l Bank v. Jaynes, 224 Mass. 14, 112 N.E. 500 (1916).

69. *See infra* note 259.

70. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY §§ 9-1, 9-2, 9-3, 9-17, 9-90 (2d ed. 1975).

71. *See* Fox v. Glickman Corp., 355 F.2d 161, 163 (2d Cir. 1965), *cert. denied*, 384 U.S. 960 (1966).

bers.[72] This model generated questions as to what type of notice could or should be sent to the class members before trial.[73] The minority model was post-trial "one-way intervention." If the class member did not intervene before trial of the liability issue, his claim, under conventional collateral estoppel theory, was not precluded by the plaintiff's loss and defendant's victory. But if the plaintiff won and the defendant lost on the liability issue, and the court were to allow the class member to intervene to take advantage of the victory, the then-prevailing notions of mutuality posited objectionable unfairness to the defendant.

The leading case allowing the "unfair" "one-way intervention" model was the Tenth Circuit's decision in *Union Carbide & Carbon Corp. v. Nisley*.[74] There, thirty-six named miners brought a spurious class action on behalf of 350 unnamed miners seeking treble damages for the defendants' antitrust monopoly violations which damaged the miners' wages and profits. The unnamed miners did not intervene before the trial. After a jury determination of liability on special interrogatories, by court order, individual miners were given six months to appear and file claims before a special master to determine the extent of each miner's damages in accordance with the formula provided in the jury verdict.[75] The court also ordered the defendants to produce records identifying members of the class, and data on which to base the damage calculations.[76]

Union Carbide was decided in 1961. It is important to note that at this point in time in the evolution of collateral estoppel doctrine, the assault on the citadel of mutuality had only just begun.[77] Thus the *Union Carbide* opinion, authorizing the "one-way intervention model," was not the majority view.[78] It was not until the United States Supreme Court decided *Parklane Hosiery Co. v. Shore*[79] in 1979 that the minority trend away from the requirement of mutuality was finally validated as the general federal preclusion rule from which to draw case-by-case exceptions for unfairness.

Back in 1966, the Rule reformers, paying heed to criticism of *Union Carbide* and "one-way intervention," and the split in authority, came up with a brilliant new solution. To satisfy both sides to these debates, to give the determination of liability or nonliability binding effect on class mem-

72. *See* Johnson v. American Airlines, Inc., 531 F. Supp. 957 (N.D. Tex. 1982) (discussed *infra* note 146).

73. *See* Woods v. New York Life Ins. Co., 686 F.2d 578 (7th Cir. 1982) (discussed *infra* note 146).

74. 300 F.2d 561 (10th Cir. 1961), *cert. dismissed*, 371 U.S. 801 (1963).

75. The *Union Carbide* case is widely known for its validation of one-way intervention. The case also is highly significant for its pre-1966 validation of a method for satisfying the defendant's seventh amendment rights to jury trial on the damage claims of each of the class members. *See infra* text accompanying notes 404-16.

76. 300 F.2d at 587-88.

77. *See* Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965); Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957).

78. The *Union Carbide* decision acknowledges this. *See* 300 F.2d at 588-89. The 1966 Advisory Committee Note on the proposed amendments to the Federal Rules of Civil Procedure cites to "conflicting views" in its discussion of Rule 23(c)(3). *Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 69, 105 (1966) [hereinafter cited as *Proposed Amendments*]. The American Law Institute also has endorsed the abandonment of strict mutuality in the RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982).

79. 439 U.S. 322, 331 (1979).

bers, and to remove the lack of mutuality and unfairness to the defendant inherent in "one-way intervention," the new procedural rule would require, prior to determination of liability, notice to all class members. This notice was to inform all class members that the court would "exclude" them if they so request; and if they did not "request exclusion," the class judgment would include them.[80] In short, the members' formal power-duty of "exclusion" or in legal slang, "right to opt out"[81] was born.[82]

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80. FED. R. CIV. P. 23(c)(2)(A), (B). Rule 23(c) also provides that "any member who does not request exclusion may, if he desires, enter an appearance through his counsel." *Id.* Commentators interpret this to constitute a form of limited intervention where the member has the right to receive copies of court filings and to audit representation for purposes of later intervention. 3B J. MOORE *supra* note 63, at ¶ 23.55.

81. The "right to exclusion" or "right to opt out" is more accurately partially described as *M*'s (member's) "power" to act to secure an "immunity" in the Hohfeldian sense. *See* W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 5 (W. Cook ed. 1923). "*M*'s right" to opt out is a misnomer because "right" necessarily implies that the *P* (plaintiff) and *D* (defendant) have a duty to act in relation to *M*. More accurately, "*M*'s power" to opt out means that *M* may act without compulsion in relation to *P* and *D*, but if *M* does not act, *M* will be bound by a new relationship. Thus by exercising his "power" to opt out, *M* secures an "immunity" from *P*'s and *D*'s "powers," "disabling" *P* and *D* from imposing a "liability" on *M*. On the other hand, when the court's notice creates *M*'s legal relationship to *P* and *D*, and *M* fails to exercise his power to opt out, *M* has simultaneously been left with both a "power" subjecting *P* and *D* to a "liability," and also a "liability" subjecting *M* to the "power" of *P* and *D* to change *M*'s "rights" in the class proceeding. Because it seems clumsy to refer to the Rule 23(c)(2) mechanism as "*M*'s power-duty to exclude himself," this Article will refer to it as "*M*'s right to opt out." Application of Hohfeld's analysis, however, underscores the point that the (c)(2) notice creates a complex set of legal relationships between *M*, *P* and *D* where none existed before the notice.

It should further be noted that *M*'s power to opt out, or of exclusion, if negated, either by failure timely to exercise it, or by the court's certification under Rule 23(b)(1) or (b)(2), creates the opposite: no power of *M* to opt out. "No power of *M* to opt out" in turn implicates a different set of legal relationships between *M*, *P* and *D*, ranging over the privileges, immunities, liabilities, powers, rights and duties of *M*, in relation to *P* and *D*. The negation of the power to opt out may thus imply *M*'s permissive power to intervene upon a showing that *P* will inadequately represent *M*, and may also implicate *M*'s *duty* to intervene, at least to the extent that *M* must file a claim or respond to pre-trial discovery under the compulsion that nonintervention will bar or merge *M*'s claim. Such a mandatory duty on the part of *M* to intervene (existing within the set of relationships that exist by implication from the negation of *M* power of exclusion) should be distinguished from *M*'s permissive power to seek intervention of right, which can co-exist with, as an alternative to, *M*'s power to opt out.

These two basic sets of relationships, which can be varied by the court's decision to certify under Rule 23(b)(1), (2), or (3) become infinitely more complex as three more variables are added: (1) the judicial power to divide the whole class action into separable class issues treatable within the two different sets of relationships; (2) the various significant timing stages at which these two sets of relationships may be altered—for example, pre and post class certification, pre and post liability determinations, and different settlement stages; and (3) the differing procedural questions that may be at stake,—for example, jurisdiction, discovery, intercourt injunctions, counterclaim, bifurcated trial, costs and attorneys' fees.

82. The one-way intervention basis for the rule is set forth in the 1966 Advisory Committee Note on the *Proposed Amendments*, 39 F.R.D. 69, 105-06 (1966). This rationale and the alternatives are also recounted in Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 391-92 (1967), noting: "In the Preliminary Draft the right to opt out was not unqualified; the court could deny it to a class member whose inclusion was found essential to fair adjudication," *id.* at 391-92 n.136; and in Cohen, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1213-26 (1966), noting also that the Advisory Committee thought that granting each member a right to intervene would make the action unwieldly.

The Third Circuit, in Katz v. Carte Blanche Corp., 496 F.2d 747, 759-60 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974), recounts and relies on this one-way intervention history to justify delaying the (c)(2) notice and opt-out where the defendant stipulates that it will be bound by a determination of liability to the class. But the court found that two additional social policies are furthered by (b)(3) certifications: avoidance of relitigation and private law enforcement on behalf

As then Judge Frankel described it, in a widely quoted passage, subdivision (c)(2) appeared to be "patterned after the highly successful procedures of the Book-of-the-Month Club."[83] Where this apt analogy partially fails, and what subsequent opinions have generally failed to point out, is that Book-of-the-Month Club purchase obligations at least arise from prior consent.[84] By contrast, the essence of the (b)(3) class action is that the members have had no prior relationship with the plaintiff and his lawyer, and that by certification and notice, the necessity for the class member to act is imposed without prior consent.[85] Judge Frankel's better analogy was to in rem proceedings and notices which force the claimant to take action to file a claim to prevent preclusion.[86]

An additional reason, drawn from previous discussion in the Rules Advisory Committee, but only indirectly expressed in the Advisory Committee Note, was that absent small claimant members would routinely not opt in prior to trial.[87] Therefore, an additional rationale later extrapolated

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of small claimants. *Id.* at 759. Since neither of these policies would be undercut, it was thought permissible in effect to allow the defendant to stipulate to a pre-1966 Union Carbide Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961), *cert. dismissed*, 371 U.S. 801 (1963) procedure, even over the objection of the plaintiff. *Katz*, 496 F.2d at 761.

See also discussion of small claims rationale *infra* notes 87-88. Kansas has adopted a qualified right to opt out. *See* Shutts v. Phillips Petroleum Co., 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978) (discussed *infra* notes 214-21 and accompanying text).

83. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 44 (1967).

84. The decision in National Equip. Rental Ltd. v. Szukhent, 375 U.S. 311 (1964), narrowly validated contractual consent to service of process, and D.H. Overmeyer Co. v. Frick, 405 U.S. 174 (1972), although validating the use of a cognovit note which had been bargained for at arms length, left the cognovit note question open as to adhesion contracts.

85. It would seem to be a fundamental principle of contract law that agreement, obligation or consent cannot be imposed by silence. J. CALAMARI & J. PERILLO, HANDBOOK OF THE LAW OF CONTRACTS § 2-21 (2d ed. 1977). Of course, a fictional implied consent can be imposed if reasonable to justify the result. Nierbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939); Hess v. Pawlowski, 274 U.S. 352 (1927).

86. *See* Frankel, *supra* note 83, at 46. Other partial analogies might also be to default judgments, or to involuntary dismissals where the failure of the defendant or plaintiff to act imposes the result. If the assumption is made that the class member would like to file suit and cannot afford to, and if the class suit offers the prospect he will not be subject to costs, counterclaim, and other collateral negative impacts of individual litigation, the fiction of silent consent is reasonable as to the class member. It is less reasonable as to the defendant, however, because the fiction has changed the ordinary litigation cost-benefit economics governing his relationship to the member.

87. This second rationale is set forth at different places in Kaplan, *supra* note 72, at 397-98: "[R]equiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people—especially small claims held by small people—who for one reason or another . . . will simply not take the affirmative step." *Id.*

The student authors of Note, *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1395 (1976) [hereinafter cited as *Class Actions*] do not recite this specific rationale as part of the legislative history of the Rule and assert that the reason the Rules Committee rejected the one-way intervention is "not clear" and "that Justice Kaplan's treatment of the matter is similarly cryptic." But in another place, the authors make reference to the above quoted passage as "a justification characteristic of the substantive theory." *Id.* at 1331 n.8.

Judge Frankel describes his phone call to then Professor Kaplan, reporter of the 1966 rules to ask about the background to Rule 23(c)(2): "I wrote down what he said—of the class action's 'historic mission of taking care of the smaller guy.' As he and the committee saw it, the likelihood is that this guy will routinely ignore, or at least fail to respond to, the notices contemplated under (c)(2). On that premise, the vote went the way we see, to the effect that a non-response means inclusion rather than exclusion." Frankel, *Amended Rule 23 From A Judge's Point of View*, 32 ANTITRUST L.J. 295, 299 (1966), *quoted in part in* Dolgow v. Anderson, 43 F.R.D. 472, 496 (E.D.N.Y. 1968). See also Kaplan, *"A Prefatory Note" The Class Action—A Symposium*, 10 B.C.

for the opt-out rule after its adoption was to include small claimants on the "moral justification" that their exclusion through requiring pre-trial opt-in would treat them as "null quantities."[88] Further, the new (b)(3) class proceeding would then be analogous to an "administrative proceeding" with "representation by the Government," and thus it "seems fair for the silent to be part of the class," thereby eliminating "discontent with the spurious action".[89] While these rationales are at least debatable,[90] in any event, they only indirectly appeared on the face of the Advisory Committee Note,[91] and are more closely affiliated with substantive justifications[92] for expansive judicial remedies in small claims situations[93] than they are with merely procedural rationales for solving the supposed unfairness of the "one-way intervention" model in large claim cases.[94]

INDUS. & COM. L. REV. 497, 498 (1969), criticizing the ruling in Snyder v. Harris, 394 U.S. 332 (1969): "The net effect of the decision is to disfavor the small fellow and thereby to defeat a main purpose of the Rule revision." Compare these statements with the rationale as expressed in the Advisory Committee Note, *infra* note 91.

88. H. NEWBERG, CLASS ACTIONS § 2475, at 168-69 (1977) (quoting *Committee Report, Class Actions—Recommendations Regarding Absent Class Members and Proposed Opt-In Requirements*, 28 Rec. N.Y. City Bar Ass'n 897, 1005 (1973) (quoting from Kaplan, *supra* note 82, at 398)).

89. *Id.*

90. For example, the opt-out procedure also contains the seeds of an opposite moral potential for treating class members as "null quantities" to the extent their silence is taken to presume that they consent to and approve the litigating posture taken by the self-appointed private class representative and class attorney. In addition, the private class representative and attorney are governed by a different cost-benefit calculus than those of government agency attorneys. Further, administrative proceedings often involve legislative rulemaking functions such as rate setting.

91. The Advisory Committee Note, however, did include a general citation to the well-known article advocating an expansive private class remedy. Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941). In another place, discussing the factors (A)-(D) to be considered in certifying a (b)(3) class action, the Advisory Committee Note states:

> The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, *or the amounts at stake for individuals may be so small that separate suits would be impracticable*. . . . (See discussion under subdivision (c)(2) below, of the right of members to be excluded from the class upon their request).

Proposed Amendments, 39 F.R.D. 69, 104 (1966) (emphasis added). The Advisory Committee Notes to Rule 23(c)(2) and (c)(3), however, discuss only the elimination of one-way intervention as the basis for the new opt-out mechanism and do not mention the rationale that predictably small claimants will not opt out, thereby creating court access and authority for the class treatment of the underlying small claims. *Id.* at 104-06. *See also supra* note 72 and accompanying text.

92. For example, *Class Actions*, *supra* note 87, at 1348-73, attacks the individual consent theory that the drafters used to justify the (b)(3)/(c)(2) opt-out class action and, as an alternative, urges substantive theories to justify class actions in order to advance the goals of increased court access and enforcement of substantive law policies. *Cf.* Boddie v. Connecticut, 401 U.S. 371 (1971) (state filing fee for divorce deprives indigents of constitutional right to court access without due process of law); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) (in shareholder derivative diversity case, state statute requiring plaintiff to post bond to indemnify defendant's costs and attorneys' fees is substantive).

93. This is not to say the courts do not have the power and should not develop such remedies; only that they should acknowledge that the source of the power is not exclusively procedural, but is also in part, judicial power over substantive law and remedies. Cover, *For James William Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 735 (1975). For a scholarly restatement of the jurisprudential theories supporting the judicial power to provide private class action remedies in the modern world, see 3 M. CAPPELLETTI, ACCESS TO JUSTICE, VINDICATING THE PUBLIC INTEREST THROUGH THE COURTS: A COMPARATIVIST'S CONTRIBUTION 515-64 (1979). For the earlier classic statement, see Kalven & Rosenfield, *supra* note 91.

94. This is not surprising considering the fact that the change in Rule 23 was accomplished

C. *The Strategic Uses of the New Right to Opt Out: A Trojan Horse for Plaintiff, Defendant and the Court*

1. *The Substantive Riddle of Small Claims: No Private Action Unless Class Action*

Little noticed in this elimination of an old "procedural" right and substitution of a new right were significant collateral substantive implications not immediately apparent as part of the ostensible goal of eliminating one-way intervention.[95] A very important substantive implication arose for small claims which a lawyer for a plaintiff, prior to 1966, would probably not have brought into any court in any form of action—either as an individual, joined or class action.

Prior to 1966, unless the private lawyer for a small claim plaintiff could be assured ahead of time, or would gamble that upon his victory the court would allow "one-way intervention" by class members, the lawyer's costs and prohibitions against solicitation could probably prevent him from bringing any action at all. Class action rules before 1966 had been conceived on procedural joinder concepts which assumed that individual claims on the underlying substantive claims would inevitably be brought into court. The practical question was whether the inevitable claims should be organized through a short-cut device to multiple joinder on a class action basis for the sake of the traditional procedural goals of economy, efficiency and convenience to the court system and the litigants.

After 1966, however, the overhaul of the permissive intervention class action and the creation and substitution in Rule 23(c)(2) of the member's duty to opt out, reversed the agency and consent relationship between the plaintiff and the class members. The new Rule, by a constructive assignment of claims and power of attorney from the members, until they took subsequent action to veto it, authorized the plaintiff to wield a powerful class remedy on their behalf, where previously, as a matter of litigation economics, prohibition against solicitation, and rejection of "one-way intervention," none had existed before. Prior to 1966, many individual claims were so small that they might never be seen by any court; after 1966 the small claims appeared unleashed as an aggregate entity in court—the substantive irony for the court system was that this change was made in

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under the authority to change a rule of procedure, and that procedural value justifications for change are said to be more neutral and conservative in political theory and hence more politically acceptable than justifications presented in terms of substantive values. Heineman, *In Pursuit of the Public Interest*, 84 YALE L.J. 182 (1974) (reviewing S. LAZARUS, THE GENTEEL POPULISTS (1974)). *Cf.* Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975) (criticizing the Court's lax supervision of the rule making process and failure to provide adequate public notice); *Class Actions, supra* note 87, at 1353.

95. It is not necessary to characterize this change as substantive to recognize that there were significant substantive implications in relation to the remedy made available to the plaintiff. *See* Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 COLUM. L. REV. 299 (1980); Cover, *supra* note 93; Fyr, *On Classifying Class Suits: A Reply to Mr. Ross*, 27 EMORY L.J. 267 (1978); Hazard, *The Effect of the Class Action Device Upon the Substantive Law*, 58 F.R.D. 307 (1973); Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance—Procedure Dilemma*, 47 S. CAL. L. REV. 842 (1974); Ross, *Rule 23(b) Class Actions—A Matter of "Practice and Procedure" or "Substantive Right"?*, 27 EMORY L.J. 247 (1978).

the name of procedural efficiency. In short, the new creation, theoretically designed as a procedural gift to the system, turned out to be a substantive trojan horse.

2. *Plaintiff's Leverage*: *The Passive Class*

Accompanying the well-publicized, express right of the member to act to obtain exclusion,[96] was his duty to be bound by silence.[97] Silence as a matter of fact can indicate either consent or objection. But with emphasis on the rights aspect of silence and deemphasis on the duty, the half-fiction was endorsed that class members have a right to remain "passive" and the plaintiff, if the court agreed that he satisfied the Rule, had a right in light of this silent consent, to represent the class.[98] The immediate consequence of this grant of authority to the plaintiff was a potentially radical change in litigation economics in those areas where mandatory true or partially mandatory hybrid class suits had previously been unavailable. As a general tendency, the smaller the claims (or those of little enough importance to the member that the member would not realistically take the trouble to opt out and would remain silent) and the greater the number of members in the class, the greater the litigating leverage the plaintiff and his lawyer could exert against the defendant, without competition from other claimants and other lawyers. For example, in *Eisen v. Carlisle & Jacquelin*,[99] the plaintiff's personal claim was for $70, the class membership was estimated to be six million persons, of whom two million were identifiable, and the total class claim was for a minimum of $22 million.[100] In short, the new Rule had the potential for converting a $70 damage claim into a $22 million claim.

3. *Defendant's Counterweight: The Cost of Notice*

Reduction of the plaintiff's potential windfall leverage in small claims cases under Rule 23(c)(2) was an unarticulated premise of the United States Supreme Court's 1974 decision in *Eisen v. Carlisle & Jacquelin*.[101] For, rather than totally striking down the small claims class action altogether, the Court simply took a literal interpretation of Rule 23(c)(2), requiring individual pre-trial notice to each class member, and imposed the cost on the plaintiff.[102] By this device, the Court narrowed the size of the

96. FED. R. CIV. P. 23(c)(2)(A).

97. *Id.* 23 (c)(2)(B), (c)(3).

98. Clark v. Universal Builders, Inc., 501 F.2d 324, 340 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974); Korn v. Franchard Corp., 456 F.2d 1206, 1211 (2d Cir. 1972). *See also supra* note 85.

99. 417 U.S. 156, 166-68 (1974).

100. 479 F.2d 1005, 1008-09 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974).

101. The law review commentary on the United States Supreme Court's unanimous decision in *Eisen* was generally critical. Illustrative is Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 944-45 (1975), who was highly critical of the Second Circuit's due process position on fluid recovery: "It is a landmark in judicial sophistry to use the due process concept, in the name of protecting the interests of class members, to reject the only litigation procedure capable of doing so . . . ." Scott was softer on the United States Supreme Court itself: "[T]he Supreme Court . . . has increased the costs of many class actions to no purpose . . . [b]ut consumer class actions will not have been completely crippled so long as the Supreme Court does not adopt the Second Circuit's position that fluid-recovery techniques may not be employed." *Id.* at 945.

102. *Eisen*, 417 U.S. at 176-77.

class to the pocketbook ability and willingness of the plaintiff (and in effect the plaintiff's lawyer) to finance the pre-trial cost of identifying the class[103] and sending notice. As a practical matter, unless the plaintiff were backed by some financing organization, the Court forced the plaintiff's lawyer to bear this cost[104] as an entrepreneurship risk in relation to the lawyer's estimate of the probability of success on the merits. Under *Eisen*, the plaintiff's potential Rule 23 windfall was substantially reduced because the smaller the individual claims of potential class members and the greater the number necessary to aggregate a viable class suit, the greater became the front-end financing load imposed on the plaintiff and the plaintiff's lawyer, both in absolute amounts and as a percentage of the possible recovery.[105] Thus, the 1966 opt out procedure, which initially had great potential as a small claims, passive class device for plaintiffs was in 1974 considerably blunted, leaving the plaintiff possibly worse off than before 1966. Prior to 1966, the plaintiff, without the cost of pre-trial notice to class members, at least had the opportunity to gamble on the growing possibility of "one-way intervention"[106]—where after a favorable trial determination of liability against the defendant, the cost of notice to invite members to opt in could be imposed on the defendant as part of the recovery period.[107] But now under *Eisen*, the plaintiff had to give individual notice and pay for the cost of developing it prior to trial.

Eisen was based on federal antitrust and securities claims jurisdiction. Almost simultaneously, in federal diversity suits, in *Snyder v. Harris*[108] and *Zahn v. International Paper Co.*,[109] the Court refused to give the failure to opt out under Rule 23(c)(2) the effect of assigning the members' claims to the plaintiff for purposes of aggregation to meet the jurisdictional amount. The grounds given, somewhat inconsistent with *Eisen*, were that the new procedural rule could not enlarge the subject matter jurisdiction of the court.[110] The Court thus eliminated diversity jurisdiction for the small claims, (b)(3) class actions by requiring the $10,000 jurisdictional amount be met as to each claim, thereby further restricting the use of Rule 23(b)(3)

103. The defendants in *Eisen* eagerly provided class names to the plaintiff. Later, other defendants withheld class names and were successful in having the Court also require the plaintiff to bear the cost of computer programming and processing necessary to identify the class members. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978). In light of the plaintiff's potential inability to finance these projected costs, defendants quickly learned to launch attacks on the adequacy of plaintiff's representation under Rule 23(a)(4). *See infra* note 280.

104. The Code of Professional Responsibility has allowed the attorney to advance costs with a reasonable expectation of repayment. *See infra* note 280.

105. But a narrow exception could be invoked where the defendant owed a fiduciary duty to the class, *see Eisen*, 417 U.S. at 178, or the notice could be fashioned outside Rule 23(b)(3) and (c)(2), or other creative methods to reduce the cost might be found.

106. *See* Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97, 121-26.

107. This fact is not expressed in Nisley v. Union Carbide & Carbide Corp., 300 F.2d 561 (10th Cir. 1961), *cert. dismissed*, 371 U.S. 801 (1963) (discussed *supra* note 74-77 and accompanying text), but is necessarily implied.

108. 394 U.S. 332, 336 (1969).

109. 414 U.S. 291, 301 (1974).

110. The Court utilized the logic that the 1966 procedural change could not work a change in the subject matter jurisdiction of the court. *Zahn*, 414 U.S. at 301; *Snyder*, 394 U.S. at 337. But this logical proposition was somewhat inconsistent with the Court's apparent concession in *Eisen* that the 1966 procedural rule, substituting opt-out for opt-in, would validly change the substantive law res judicata impact on the class member.

for small damages claims to federal question cases not requiring jurisdictional amounts.

By these decisions, the Court considerably blunted the utility of (b)(3) class suits as small claims consumer class actions. But by carefully avoiding the option of total invalidation of Rule 23(c)(2),[111] the Court apparently hoped that Congress would not overreact by enacting new, expansive legislation authorizing private class actions, which might swamp the federal courts.[112] The necessary effect of the Court's decision was also to give impetus to plaintiffs' avoidance devices and to the development of state court multistate class actions.[113]

4. *Plaintiff's Avoidance Devices: Entities, Limited Funds, or Injunctions With Ancillary Restitution or Damages*

One immediate reaction to the blunted utility of (b)(3) class suits was that plaintiffs who sought to avoid notice and its costs, and the federal jurisdictional barriers in small claims cases, were urged instead to seek certification under Rule 23(b)(1) or (b)(2). Under these rules, notice is not mandatory, but the binding effect is, and aggregation or ancillary jurisdiction, under the pre-1966 jurisdictional case law, presumably would be allowed.[114] If the individual class members could not be classified as necessary parties to a de facto entity or to a limited fund under Rule 23(b)(1) then the plaintiffs could turn to Rule 23(b)(2) to ask for declaratory, injunctive relief with the monetary claims made out as equitable restitution or ancillary damages.[115] But it was probably an unduly sanguine view that the courts would fully go along with transparent manipulations of remedy categories to avoid the effects of *Eisen v. Carlisle & Jacquelin* and *Zahn v. International Paper Co.*, unless some paramount federal statutory scheme such as Title VII were at stake,[116] or some other overriding consensus goal could be found to justify the manipulation.[117]

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111. The Court could have interpreted the change as an impermissible attempt to change the substantive law. *See supra* note 110.

112. Two years earlier, the Court in Hawaii v. Standard Oil Co., 405 U.S. 251 (1972), allowed Hawaii, as a consumer, to represent a price fixing antitrust class of similarly situated consumers, but apparently rejected a state's standing to sue *parens patriae* for damages to the economy of the state. Congress reacted by passing the Hart-Scott-Rodino Antitrust Improvement Act, 15 U.S.C. § 15c (1976), which authorized state suits on a fluid recovery basis, but the Court then blunted this act by finding privity, or its equivalent, was required between the consumer and the price fixer. Illinois Brick Co. v. Illinois, 431 U.S. 720, 730-35 (1977). Later, however, the Court expressly acknowledged for the first time that an individual consumer of goods has substantive standing to assert injury to his "business or property." Reiter v. Sonotone Corp., 442 U.S. 330, 342 (1979). The Court continues a tendency to favor the governmental class action or organizational group remedies over individual private attorney general class suits. *See infra* note 282.

113. *See infra* notes 204-21 and accompanying text.

114. *Cf.* Eliason v. Green Bay & W.R.R., 33 FED. R. SERV. 2d 844, 850-51 (E.D. Wis. 1982) (in diversity class action under Rule 23(b)(1)(B) on behalf of debenture holders, although court would not aggregate claims, it would exercise ancillary jurisdiction over members' claims for less than $10,000 even without their exercise of intervention of right under Rule 24(a)).

115. *See* Denbeaux, *supra* note 39 (advocating a (b)(1) equitable restitution end-run around *Eisen*, *Snyder*, and *Zahn*); Note, *Restitution: A Solution to* Illinois Brick Co. v. Illinois *and to the Manageability Problems of Antitrust and Other Problems of Consumer Class Actions*, 18 ARIZ. L. REV. 940 (1976).

116. *See* Rosen, *supra* note 35, at 954.

117. *See, e.g.*, Samuel v. University of Pittsburgh, 538 F.2d 991, 993 (3d Cir. 1976) (abuse of

5. *Court's Efficiency: Mandatory Class Actions For Multiple Claims That Will Be Brought Individually: A Modern Bill of Peace*

The overriding consensus goal for the use of Rule 23(b)(1) or (b)(2) might be court efficiency. *Eisen v. Carlisle & Jacquelin* and its aftermath focused mainly on the small damage claim, passive class action. But unlike *Eisen*, if the individual monetary damage claims were large enough, someone, predictably many, would bring individual claims to court even if they were unaided by the class action device. If a class action were proposed for such claims, unlike the small claim, passive class action situation in *Eisen*, the members would be active and there would inevitably be court litigation even without the class device. Further, the cost of notice under Rule 23(c) would not be an effective barrier to the maintenance of the litigation as a (b)(3) class action, particularly if the number of members in the class were smaller. In such cases where claims were larger and notice and cost of notice did not present the paramount issue, the strategic battle would then shift to the members' rights to opt out. Unlike the situation in *Eisen*, realistically the right to opt out might be exercised by many members and their own chosen lawyers. But now if a court could organize the litigation under Rule 23(b)(1) or (b)(2), presumably there would be no right to opt out, and the court would have a more efficient and powerful device for controlling the litigation than having to deal with the individual cases and lawyers through the limited judicial powers of transfer, consolidation for pre-trial and trial, and consensual committees of lawyers.[118]

In brief, a federal court, depending on the substantive value at stake, probably would not choose to use Rule 23(b)(2) to avoid *Eisen* and to create court litigation of small claims where no individual claims would otherwise be brought. Nevertheless, the same court would be tempted to use Rule 23(b)(1) or (b)(2) as a modern version of an old fashioned "bill of peace"[119] against existing or predictable multiple litigation, or in other

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discretion to deny class restitution of tuition differential found unconstitutional in (b)(2) class suit).

118. If a class is not certified, there remains power in the court through various consolidation devices to bring about a result substantially similar to a class action, assuming the actions can be gathered in one court. *See* Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909 (9th Cir. 1964) (joinder); Farrell v. American Flyers Airline Corp., 42 F.R.D. 341 (S.D.N.Y. 1967) (consolidation); Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116 (1968). But there are significant practical differences. Comment, *Mass Accident Class Actions*, 60 CALIF. L. REV. 1615 (1972); *see* 6 FEDERAL PROCEDURE LAWYERS EDITION § 12:156 (1981); *infra* text accompanying notes 386-99. In addition, it appears that by designating a mandatory class action, aside from overcoming barriers to consolidation of actions not filed in the same court, the court may gain greater power to appoint lead class action counsel and to control the trial of the case. *See In re* "Agent Orange" Product Liab. Litig., 506 F. Supp. 762, 785 (E.D.N.Y. 1980). Thus, the class certification significantly undercuts the power which other individual attorneys would otherwise have over their own individual clients and claims in a non-class consolidation format, and subtly decreases their power to participate in the selection of, and influence over, the liaison attorneys, and to participate in discovery, trial, settlement and attorneys' fees. *See infra* text accompanying notes 373-79.

119. 1 H. NEWBURG, *supra* note 88, at § 1004; J. POMEROY, EQUITY JURISPRUDENCE §§ 252-53 (1918); Chaffee, *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297 (1932); *see* Johnson v. Shreveport Garment Co., 422 F. Supp. 526, 531-32 (W.D. La. 1976), *aff'd*, 577 F.2d 1132 (5th Cir. 1978) (tracing the history of modern class actions from their origins in equitable bills of peace).

words to impose a "mandatory class action" for the sake of efficient unitary adjudication. A modern court might do this even though, unlike a defendant's bill of peace, the defendant did not seek, and might even resist, the class certification, and even though the individual class members' tort claims did not strictly constitute multiple relitigation of the same right.[120]

III. THE PROCEDURAL RIGHTS AND DUTIES OF CLASS MEMBERS

A. *Non-Class Member's Implied Procedural Rights and Duties Correlating with Non-Certification of Class Action*

1. *Preliminary: The Individual's Duty of Initiative; The Right Not to be Solicited, and Not to be Represented*

Before focusing on the rights of class members, it is helpful to recall some of the basic concepts that control the individual's relation to lawyers and the judicial system in the absence of a class action, and then to compare these concepts with those that define the relationship between the class member, the class representative, the class lawyer, and the courts. The traditional individualism premise of Anglo-American common law adversary method is that the duty is upon the individual to initiate contact with a lawyer who is to seek adversarial protection of the individual's own rights in a neutral, passive court.[121] Correlative with this premise is the basic concept that the attorney-client relationship is founded on voluntary agency contract and grant of authority under power from the court.[122] This model then gives rise to a regulated market, litigation system in which the lawyer must, in competition with other attorneys, create and expend money on a legal marketing method to obtain client consent to be represented, and then pursue these authorized claims on an individual basis or, if consent can be worked out, on a joined basis. Accordingly, the system structures the various rules concerning solicitation and attorneys' fees, including the contingent fee, consistent with the individualism-consent theory.

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120. W. DEFUNIAK, HANDBOOK OF MODERN EQUITY § 107 (2d ed. 1956): "[T]he so-called bill of peace originated as a means or remedy of seeking to enjoin repeated attempts to litigate the same right." *But see* Yuba Consol. Gold Fields v. Kilkeary, 206 F.2d 884, 889 (9th Cir. 1953), adopting Pomeroy's modern view that a common right is not essential and that all that is required is a community of interest in the issue of law and fact, thus recognizing the possibility of a federal bill of peace injunction sought by the defendant against multiple individual plaintiff state court claimants for flood damages. See also *Class Actions*, *supra* note 87, approving Pomeroy's modern view.

By close analogy, an insurance company may not use a federal interpleader injunction to enjoin individual tort claimants into one proceeding until after the individuals have reduced their tort claims to judgments, and are then seeking satisfaction from the same insurance fund. State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 537 (1967). *See also* Club Exch. Corp. v. Searing, 222 Kan. 659, 664, 567 P.2d 1353, 1357-58 (1977) (similar result under state law). *See generally* D. DOBBS, REMEDIES § 2.12, at 127-34 (1973) (bill of peace and interpleader).

121. J. COUND, J. FRIEDENTHAL & A. MILLER, CIVIL PROCEDURE 1-2 (2d ed. 1974); G. HAZZARD, ETHICS IN THE PRACTICE OF LAW ch. 9 (1978); *Professional Responsibility, Report of the Joint Conference*, 44 A.B.A.J. 1159 (1958); *see infra* text accompanying notes 125-34. *But see* P. CARRINGTON & B. BABCOCK, CIVIL PROCEDURE 1 (2d ed. 1977) ("The adversary tradition is a prosaic idea.").

122. *See* Devitt, *The Search For Improved Advocacy in the Federal Courts*, 13 GONZAGA L. REV. 897, 897-902 (1978) (short history of the origins of the common law lawyer); *infra* text accompanying notes 136-39, 145.

In contrast, the availability of the class action exception reverses the premise of the traditional system.[123] The class action allows a stranger, a lawyer, and a court to initiate the action for protection of the members' rights and allows the mass processing of their individual claims. In turn, the class action changes the lawyer's method and costs for obtaining client consent, tends to remove these claims from the competitive struggle for acquisition by other attorneys, and allows the class attorney to gain fees through theories of unjust enrichment.[124]

A pointed illustration of the pervasiveness of the individualism premise underlying most procedural rules is presented by the multiple rulings in *Pan American World Airways, Inc. v. United States District Court*.[125] A commercial jet airliner crashed near Paris, France killing some 350 people.[126] The wrongful death actions were consolidated for pre-trial in federal court in California.[127] Because the court proposed to do so, the defendant, McDonnell-Douglas, made a motion that the court not allow discovery of passengers' names and that the court not approve a notice to other potential wrongful death claimants inviting them to join in the California actions.[128] The trial judge denied the motions, and McDonnell-Douglas brought a petition for mandamus.[129] The Ninth Circuit, speaking through Judge Wallace, systematically rejected each of the procedural rule justifications advanced by the plaintiff to support the proposed court approved notice to victims.[130] In the absence of certification of a class action under Rule 23, there was no power in a court to authorize such a notice.[131] The permissive party joinder rules contemplated that the persons voluntarily join together before entry into court (implicitly this meant that a lawyer must legally solicit their joinder in the regulated marketplace of attorney competition); and potential multiple tort claimants clearly did not present a situation governed by compulsory party joinder rules. The rule on consolidation similarly held no authority because it contemplated existing actions, not court-generated actions. Finally, there was no inherent judicial equitable authority to send notices to potential claimants, even if this made practical sense.

Judge Schnacke, in dissent, thought that the court had asked the wrong question. He formally argued: "The question is not whether some

123. *See* DeWees, Prichard & Trebilcock, *An Economic Analysis of Cost and Fee Rules for Class Actions*, 10 J. LEGAL STUD. 155 (1981); *see also* Bernstein, *Judicial Economy and Class Actions*, 7 J. LEGAL STUD. 349 (1978) (statistical analysis of effect of class action certification on judicial economy); *infra* note 280.

124. Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849 (1975); DAWSON, *Lawyers and Involuntary Clients: Attorneys Fees From Funds*, 87 HARV. L. REV. 1597 (1974).

125. 523 F.2d 1073 (9th Cir. 1975). There were two air crashes involved in the court of appeals opinion. *Id.* at 1075. One action had been filed as a class action. *Id.*

126. *Id.* Somewhere between 346 and 360 persons died in this crash. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 1077-81.

131. The Ninth Circuit later reversed a certification of the same air crash cases as a class action. McDonnell Douglas Corp. v. United States Dist. Court, 523 F.2d 1085 (9th Cir. 1975). See also a similar ruling in Causey v. Pan Am. World Airways, Inc., 66 F.R.D. 392 (E.D. Va. 1975), *noted in* 42 J. AIR L. & COM. 255 (1976).

rule permits the action proposed, but whether any rule, statute, or logical concept forbids it."[132] This analytic logic split between the majority and the dissent implied a deep philosophical division between the traditional individualism theory of litigation, which requires individual initiative to authorize passive judicial remedies, and a new, active protection theory of the court's role, borrowed from modern class action theory.[133] Implicitly the two views also pose differing lawyer economic models for soliciting and obtaining clients' consent and processing their claims. When considered in the light of these fundamental ideological conflicts, the 1966 Rule change, from the permissive opt-in class action to the permissive opt-out, represents much more than an innovative way to solve the problem of one-way intervention.[134]

Accordingly, there is need for careful comparison of the individual's procedural rights in the two major models of non-class and class action[135] processes in relation to comparative attorney-client communications, authorization, control, fees, costs and efficiency. The comparisons can only generally be described because the sharp contrasts that formerly existed between the two models are blurring. For example, under the earlier code of professional responsibility prohibitions against solicitation and advertising, the class action stood out as a major exception—the functional equivalent of court-authorized solicitation.[136]

From one perspective, under the traditional system it might be said a person had a "right" not to be solicited or represented by a lawyer,[137] unless the lawyer first got court approval through a certified class action. But the 1977 decision in *Bates v. State Bar of Arizona*[138] allowed regulated attorney advertising and opened new possibilities for lawyers to initiate contact with potential class members and to elicit consent from them through the media outside a certified class action.[139] The 1978 decision *In*

132. *Pan Am.*, 523 F.2d at 1082 (Schnacke, J., dissenting).

133. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Scott, *supra* note 101; *Class Actions*, *supra* note 87.

134. The recognition of the class member's interest in choosing representation is succinctly stated in Blackie v. Barrack, 524 F.2d 891, 911 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976): "[U]nder the notice and opt-out procedure of Rule 23(b)(3) and 23(c)(2), an absent class member may evaluate his position in the class and decide for himself whether to avail himself of the representation offered."

135. Within the class action model, there is further need to compare the differing models and variations between mandatory, permissive pre-trial opt-in and opt-out, and permissive post-trial opt-in.

136. *See* Halverson v. Convenient Food Mart, Inc., 458 F.2d 927 (7th Cir. 1972) (applying traditional Ethical Considerations to conclude that franchisee association lawyer had not improperly solicited joinder in class action); O'Kelley, *Class Actions: Proposals for New Rules of Professional Responsibility*, 5 LITIGATION 25 (Winter 1979); Schoor, *Class Actions: The Right to Solicit*, 16 SANTA CLARA L. REV. 215 (1976).

137. For example, the court could not assess a liaison attorney discovery fee cost on the settlement of a victim who had consciously chosen not to be represented by a lawyer and not to seek court vindication of her rights. *See infra* note 394.

138. 433 U.S. 350 (1977).

139. A newspaper ad offering to "swap information of possible mutual benefit regarding (a specified) class action," was found permissible in Opinion, New York State Bar Association, Committee on Professional Ethics, N.Y.L.J., Dec. 14, 1978, at 1, col. 4. See also a previous ABA informal opinion authorizing a client to mail to each member of a potential class a request for a $50 contribution and a limited power of attorney authorizing the client to retain an attorney on a

re Primus[140] further expanded first amendment protection for the lawyer against code prohibitions of face-to-face solicitation, where the lawyer's motives are public interest pure, even though it is possible he may generate a fee award in the process.[141] These two decisions significantly modify the old relationship between lawyer and potential clients outside the class action,[142] and accordingly substantially dilute the contrasting differences between those relationships within the class context. It is difficult to pose a static comparison within the class action as well, for as shown in *Gulf Oil Co. v. Barnard*,[143] the first amendment also works significant restrictions against judicial regulation of attorney communications both before and after class certification.[144] It may be that the application of first amendment principles is simply collapsing the two models of class and non-class actions into one set of communication standards.

If this is so, the prohibition against attorney initiative is no longer the essential question. Rather, the key differences are now between the different methods for establishing client consent, thereby authenticating the authority of the lawyer and the court to act on behalf of the clients. The traditional non-class model, requiring the person's individual, informed, affirmative consent to create authority in the lawyer, certainly appears to be more costly and less efficient, though more highly individualized, in contrast to the apparent efficiency found by collectivizing the claims through the assumed client consent created in Rule 23(c)(2), or the consent imposed by a (b)(1) or (b)(2) certification within the class action rules. Unless the class certification process becomes larded with collateral costs,[145] it

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contingent fee of 35% and an assignment of 12% of the recovery to the client for pursuing the claim. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1280 (1975).

140. 436 U.S. 412 (1978) (an American Civil Liberties Union (ACLU) lawyer could not be sanctioned for "benign" solicitation of a welfare mother who had been sterilized, to sue the doctor for damages).

141. Under the ACLU policy outstanding at the time, an award of attorneys' fees could not go to the cooperating attorney, but subsequent ACLU policy changes allowed local experimentation with the sharing of court-awarded fees between the state affiliate and cooperating attorneys. *Id.* at 430 n.24. The Court stated: "We express no opinion whether our analysis in this case would be different had the latter policy been in effect during the period in question." *Id.* at 430-31 n.24. The *Primus* decision should be compared with Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), decided simultaneously with *Primus* and upholding a sanction against old-fashioned coercive ambulance chasing of a personal injury claim for commercial motive.

142. Simet, *Solicitation of Public and Private Litigation Under the First Amendment*, 1978 WASH. U.L.Q. 93; Comment, *Attorney Solicitation: The Scope of State Regulation After Primus and Ohralik*, 12 J.L. REFORM 144 (1978); Comment, *Benign Solicitation of Clients by Attorneys*, 54 WASH. L. REV. 671 (1979). For a case that falls between *Primus* and *Ohralik*, see *In re* Marshall I. Teichner, 75 Ill. 2d 88, 387 N.E.2d 265 (1979) (a non-class action case involving multiple black claimants injured in an explosion).

The latest proposed draft of the ABA Model Rules of Professional Responsibility, as reported in Legal Times Feb. 14, 1983, at 23-24, provides simply:

> Rule 7.3 Personal Contact With Prospective Clients
>
> A lawyer may not solicit professional employment from a prospective client by mail, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

143. 452 U.S. 89 (1981).

144. Comment, *Restrictions on Communication by Class Action Parties and Attorneys*, 1980 DUKE L.J. 360.

145. An association or union or other marketing device might conceivably be able to collect individual client authorizations on a less costly basis than the litigious cost involved with seeking class action authority from the court.

is usually more costly for the lawyer outside the class action to gain authority, which must be obtained from a person's signature, without court influence,[146] than to obtain (c)(2) authority, which is presumed unless the person acts to veto it, or (b)(1) or (b)(2) authority, which is imposed on the class members unless they mount a successful judicial attack against the representation.[147]

Even more significant than the class action lawyer's authority is the authority of the court itself to act. For if a contrasting analysis can be made as to the different methods for establishing lawyer authority, the same analysis would show substantially different methods for establishing the court's authority to act, because traditionally the court's power is dependent upon a real request for action by some identifiable, injured person, and not merely by the unilateral assertion of a lawyer.[148] Seen in this light, resolution of whether the right to opt out should be granted is an essential link in the series of evidentiary-procedural steps necessary for the court to take in order to define and make concrete the legal identity of the group person on whose behalf the court purports to claim its own authority to act.[149]

There are other significant contrasting legal relationships present in the class versus the non-class model and a few of those contrasts are suggested below.

2. *Duty of the Non-Class Member to Show Standing in His Own Right*

The traditional prudential rules of standing generally require, subject to exceptions, that a party represent to the court his own rights and not those of third persons.[150] In effect, the third person's rights go unrepre-

146. The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq* (1976 & 1980 Supp.) deliberately provides an old-fashioned "opt-in" form of group remedy not provided for in 1966 Rule 23(b)(3)/(c)(2). Nevertheless, the trial court has power to authorize a pre-trial notice signed by a plaintiff's attorney informing class members of their right to opt in to the action and to indicate in the notice that "This notice has been authorized by the Honorable Robert M. Hill, the Judge to whom the case is assigned." Johnson v. American Airlines, Inc., 531 F. Supp. 957, 967 (N.D. Tex. 1982). Judge Posner has agreed that in an ADEA class action, the trial judge may authorize the plaintiff to send pre-trial opt-in notice to potential plaintiffs but Judge Posner did not allow the notice to go out on court letterhead or over the signature of a court official. Woods v. New York Life Ins. Co., 686 F.2d 578, 581 (7th Cir. 1982). "That activity changes the character of the judge from that of an adjudicator of disputes brought to him to that of a kind of town crier, ringing the occasion to awaken those who may be sleeping on their rights . . . ." *Id.* But he acknowledges that the power of the judge to communicate to potential class members is different under Rule 23 because "potential class members really are parties to a Rule 23 class action until they opt out . . . ." *Id.* at 582. *See also* Thompson v. Sawyer, 678 F.2d 257, 269-70 (D.C. Cir. 1982) (where Equal Pay Act requires opt-in class action, trial judge's denial of notice to class was not reversible error where union had circulated consent forms). *Cf.* Partlow v. Jewish Orphan's Home of S. Calif., Inc., 645 F.2d 757 (9th Cir. 1981) (where ADEA requires opt-in consent the court wrong-headedly invalidated written consents obtained through solicitation of counsel, but regained common sense by ordering due process notice to those who relied on the invalidated consents).

147. *E.g.*, Sperry Rand Corp. v. Larson, 554 F.2d 868, 873-75 (8th Cir. 1977).

148. J. VINING, LEGAL IDENTITY 126 (1978).

149. *See id.* ch. 4 (chapter entitled "The Unchanged Necessity of Personification").

150. H.L. v. Matheson, 450 U.S. 398, 406-07 (1981) (15 year old, unemancipated, dependent girl living at home with no special reasons for not obtaining parental consent had no standing to

sented unless the third person chooses to assert them. However, class actions operate as an apparent exception to this rule.[151] The exception is only apparent in that the named plaintiff at the time of bringing suit must still satisfy the traditional standing rule because he must show injury to his own rights.[152] The apparency of the exception lies in the fact that the representative is also allowed to represent third persons whose rights are similar to his own. However, from the perspective of third persons, the class action provides a functional exemption from standing requirements, in that the third person's rights are represented by another party.[153] Apparent exceptions also exist for class members as to other requirements analogous to standing, such as exhaustion of remedies.[154]

3. *Duty of the Non-Class Member to Initiate Action Before the Statute of Limitations Bars His Action*

Unaided by a class action, the individual must act to initiate protection of his rights before being barred by a statute of limitations or laches. Under the class doctrine restated in *American Pipe & Construction Co. v. Utah*,[155] the filing of a class action tolls the statute of limitations for those persons defined into the class for a period of time from the filing until the time the court acts to refuse certification, to decertify, or to define a mem-

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attack abortion parental consent statute even though Court conceded statute was unconstitutional as to others included within the class definition); Warth v. Seldin, 422 U.S. 490, 499 (1975).

151. *See* Kane, *Standing, Mootness, and Federal Rule 23—Balancing Perspectives*, 26 BUFFALO L. REV. 83 (1976); *see also* Comment, *Class Standing and the Class Representative*, 94 HARV. L. REV. 1637 (1981) (arguing for a liberalized test of injury to the class, in part because after (c)(2) notice, by not opting out, the members become the injured persons before the court).

152. *See* authorities cited *infra* note 153. *But see* Tidwell v. Schweiker, 677 F.2d 560, 565-66 (7th Cir. 1982) (extending these authorities to allow maintenance of class suit by plaintiff even though plaintiff had no standing to bring individual suit).

153. Conversely, the mooting of the named representative's claim by passage of time, failure on the merits, or satisfaction by the defendant, does not destroy the case or controversy between the defendant and a certified class, Sosna v. Iowa, 419 U.S. 393 (1975), or a retroactively certified class. United States Parole Comm. v. Geraghty, 445 U.S. 388 (1980); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980); Gerstein v. Pugh, 420 U.S. 103 (1975) (under narrow conditions). However, these similar, yet differing, factors for ending the plaintiff's individual claim may lead to a conclusion that the representative does not continue to be an adequate representative of the class under Rule 23(a)(4), East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977), *noted in* 13 HARV. C.R.-C.L.L. REV. 175 (1978), thereby requiring either (1) allowing the representative to continue representing the class, (2) intervention by a class member, (3) allowing the formation of a subclass, or (4) dismissal. See the tortuous history of Satterwhite v. City of Greenville, 395 F. Supp. 698 (N.D. Tex. 1975), *aff'd in part, rev'd in part*, 549 F.2d 347 (5th Cir.), *modified*, 557 F.2d 414 (5th Cir. 1977), *rev'd*, 578 F.2d 987 (5th Cir. 1978) (en banc), *vacated and remanded*, 445 U.S. 940 (1980), *remanded*, 634 F.2d 231 (5th Cir. 1981) (en banc). The inscrutability of the United States Supreme Court's remand leaves the trial judge only a hunch, but based upon General Tel. Co. v. Falcon, 102 S. Ct. 2364 (1982) (employee denied promotion because of race cannot represent class of job applicants), the best guess is that the trial judge should invite intervention. *See* Note, Satterwhite v. City of Greenville *and Breathing New Life into the Headless Title VII Class Action*, 32 STAN. L. REV. 743 (1980). The decision in Quitana v. Harris, 603 F.2d 78 (10th Cir. 1981) interprets *Geraghty* as requiring the trial court to allow the mooted plaintiff the opportunity to construct a subclass. *See also* Jordan v. County of Los Angeles, 669 F.2d 1311 (9th Cir. 1982).

154. *See* Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968) (person exhausting EEOC remedy may file class action for those who have not); *see also* Note, *Administrative Exhaustion Under the Federal Tort Claims Act: The Impact on Class Actions*, 58 B.U.L. REV. 627 (1978) (examining difficulty of maintaining class action under current interpretation of FTCA).

155. 414 U.S. 538, 554 (1974).

ber out of the class.[156] A putative class member then, even without showing his personal reliance on the filing of the class action, can take advantage of this tolling period, in later intervening into the non-class or decertified class action.[157] Here again, the class action device may be seen to convert a person's individual duty to act into a class member's privilege not to act.

Some disagreement exists whether the tolling doctrine of *American Pipe* should be limited to the option of intervention or whether it also extends to the option of filing an individual suit.[158] In *Pavlak v. Church*,[159] the Ninth Circuit decided in a section 1983 civil rights action that after denial of a (b)(3) class certification for lack of numerosity, the only option of the otherwise time-barred class member was to intervene and the member could not take advantage of the tolling period in his subsequently filed individual suit. Among many reasons, there is good cause to question this solution because the necessary implication is the doubtful proposition that the person who opts out of a certified class action in response to a (b)(3)/(c)(2) notice, must begin his own action within the relevant limitations period, unaided by the filing of the class action.[160]

4. *Right of A Non-Class Member to Use Offensive Collateral Estoppel*

The demise of the mutuality doctrine and the rise of offensive collateral estoppel set forth in *Parklane Hosiery Co. v. Shore*[161] have theoretically granted the non-class member a powerful new weapon outside the class action. But the benefits to the nonparty of this demise and rise are

156. Parker v. Crown Cork & Seal Co., Inc., 677 F.2d 391, 394 (4th Cir. 1982).

157. 414 U.S. at 551.

158. *See* Note, *The American Pipe Dream: Class Actions and Statutes of Limitations*, 67 IOWA L. REV. 743, 759 n.107 (1982). I am indebted to Mr. William A. Jonason, Articles Editor of the *Iowa Law Review* for bringing this point to my attention. *See also infra* note 160.

159. 681 F.2d 617, 620 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3344 (U.S. Nov. 2, 1982). The majority limited *American Pipe* literally to intervention on the theory that only the option of intervention was necessary to accomplish the two equitable goals of satisfying potential reliance by class members and of encouraging court efficiency by discouraging protective separate actions and motions for intervention. *Id.*

160. Judge Norris in his *Pavlak* dissent thought that the *Eisen v. Carlisle & Jacquelin* Court had explicitly stated the *America Pipe* doctrine would toll the statute as to all members of the class including those who opt out to file their own actions. The *Eisen* Court, in response to an argument that requiring individual (c)(2) opt-out notice would be futile because no one would opt out of the class action after limitations had run, stated: "This contention is disposed of by our recent decision in American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), which established that commencement of a class action tolls the statute of limitations as to all members of the class." 417 U.S. 156, 176 n.13 (1974). The Fourth Circuit agrees with Judge Norris. Parker v. Crown, Cork & Seal Co., Inc., 677 F.2d 391, 393-94 (4th Cir.), *petition for cert. filed*, 51 U.S.L.W. 3074 (U.S. Aug. 10, 1982) (82-118) ("intervention is not barred by the statute of limitations, and it seems to us to exalt form over substance to say that intervention would be permitted but not institution of a new suit").

See Note, *supra* note 158, at 752-58, discussing at least four rules for those who do opt out: McAlpine v. AAMCO Automatic Transmissions, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,359, at 71,265 (E.D. Mich. 1977) (tolling from filing of the class until the member opts out); Jefferson v. H.K. Porter Co., 485 F. Supp. 356 (N.D. Ala. 1980) (no tolling); Wood v. Combination Eng'g Co., 643 F.2d 339 (5th Cir. 1981) (tolling with equitable period after opt-out); and the author's preferred rule "allowing a tolled statute from the filing of the class until the class is certified and notice sent to the members informing them of their right to opt out." Note, *supra* note 158, at 757.

161. 439 U.S. 322 (1979).

probably greatly exaggerated because of the limitations on the doctrine of offensive collateral estoppel and the difficulty in applying it to many different factual-legal issues.[162] In federal diversity cases, the *Erie* doctrine will also exert a drag on projecting this development under state law.[163] Nevertheless, the non-class member who is represented by a lawyer[164] after *Parklane Hosiery* in some ways may be in a superior position than a class member, because the non-class member may not be bound by a plaintiff's loss, but the class member will be bound.[165] Commentators initially assumed that if a class member did choose to opt out of a certified (b)(3)

162. Collateral estoppel in anti-trust litigation may provide substantially less than the securities law offensive collateral estoppel authorized in *Parklane Hosiery*. This is so because the effect to be given an anti-trust judgment is governed by statutory standards, which were intended to be liberal when first enacted, but which are now interpreted, retrogressively, to constitute a fixed standard unaffected by liberalizing common law developments in collateral estoppel. Illinois v. General Paving Co., 590 F.2d 680 (7th Cir. 1979) (interpreting 15 U.S.C. § 16a (1976)); *see* Note, *Section 5(a) of the Clayton Act and Offensive Collateral Estoppel in Antitrust Damage Actions*, 85 YALE L.J. 541 (1976).

In the absence of a class action device, offensive collateral estoppel in defective design strict liability asbestos cases has a difficult chore to achieve fairness for both plaintiffs and defendants. In Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076, 1088-89 (5th Cir. 1973), *cert. denied*, 419 U.S. 896 (1974), the court affirmed a jury finding that under section 402A of the Restatement (Second) of Torts, asbestos products were "unreasonably dangerous." Almost simultaneously, a federal district court trial judge in the Eastern District of Texas ruled that workers' claims based on manufacturing asbestos could not be maintained as a class action by a plaintiff, although this suit did not involve strict liability claims. Yandle v. P.P.G. Indus., Inc., 65 F.R.D. 566, 572 (E.D. Tex. 1974). Seven years later in Mooney v. Fibreboard Corp., 485 F. Supp. 242, 249 (E.D. Tex. 1980), the district court using *Borel*, offensively collaterally estopped the defendants common to *Borel*. *See also* Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353 (E.D. Tex. 1981), *rev'd*, 681 F.2d 334 (5th Cir. 1982); Flatt v. Johns-Manville Sales Corp., 488 F. Supp. 836 (E.D. Tex. 1980).

In contrast, another district court, emphasizing that of the 24 asbestos cases actually litigated in the United States, only 10 were decided in favor of the plaintiffs and 14 were decided in favor of the defendants, therefore refused to apply offensive collateral estoppel to asbestos products. McCarty v. Johns-Manville Sales Corp., 502 F. Supp. 335 (S.D. Miss. 1980); *see also* Tretter v. Johns-Manville Corp., 88 F.R.D. 329 (E.D. Mo. 1980). The Fifth Circuit reversed a holding that asbestos or any other product can be held defective or unreasonably dangerous as a matter of law under *stare decisis*, Migues v. Fibreboard Corp., 662 F.2d 1182, 1187 (5th Cir. 1981), and first left open the question of collateral estoppel in recognition of the special difficulty in applying *Parklane Hosiery* to products liability cases. Later, the Fifth Circuit decided that offensive collateral estoppel could not be used to estop those defendants who were not parties to prior litigations, nor could it be used against those defendants common to *Borel*, because among many reasons, there were inconsistent judgments in other, similar cases. Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 345-46 (5th Cir. 1982). *See also* Callen & Kadue, *To Bury Mutuality, Not to Praise It: An Analysis of Collateral Estoppel After Parklane Hosiery Co. v. Shore*, 31 HASTINGS L.J. 755 (1980) (advocating flexible approach in use of offensive collateral estoppel); Note, *The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits*, 79 MICH. L. REV. 1485 (1981).

163. One reason given by Circuit Judge Heaney to support the *Kansas City Skywalk* certifications was that offensive collateral estoppel was not available under Missouri law. *Kansas City Skywalk II*, 680 F.2d at 1186 n.4. The trial judge gave the same reason under Massachusetts law to support certification of a statewide liability class in one of the DES Daughters cases. Payton v. Abbott Labs, 83 F.R.D. 382 (D. Mass. 1979).

164. Class members who will not seek or obtain legal assistance are legally the same but practically different, unless some class method is used to exercise their right to opt out to provide them with some other group representation.

165. But see George, *Sweet Uses of Adversity:* Parklane Hosiery *and the Collateral Class Action*, 32 STAN. L. REV. 655 (1980), arguing that the death of mutuality necessarily and rightly implies the future death of privity, thereby causing collateral estoppel effect, as to issues fully and fairly litigated, win or lose, on "collateral classes" of persons who are not parties, not in privity, nor members of formal, certified classes. For an example case demonstrating the evolution of this theory, but not cited by Professor George, see Southwest Airlines Co. v. Texas Int'l Airlines, Inc., 546 F.2d 84 (5th Cir.), *cert. denied*, 343 U.S. 832 (1977).

class, the member forfeited the right to any offensive collateral estoppel that may be available.[166] However, because after *Parklane Hosiery*, there is no fixed policy against one-way intervention, the conclusion no longer must follow, if it ever did, that the exercise of opt-out must forfeit offensive collateral estoppel.[167] This is so particularly if, as Professor George argues, privity is also dying and members of collateral classes will be bound irrespective of their inclusion in a formal class.[168] Apart from the statute of limitations problem for members without lawyers,[169] it could now be argued that offensive collateral estoppel provides a "superior" alternative to the (b)(3)/(c)(2) class certification.[170] In sum, this new evolution authorizing offensive collateral estoppel may be an invitation for the courts to find ways to restore a post-trial one-way intervention class procedural model.

5. *An Illustration: The* Eisen *Remand*

It is important to note that *Eisen v. Carlisle & Jacquelin*[171] was a unanimous decision of the United States Supreme Court to dismiss the class complaint as drafted. But the concurring and dissenting opinion of Justice Douglas raised a point of difference about the future rights of the six million persons defined in the original class action complaint filed in 1968.[172] Presumably under the doctrine of *American Pipe & Construction Co. v. Utah*,[173] the statute of limitations was tolled as to their claims from the original filing in 1968 through the time of dismissal of the class complaint

166. Professor Kaplan early endorsed this view as a necessary result of the policy against one-way intervention. Kaplan, *supra* note 82, at 391 n.136; *see also* George, *supra* note 165, at 673 n.99. This forfeiture view is now entombed in RESTATEMENT (SECOND) OF JUDGMENTS § 42(d) [sic] [(e)], illustration 6, at 409 (1982), which classifies the exercise of an opt-out as a "Divestiture of Authority."

167. Even before the decision in *Parklane Hosiery*, a federal district court in *In re* Transocean Tender Offer Sec. Litig., 455 F. Supp. 999, 1006 (N.D. Ill. 1978) found that even though a shareholder had opted out of a prior class suit, he could rely on offensive collateral estoppel based on the class victory. *See* Note, *Offensive Assertion of Collateral Estoppel by Persons Opting Out of a Class Action*, 31 HASTINGS L.J. 1189, 1213-14 (1980), concluding that where a person who opts out of a class action because of a strong individual interest would bring a separate suit anyway, then judicial economy, uniformity, and binding effect of class judgments are served by allowing subsequent offensive collateral estoppel. *See also* Kempkes, *Issue Preclusion:* Parklane Hosiery Co. v. Shore, *Revisited*, 31 DRAKE L. REV. 111, 128 (1981) (urging that member's exercise of opt-out should not foreclose use of offensive collateral estoppel).

However, the conventional view prior to *Parklane Hosiery* would be that opt-out forfeits offensive collateral estoppel. *See* Sarasota Oil Co. v. Greyhound Leasing & Fin. Corp., 483 F.2d 450 (10th Cir. 1973) (opt-outs could not sue successful class plaintiff for portion of recovery). If this forfeiture principle is retained, it seems a possible logical implication that in the future, in non-class actions, failure to intervene where there is a right to do so may also constitute waiver of the use of offensive collateral estoppel. *See infra* note 401.

168. George, *supra* note 165.

169. Upon opting out, it appears the class member presumably must satisfy the statute from that point in time. See dictum in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 n.13 (1974), rejecting argument that right to opt out was meaningless because opt-outer's claim would be time barred, by citing *American Pipe* for proposition that class action tolled statute as to all members. But see the different approaches, *supra* note 160.

170. *See* Katz v. Carte Blanche Corp., 496 F.2d 747, 757 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974) (suggesting that offensive collateral stoppel may be "superior" to class certification).

171. 417 U.S. 156 (1974).

172. *Id.* at 179 (Douglas, J., dissenting).

173. 414 U.S. 538 (1974).

in 1974. According to the *Eisen* Court the class claim of the six million was now dismissed; by implication, the statute began to run again as to their individual claims. However, Mr. Eisen's individual claim was still pending in the original action, and "[the Court's] dismissal of the class action as originally defined is without prejudice to any efforts petitioner may make to redefine his class either under Rule 23(c)(4) or . . . [Rule] 15."[174] The Court implied that the remainder of the individual claims would be left to run out under the statute of limitations.[175]

Justice Douglas, however, engaged in a valiant effort to salvage these claims. To Justice Douglas, the Court's opinion left open the possibility that the original class of six million could be allowed to remain as an uncertified and dormant class for lack of willingness of the plaintiff to finance pre-trial notice, but the statute of limitations would still be tolled as to them, and Mr. Eisen's attorney should be given the opportunity to define a smaller subclass, send notice, and try the subclass case.[176] Justice Douglas is not clear as to what would happen in the event of a subclass victory because "strict application of the doctrine of mutuality of estoppel would limit the usefulness of that subclass victory . . . ."[177] Apparently, a victorious Mr. Eisen could ask for post-trial notice to the remainder of the six million in an attempt to have them intervene to invoke an arguable right to rely on offensive collateral estoppel, and a toll on the statute of limitations.

Justice Douglas' interpretive extrapolation of the majority opinion apparently was not acceptable to the rest of the Court.[178] Rather, the Court, after dismissal of the class count of the complaint, was content to leave the relationship between the six million and Mr. Eisen's lawyer to be governed under the non-class model. In this model the lawyer would have to solicit the members' affirmative consent through some form of organizational advertising and collection of their claims, since he and the plaintiff were not willing to finance individual (c)(2) pre-trial notice and opt-out consent.

B. *Member's Implied Rights and Duties Attaching to Class Certification of Rule 23(b)(1)-(2), or of Rule 23(b)(3) Class Action*

1. *Member's Right to Receive Individual Pre-Trial Notice of the Action*

a. *Constitution or Rule-Based Right*

The class member's right to receive individual pre-trial notice of the action, if it exists, arises primarily from the Constitution[179] or from Rule

174. 417 U.S. at 179 n.16.

175. The *Eisen* Court implied that class members could file individual actions, but some later courts have allowed the member to use the tolling period only if the class member subsequently intervenes. *See supra* notes 158-60.

176. 417 U.S. at 180-82.

177. *Id.* at 182 n.3.

178. Justice Douglas maintained that the issue was being left open, but simultaneously filed his opinion as a partial dissent. *Id.* at 181.

179. This right arises from the due process clauses of the fifth and fourteenth amendments. U.S. CONST. amends. V & XIV.

23.[180] Under Rule 23, the right to individual notice is mandatory for an action certified as a (b)(3) class action.[181] If an action is certified as a (b)(1) or (b)(2) class claim, however, the potential right to individual notice could also arise from the exercise of the court's discretion under Rule 23(d) or (e), as implied from the Constitution.

b. *Constitutional Right to: (1) Notice and Adequacy of Representation; (2) Adequacy Only; or (3) Notice Only*

A puzzle arises from two early United States Supreme Court cases imposing due process of law requirements in actions that functionally were the equivalent of class actions. One case focused on adequacy of representation; the other, on notice.

In *Hansberry v. Lee*,[182] in 1940, Justice Stone, the great scholar of equity, wrote the classic opinion restating the principle that the class action device, as an equity exception to joinder of parties and service of process requirements of the fourteenth amendment, requires adequate representation of individual interests in order to give res judicata effect to a state judgment purporting to bind those interests. Thus, a plaintiff class action brought to enforce racially restrictive real estate covenants could not bind purported class members whose interests were opposed to enforcement.[183] Because Justice Stone's opinion in *Hansberry* was silent about the fact that there was no pre-trial notice to class members, the opinion could be read as holding that due process requires only adequacy of representation of interests. But *Hansberry* left at least two questions open: if there had been notice to all the property owners, would notice have cured inadequacy of representation, and conversely, if there had in fact been adequacy of representation,[184] could notice also have been required?

In 1950, in *Mullane v. Central Hanover Bank & Trust Co.*,[185] however, Justice Jackson wrote the second classic due process opinion, requiring individual notice to pooled trust beneficiaries, against whom a trustee sought exoneration through a state statutory accounting. Because the statutory action functionally was a reverse, declaratory judgment form of class action against the beneficiaries, Justice Jackson's opinion could be read broadly as constitutionally requiring individual notice in all class actions.[186] Depending upon the type of class action and other factors, *Han-*

180. It is possible that some other basis may exist based on statutory or other substantive law, such as a contractual or fiduciary duty owed by the defendant.

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

182. 311 U.S. 32 (1940).

183. *Id.* at 42-43.

184. Justice Stone's opinion finding inadequacy of representation did not rest on the finding in the trial court that the defendant's stipulation was fraudulent or collusive in light of the fact that the Illinois Supreme Court found the stipulation was merely untrue. 372 Ill. 369, 373-74, 24 N.E.2d 37, 39 (1939).

185. 339 U.S. 306, 319-20 (1950). The language of Rule 23(c)(2) requiring "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort . . ." can be seen to be a direct derivation of the language in *Mullane*: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action . . . ." *Id.* at 314.

186. There are many puzzles in reconciling present Rule 23 with *Hansberry* and *Mullane*.

sberry and *Mullane* could be read together to require both individual notice and adequacy, or only adequacy, or only notice.[187]

Subsequent decisions applying these principles to federal class actions have not been uniform. The majority of federal courts have not required individual notice in (b)(1) or (b)(2) class suits on issues where the judges believe "homogeneity of interests" will insure adequacy of representation.[188] But there is substantial dissent from this point of view, on the theory that a court cannot realistically audit whether the interest is homogeneous and representation is in fact adequate unless class members are notified, so that they can express their subjective interests and consent, particularly with respect to the potentially divisive issue of shaping remedies.[189] This modern schizoid tension over individual notice and consent

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Both involved pre-1966 state court actions; nevertheless, it is submitted that neither, if treated under Rule 23 today, would be categorized as (b)(3) actions. The underlying action in *Hansberry*, if properly structured, would probably be certified as a (b)(1) or (b)(2) suit and would have added a defendant class of owners opposing the restrictive covenant sought by the plaintiff; and *Mullane*, while a statutory class action and therefore falling outside the Rule, would be in the nature of a mandatory class action under Rule 23(b)(1) or (b)(2). That is, neither *Mullane* nor *Hansberry* type class suits today would be classified as (b)(3) suits and therefore would probably not allow the absolute, total right to opt out under Rule 23(c)(2). However, puzzlingly, Rule 23 is silent about notice in mandatory or partially mandatory class actions, and instead, in permissive (b)(3) actions requires by Rule 23(c)(2) both individual notice *and* the right to opt out.

It is difficult not to conclude that *Mullane*, which, it is submitted, was some form of a mandatory class action, requires at least some minimal form of notice (not necessarily individual) to the class members in (b)(1) and (b)(2) class actions. For even though the Rule is silent and the class members have no absolute right to opt out, the mandatory class members have an interest, as Justice Jackson notes, in challenging frivolous or faithless claims of representation brought in their names and to avoid having the cost of such a fruitless litigation passed on to them by the opponent of the class, should the class opponent prevail. *Mullane*, 339 U.S. at 314. It must also be remembered that in *Mullane*, the New York court under the statute had appointed Mullane, an outstanding member of the New York bar, to represent the income beneficiary interests as a guardian and therefore there was an adequate attorney representative in fact, although there was no lay representative control over his decisions. Nevertheless, this adequacy of the attorney was not sufficient to overcome the right of the class members to receive notice in order collectively to assert their approval or disapproval of positions to be taken by Mullane, the guardian-attorney, in response to the declaratory judgment class suit being sought by the bank as the opponent of the class. In short, the members had an interest in approving their representative, which interest had to be respected by a current individual notice and could not be satisfied by a prior receipt of a copy of the statute and by current court appointment of a guardian.

See also TEX. R. CIV. P. 42(c)(2) (discussed *infra* note 227).

187. *See In re* Four Seasons Sec. Laws Litig., 502 F.2d 834 (10th Cir.), *cert. denied*, 419 U.S. 1034 (1974) (notice of settlement alone binds member who fails to opt out).

188. A leading case supporting this view is Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975), allowing (b)(2) certification of a nationwide Title VII sex discrimination class without notification to the members. *See also* Bartels v. Biernat, 405 F. Supp. 1012, 1016-17 (E.D. Wis. 1975) ("the fact that certain members of this group may be personally satisfied with the questioned conduct is of no material consequence").

The treatises agree that notice is not always constitutionally required. 3B J. MOORE, *supra* note 63, § 23.55, at 23-440 to -442; 2 H. NEWBERG, *supra* note 88, at § 2300; 7A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 1786 (1972) [hereinafter cited as 7A C. WRIGHT]. *See* Payne v. Travenol Laboratories, Inc., 673 F.2d 798 (5th Cir. 1982) (Goldberg, J., dissenting) (allowing, without notice to black males, redefinition of class limited to black females, and interlocutory injunction in their favor).

189. *See* Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976). Rosen, *supra* note 35, marshals the case law agreeing and disagreeing with *Wetzel* and argues for greater protection of the rights of absent class members, beginning with notice. *See also* Jurrow, *School Desegregation, Class Suits, and The Vexing Problems of Group Remedies*, 80 W. VA. L. REV. 25 (1977) (urging greater recognition of individual interests through notice, intervention and subclasses); Note, *Due Process Rights of Absentees in Title VII Class Actions—The Myth of Homogeneity of Interests*, 59 B.U.L. REV. 661 (1979) (advo-

may reflect a number of historical factors. Professor Yeazell tells us, for example, that the origins of early class actions were based upon pre-existing, de facto consent of the members of small feudal groups to adjudicate prospective equity injunctions,[190] whereas the later evolution of larger capitalist organizations required the courts to allow class representation of abstract interests without specific member consent.[191] In any event, the majority of modern federal cases deliver the functional message that where the prospective injunctive claim is sufficiently important, the courts, without asking, assume the consent of the individual class members, and rationalize the litigation result as a vindication of an "homogenous interest" which individual class members have no power to disclaim.[192]

c. *Member's Immunity from Jurisdiction*

Nonresident members of a class present a theoretical, but also very practical problem concerning reconciliation of their inclusion with the usual requirement of in personam jurisdiction in individual actions. If the class members are viewed functionally as quasi-plaintiffs, a theory of constructive consent and waiver through the class representative can be posed.[193] If, however, the class members are viewed as involuntary party

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cating some form of notice to absent class members in Title VII class actions); Note, *Long Run Economic Loss: Conflicting Interests of Class Members*, 56 NEB. L. REV. 338 (1977) (properly criticizing the decision in Blankenship v. Omaha Pub. Power Dist., 195 Neb. 170, 237 N.W.2d 86 (1976), denying class action on ground that majority of consumer class would suffer economically in rates if late charge were found to be illegally usurious, but commentator rationalizes court's result because no notice was contemplated for proposed class).

Often, however, courts separate out an homogenous interest of the class in relation to the determination of liability, and then hold that potential class conflicts as to remedies can be treated by later notice and subclassing. *See, e.g.*, Sperry Rand Corp. v. Larson, 554 F.2d 868, 873-75 (8th Cir. 1977).

The tensions between these two points of view may produce the result that a prior class action injunction (b)(2) decree obtained by a different representative without notice may be partially binding on the members, but will not bar their subsequent individual monetary claims. Johnson v. General Motors Corp., 598 F.2d 432 (5th Cir. 1979), *critically noted in*, 128 U. PA. L. REV. 1236 (1980); *see* Comment, 68 GEO. L.J. 1009, 1012 (1980); *see also* Crowder v. Lash, 34 FED. R. SERV. 2d 1223, — F.2d — (7th Cir. 1982) (prior membership in class for injunctive relief does not bar subsequent claim for individual damages).

190. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 878, 888 (1977).

191. Yeazell, *From Group Litigation to Class Action Part I: The Industrialization of Group Litigation*, 27 U.C.L.A. L. REV. 514, 524, 527, 552 (1980); Yeazell, *From Group Litigation to Class Action Part II: Interest, Class and Representation*, 27 U.C.L.A. L. REV. 1067, 1073, 1111, 1119 (1980) [hereinafter cited as Yeazell, *Part II*]. The modern tension may also reflect the political theory debates between the followers of Jeremy Bentham, who advocated the primacy of actual consent by the governed, and the disciples of Edmund Burke, who advocated that only representation of interest, and not consent, was necessary to legitimate political authority. *Part II*, *supra*, at 1072-79.

192. For example, at the first stage of Baker v. Carr, 369 U.S. 186 (1962), the Court obviously does not contemplate that the class of other rural voters similarly situated could disclaim the representation of their interest in obtaining voting equality, but at later stages, the same members might have sharp conflicts of interest in the adoption of a specific reapportionment plan. *See* Horton v. Goose Creek Ind. School Dist., 690 F.2d 470, 483-88, n.31 (5th Cir. 1982) (the better solution to potential antagonism in a large class of students, in a class action concerning their constitutional rights, is not to deny certification, but rather to provide notice and an opportunity to request intervention or exclusion). *Cf.* Zacharias, *Standing of Public Interest Litigating Groups to Sue on Behalf of Their Members*, 39 U. PITT. L. REV. 453, 486-90, 493 (1978).

193. *See* Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 HARV. L.

plaintiffs, or even as defendants[194] in relation to the defendant's implied prospective counter-claim for a declaration of nonliability, then the court's power to bind the class members should be conditioned upon satisfaction of the due process minimum contacts standard of *International Shoe Co. v. Washington*.[195] Treating the nonresident class members as involuntary party plaintiffs or as defendants would tend to disallow nonresident membership in a class in relation to pure in personam claims where the nonresidents have no forum contacts, but would allow nonresident membership in classes based upon de facto consensual entities or in rem funds.[196]

For example, in *Mullane v. Central Hanover Bank & Trust Co.*,[197] Justice Jackson validated the power of the New York court to assert jurisdiction over and to bind non-New York beneficiaries to nonliability under the New York forum statute.[198] Justice Jackson declined to categorize the claims as in personam, in rem, or quasi in rem, relying instead on state interest, necessity, and custom.[199] The rough dividing line for the jurisdictional authority to represent and to bind members of nonresident classes could correlate with Rule 23(b)(1) where there would be jurisdiction based on actual entity consent or claims to property within the jurisdiction of the court, and, more problematically, with Rule 23(b)(3), in the absence of contacts where consent of the nonresident would be required but would be imposed by sending opt-out notice and failing to receive a response.[200]

This general solution, however, would still leave a jurisdictional vacuum as to (b)(2) classes certified without notice. *Wetzel v. Liberty Mutual Insurance Co.*,[201] the leading case allowing a nationwide sex discrimination (b)(2) class without pre-trial notice to class members, did not bother to raise a personal jurisdiction issue. It is possible that because the action was based on federal question subject matter jurisdiction, nationwide personal jurisdiction was assumed.[202] Alternate explanations exist: perhaps by

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REV. 718 (1979); Comment, *Toward a Policy-Based Theory of State Court Jurisdiction Over Class Actions*, 56 TEX. L. REV. 1033 (1978).

194. *See* Wolfson, *Defendant Class Actions*, 38 OHIO ST. L.J. 457 (1977); Note, *Defendant Class Actions*, 91 HARV. L. REV. 630 (1978); Note, *Personal Jurisdiction and Rule 23 Defendant Class Actions*, 53 IND. L.J. 841 (1978).

195. Feldman v. Bates Mfg. Co., 146 N.J. Super. 84, 89-94, 362 A.2d 1177, 1179-82 (App. Div. 1976); Klemow v. Time, Inc., 466 Pa. 189, 196-97 n.15, 352 A.2d 12, 16 n.15, *cert. denied*, 429 U.S. 826 (1976).

196. *See supra* notes 63, 194.

197. 339 U.S. 306 (1950).

198. If a Florida beneficiary attempted to sue the New York bank trustee in Florida, it would seem appropriate that through concepts of jurisdiction, forum non conveniens, and conflict of laws that New York should be treated as the exclusive forum. *Cf.* Hanson v. Denkla, 357 U.S. 235 (1958); Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356 (1921).

199. The interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided the procedure accords full opportunity to appear and be heard.

339 U.S. at 313.

200. *See infra* notes 205-21 and accompanying text.

201. 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 972 (1975).

202. Unless there is some other provision, 42 U.S.C. § 2000e-5(f) (1976) does not appear to provide nationwide service of process. The Note, *supra* note 193, at 723-24 appears to assume there is federal court personal jurisdiction over class members in most federal class actions:

Any inquiry into multistate class actions must deal at the outset with the perhaps com-

working for a nationwide defendant, the class members had minimum contacts at the home office; perhaps because individual notice was not required, individual power wasn't either;[203] or perhaps class members were viewed as consenting, waiving plaintiffs. Ignoring the question of personal jurisdiction, however, does not make it go away.

The question also remains whether opt-out notice can be used to obtain the consent of plaintiff class members over whom the court would not otherwise have personal jurisdiction.[204] As previously noted, the Supreme Court of Illinois in *Miner v. Gillette*[205] found that nonresident class member minimum contacts with Illinois were not necessary "(1) if plaintiff adequately represents the nonresident parties and (2) if notice can insure the class of its constitutional opportunity to be heard and protect each member's option to choose not to participate."[206] The dissent argued that other legitimate multistate class actions have based jurisdiction upon common funds or other minimum contacts and that in this case there was no special Illinois nexus which would justify an exception ousting other States' jurisdiction.[207] Both the majority Illinois Supreme Court's opinion, projecting

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mon assumption that the issue of jurisdiction over absent plaintiff class members is purely illusory. A number of factors might foster such a belief: . . . most important, the virtual absence of any discussion of the issue in the federal cases. . . . But the ability of federal courts to bind United States residents does not prove that state courts can bind the residents of other states.

But even in federal question cases, the issue is not purely illusory because there must ordinarily be specific statutory or federal common law authority for nationwide service, or else the federal district court is confined to territorial jurisdiction and state long-arm service under FED. R. CIV. P. 4; 2 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶¶ 4.32[1], 4.42[2], 4.41-1[3] (2d ed. 1982); C. WRIGHT, FEDERAL COURTS § 64 (3d ed. 1976); *see* Seeburger, *The Federal Long-Arm: The Uses of Diversity, or 'Tain't So, McGee'*, 10 IND. L. REV. 480 (1977). *But see* Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963) (Clark, J., dissenting).

203. The RESTATEMENT (SECOND) OF JUDGMENTS § 41(2) (1982), unless exceptions from other sections are read into it, somewhat cavalierly appears to endorse the unqualified jurisdictional power of nationwide class actions by providing: "A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to service of process."

Section 42 provides the exceptions which include the exercise of an opt-out in Rule 23 (c), but which do not include failure of jurisdictional requirements as to the class members:

(1) A person is not bound by a judgment for or against a party who purports to represent him if:

(a) [required notice was deficient] or

. . . .

(c) [representative authority was divested] or

(d) [a conflict or interest prevented fair representation] or

(e) [there was failure of representation].

Id. § 42.

204. *Dalkon Shield I* rejected the necessity of in personam jurisdiction over the national plaintiff punitive damage (b)(1) class, 526 F. Supp. at 906-90, and *Dalkon Shield II* only mentions that the out-of-state plaintiffs were not given adequate opportunity to oppose the class certification. 34 FED. R. SERV. 2d at 655-56, — F.2d at —.

205. 87 Ill. 2d 7, 428 N.E.2d 478 (1981). On interlocutory appeal, the court authorized a multistate claim consumer plaintiff class action to consider small claims of deceptive practices and breach of contract in connection with the defendant's national sales promotion of its "Cricket" cigarette lighters.

206. *Id.* at 14, 428 N.E.2d at 482. Later the court mandated that individual opt-out notice will be required. *Id.* at 15, 428 N.E.2d at 482-83.

207. After granting certiorari, 50 U.S.L.W. 3802 (U.S. Apr. 5, 1982) (81-1493), and hearing oral argument, 51 U.S.L.W. 3377 (U.S. Nov. 10, 1982), the United States Supreme Court dismissed the petition for want of jurisdiction, there being no final judgment. 51 U.S.L.W. 5013 (U.S. Dec. 6, 1982). This disposition was appropriate because a comparable order, if entered in

full, binding effect to the multistate opt-out class action, and the dissent, which would instead require a dominant Illinois nexus, address the minimum contacts issue head on. However, both opinions are highly vulnerable for setting up different rules for plaintiff, as opposed to defendant, class actions and for failing to recognize that opt-out notice places a duty on the class member.[208] Neither opinion recognizes the possibility of another half-way house analysis, based on the nature of the right to opt out. This analysis would pose, like one-way intervention, that an Illinois victory could benefit a national class, even though an Illinois loss would not preclude Illinois nonresidents. Thus, another supportive theory would be, by analogy to default judgments, that the present Illinois suit for nonresidents may be maintained and a judgment entered, subject to being declared void or voidable on a collateral attack in another state by a nonresident class member who later appears to assert, on behalf of his own interest, with standing in his own right, that the Illinois court had no power to impose the duty to opt out. In other words, if the Illinois record shows that opt-out notice has been served upon a non-appearing class member, even when he is viewed as being in the nature of an involuntary party plaintiff-defendant, the fourteenth amendment does not preclude the Illinois court from following a procedure entering a judgment which remains valid until a specific nonresident makes a collateral attack on the judgment on the grounds that the judgment is voidable or void as to him.[209] In effect, this analysis poses that there are two classes of nonresidents, those whose silence in response to opt-out notice indicates consent, and those whose silence indicates objection. In line with this theory, it could be argued that the defendant has no standing in relation to, and cannot adequately represent, those nonresident members who want to consent; and the Illinois court in effect could be viewed as having precluded the defendant's standing and objection at this time on behalf of those whose silence theoretically indicates their objection.[210] On the other hand, if the defendant were to win at trial, even if the conclusion is accepted that nonresidents who failed to opt out could not be bound, and therefore could sue the defendant in other states, the result would not be objectionable constitutionally because

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the federal system, would not be an appealable order by the defendant under 28 U.S.C. § 1291 (1976); *see infra* notes 347-85 and accompanying text; and properly, the Court recognized no exception under 28 U.S.C. § 1257 (1976) for treating the federal constitutional issue as final prior to further state court proceedings. *See* Cox Broadcasting v. Cohn, 420 U.S. 469 (1975).

208. For example: (1) Rule 23(a)(1) requires impracticality of joinder, not impossibility, suggesting that the class member must be subject to joinder as both an involuntary, as well as a voluntary, plaintiff; (2) a plaintiff class action necessarily implies a counterclaim defendant class action for declaration of nonliability; (3) class actions originated in the injunction decree; jurisdictional concepts should be similarly limited; (4) the nature of opt-out in part judicially imposes a duty and burden on the member; how can a court impose a duty to act without a jurisdictional nexus if the member makes no appearance?

209. York v. Texas, 137 U.S. 15 (1890). But Shaffer v. Heitner, 433 U.S. 186 (1977) may have undercut *York* to the extent a state may no longer be free to preclude a pre-trial objection to jurisdiction.

210. However, as the Illinois court did in fact, it is universal practice to recognize the defendant's standing to raise pre-trial objections to the plaintiff's failure to satisfy class action requirements. Once trial is held, and a judgment favorable to the plaintiff class is entered, the problems become those of bifurcation, post-trial distribution and attorneys fees. *See* Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) (discussed *infra* notes 427-36 and accompanying text).

of the demise of mutuality.[211]

Thus, rather than creating an exception for plaintiff class actions, as the Illinois Supreme Court did, the use of this combined default judgment and one-way intervention justification to support the multistate class action more adequately reconciles it with the existing system. For example, the theory posing an exception for plaintiff class actions has difficulty answering the worst hypothetical horrible in which fifty multistate opt-out class actions are certified simultaneously and all members remain silent in response to fifty notices.[212] It may be however, that no theory will be able to sustain the multistate plaintiff class action without minimum contacts, and that the only way out of this dilemma for interstate federalism, in the absence of a traditional basis for a state's jurisdiction to impose a mandatory class action, will be for the United States Supreme Court constitutionally to require the states to use a pretrial opt-in procedure as to nonresidents.[213]

The decision of the Kansas Supreme Court in *Shutts v. Phillips Petroleum Co.*[214] illustrates the point that it may be useful to rely upon a correlation between the mandatory nature of the class action or issue and the power of the court to include nonresident class members as to the determination of the class issue. There the Kansas trial court certified a multistate class action for recovery of interest on monies first held in suspense by the defendant and later distributed to plaintiff class members as royalties on gas leases. The leases covered a Federal Power Commission rate-making area including all of Kansas and portions of Oklahoma and Texas. Opt-out notice was court-ordered and sent to the royalty holders by defendants. The right to opt out was conditional and not absolute in that opt-out would be granted "unless upon notice and after hearing and for stated reasons the court finds that inclusion is essential to the fair and efficient adjudication of the controversy."[215] The trial court sustained defendant's motion to deny late requests for exclusion by Texas class members.[216] After a judgment for the plaintiff, the Kansas Supreme Court upheld jurisdiction by utilizing the questionable theory that the necessary requirement for exercise of jurisdiction over nonresident class member plaintiffs is notice and the opportunity to be heard—not the minimum contacts requirement for jurisdiction over nonresident defendants.[217] But the court also found that the royalties retained by Phillips comprised a common fund under a constructive trust theory, and although Phillips had commingled the funds with Phillips' other assets, the class action could nevertheless be

211. *See* Shore v. Parklane Hosiery, 439 U.S. 322 (1979) (discussed *supra* notes 161-70 and accompanying text).

212. Two would be horrible enough; *see supra* note 22. Although many puzzles remain, ultimately the decision in *Miner v. Gillete Co.* could portend that a State has the power to use pre-trial notice and post-trial one-way intervention to administer relief to multistate classes.

213. *See also In re* U.S. Fin. Sec. Litig., 69 F.R.D. 24, 53-54 (S.D. Cal. 1975) (foreign investors could be subjected to (c)(2) opt-out notice, and court would consider opt in notice to improve res judicata effect of judgment).

214. 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978).

215. *Id.* at 538, 567 P.2d at 1302.

216. *Id.* at 539, 555, 567 P.2d at 1302, 1313.

217. *Id.* at 542-43, 567 P.2d at 1305.

binding on nonresident members' interest in that fund.[218] In using these dual grounds, the Kansas court was not bothered by the argument that it was inconsistent to justify jurisdiction for the action both as a mandatory class action under the Kansas equivalent of Rule 23(b)(1) and as a permissive class action under Rule 23(b)(3) in which the conditional right to opt out was granted.[219] In effect the court grew a Kansas hybrid.[220] Aside from its vulnerable theory that the same jurisdictional rules do not apply to plaintiff as apply to defendant classes, the *Phillips Petroleum* restitution case presents a stronger case than do the damage claims in *Miner v. Gillette* for a multistate class action.[221]

d. *Procedural Rights As Distinguished from Notice*

Analyses of *Hansberry v. Lee*[222] and *Mullane v. Central Hannover Bank & Trust Co.*[223] often are preoccupied with notice and overlook an examination of the procedural rights of the class members in those cases.[224] However, there is a fundamental distinction between the right to receive individualized pre-trial notice, and the procedural rights the recipient will be granted independent of the receipt. For example, in a remarkable decision[225] the Alaska Supreme Court struck down, in small claims cases, the traditional Alaska court summons "to appear" (which was understandable to lawyers) as violative of due process under the Alaska constitution. The notice did not inform the ordinary Alaskan about his procedural right to respond in writing to the summons and to change venue, and those fundamental procedural rights should have been communicated to him by the summons in plain English.[226]

Similarly, in class actions, there is a need to think separately about the rights which the court will grant the member independently from the notice that should be communicated to him.[227] In the abstract, the purpose of a notice may be to define in a concrete procedural way the legal identity of the ad hoc group person whose rights the court is asserting the power to

218. *Id.* at 552-53, 567 P.2d at 1311-12.

219. *Id.* at 558, 567 P.2d at 1315.

220. *See infra* text accompanying notes 325-31. In a later, somewhat similar proceeding involving fewer Kansas contacts, the defendant was denied certiorari in Phillips Petroleum Co. v. Duckworth, 51 U.S.L.W. 3498 (U.S. Jan. 11, 1983) (No. 82-461), seeking a writ of mandamus ordering the trial court judge to decertify the class on the grounds that the nonresident plaintiffs have no contacts with Kansas, have not consented to jurisdiction, and that the foreign claims have no nexus to Kansas.

221. The basis would be either that the fictional situs of the constructive trust fund can be found to be in Kansas, or that more realistically, Kansas has the dominant nexus among sister states to allow it to take exclusive jurisdiction to impose a mandatory class action for the remedy sought.

222. 311 U.S. 32 (1940).

223. 339 U.S. 306 (1950).

224. *Class Actions*, *supra* note 87, at 1402-06.

225. Aguchak v. Montgomery Ward Co., 520 P.2d 1352, 1356-58 (Alaska 1977).

226. The *Aguchak* court drafted the language of a summons which would satisfy its standards in the interim until its Special Advisory Committee on Rules for Small Claims could act. *Id.* at 1358 n.34.

227. The *Wetzel* court appears to reason circularly that because the right to opt out is not required, notice is not either. 508 F.2d at 252-53. In contrast, the Texas rule, for example, unlike Federal Rule 23(c)(2), mandates notice in all class actions, but requires the right to opt out only in the (b)(3) suit. TEX. R. CIV. P. 42(c)(2).

adjudicate.[228] More concretely, some of the major purposes of a notice may be: (1) simply to inform the members of the suit, and not to ignore the class member as a null quantity; (2) to authenticate consent to the plaintiff's and the class lawyer's representation and to impose binding effect on the members either by not permitting an opt-out, or by permitting opt-out and receiving no response or by requiring an opt-in; (3) to defeat or narrow the class, where responses show disapproval; (4) to improve class representation through appearances,[229] invitation to intervention, subclassing or other devices; (5) to communicate information to the members about the suit to provide informed consent for the member to make the procedural choices available; and, (6) to elicit back information from the member for purposes of discovery on the class certification issues or on the merits.

To illustrate, in *Bauman v. United States District Court*,[230] the trial judge certified a Title VII (b)(2) class action and under Rule 23(d) ordered individual notice to class members, permitting them to opt out and requiring a statement of discrimination if members wished to remain in. The Ninth Circuit refused the plaintiff's petition for mandamus because there was a split in authority whether it is erroneous for a trial judge to grant opt-out rights in a (b)(2) suit[231] and because the court interpreted the notice to mean that nonresponding members could not be excluded from the class and that evidence of nonresponses could not be used to destroy numerosity.[232]

2. *The Mandatory Class Action: Member's Minimum Procedural Rights of Control and Maximum Duties*

Where class members are given no pre-trial notice, their procedural rights become largely illusory. For example, the exercise of an effective right to intervene depends on timely knowledge of the action.[233] Further, if the court recognizes no right of notice, and none is given, the clear implication is the court intends no right to opt out. Add to these disabilities, the inability of the members to participate in the settlement process, and the possibility of loss on the merits, and it becomes clear the rights of the

228. *See* J. VINING, *supra* note 148.

229. Rule 23(c)(2) also requires that the notice give the right to "an appearance." *See supra* note 80.

230. 557 F.2d 650, 652 (9th Cir. 1977).

231. The answer to this question should not be assumed through definitional imperatives in the Rule. More accurately the question is which issues should be defined by the court to require mandatory (no opt-out) treatment and which issues should be defined to allow permissive (absolute opt-out) treatment and whether conditional opt-out should be utilized. *See also infra* note 329.

232. For example, Judge Hufstedler, specially concurring, disagreed on this issue and thought the intended effect of the notice was an impermissible opt-in which would exclude non-responding members and would be used by the trial judge to destroy numerosity. 557 F.2d at 662.

Judge Wisdom, concurring specially in Robinson v. Union Carbide Corp., 538 F.2d 652 (5th Cir. 1976), *modified*, 544 F.2d 1258 (5th Cir. 1977), is at pains to draft a Title VII race discrimination notice which both communicates rights in simple English and does not burden the member's required response so as to amount to an impermissible mandatory opt-in before a determination of liability.

233. Piambino v. Bailey, 610 F.2d 1306, 1320 (5th Cir.), *cert. denied*, 449 U.S. 1011 (1980).

members as a practical matter become dependent on the class lawyer and representative, the court, and whatever objections the defendant chooses to raise on the class members' behalf.[234] In the absence of pre-trial notice, the danger of constructive collusion between the plaintiff's attorney and defendant, particularly in relation to settlement and attorneys' fees, is overcome only by subsequent notice and review by class members.

In sum, the "mandatory" class action without notice affords the fewest procedural rights to class members, the "partially mandatory" affords more, and the "permissive" the most. The justification for these increasing degrees of members' procedural rights lies in the decreasing degrees of necessity for unitary court adjudication in relation to the issues being adjudicated by the court. The nature of this necessity can be both procedural and substantive.

A "mandatory" or "compulsory" class action can now be defined as one which by its nature requires exclusive subject matter jurisdiction over the issue and corresponding personal jurisdiction over the members in the forum court.[235] The school integration suit is a good modern example. Although there is no discussion of the point in the United States Supreme Court's opinion, the original action in *Brown v. Board of Education of Topeka*[236] and the actions in the companion cases, were filed as class suits for injunctive relief.[237] Although there was general agreement that such suits to end governmental race discrimination were proper class suits, technical disagreements existed over whether such suits should be categorized as "true"[238] or "spurious."[239] Substantially ignoring this dispute, the 1966 Rule reformers chose to separate and abstract these suits into a separate category, the (b)(2) class suit, keyed to the type of relief sought. The 1966 Rule reformers, however, provided no discussion of the procedural rights of class members in such suits.[240]

The evolutionary result was that what may have started before 1966 as a spurious permissive class suit ended up after 1966 with the Fifth Cir-

234. It is implicit in the many decisions that the defendants have been given standing to raise objections for the members in order to obtain res judicata protection for the defendant, but the courts sometimes view the objections skeptically because of the defendants' self-interest in defeating the class.

235. *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co, 339 U.S. 306 (1950) (statutory proceeding, not technically a class action). The majority opinion and Judge Heaney in dissent in *Kansas City Skywalk II* use the term "mandatory" to describe an action certifiable under Rule 23(b)(1), 680 F.2d at 1191, and cite to Reynolds v. National Football League, 584 F.2d 280 (8th Cir. 1978), but this latter opinion does not use the phrase.

236. 347 U.S. 483 (1954).

237. Brown v. Board of Educ., 98 F. Supp. 797 (D. Kan. 1951).

238. Todd v. Joint Apprenticeship Comm. of Steel Workers, 223 F. Supp. 12, 16 (N.D. Ill. 1963), *vacated as moot*, 332 F.2d 243 (7th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965).

239. Professor Moore maintained that such suits were "spurious": "While the type of class action was properly a spurious class suit, because of the individual nature of the rights of the members and the lack of any jural relationship with each other an occasional court classified the suit as a true class action." 3B J. MOORE, *supra* note 63, ¶ 23.08, at 23-2761 n.2 app. and again:

> That a class suit injunction, if issued, against racial discrimination and the violation of other civil rights would have a beneficial effect on all class members—including non-interveners—should not alter the general doctrine that a judgment in a spurious class action adverse to the class did not bind those who were not parties to the suit.

Id. ¶ 23.10-1, at 23-2769 app.

240. Advisory Committee Notes to *Proposed Amendment*, 39 F.R.D. 69, 102 (1966).

cuit rule in school desegregation cases: the "mandatory" class action. That is, once a school district became subject to a continuing court decree, separate individual claims of racial discrimination were required to be brought by "mandatory" intervention into the class suit, and in effect, there was no right to opt out.[241]

This evolution in the "procedural" nature of the (b)(2) class action was closely intertwined with necessary, if not more significant, developments in the substantive law of remedies pertaining to injunctive relief. It was a foregone conclusion when the United States Supreme Court in 1972, in *Lynch v. Household Finance Corp.*,[242] confirmed that the section 1983 injunctive remedy of the Civil Rights Act[243] protects property as well as personal rights. By fully validating the federal equitable injunction to protect personal rights and property rights, and by using the vehicle of the (b)(2) class suit, the Court confirmed the foundation for new forms of "mandatory" class actions built on grounds similar to those used to justify ancient in rem actions: that is, the insistent need for an exclusive subject matter jurisdiction over the res in one action in one court.[244] Only now the "res" was not property but a community dispute, substantively and jurisdictionally defined and justified under the Civil Rights Act[245] or other federal statute.

To illustrate the full fruition of this interrelationship between the substance and procedure of modern federal class injunctions, the Fifth Circuit, in *United States v. Hall*,[246] considered the appeal of a contempt conviction against an agitator who had violated a federal school desegregation order. The court faced the argument that a school injunction could not bind the whole world in the absence of personal joinder of the defendant.[247] However, the Fifth Circuit made short work of this argument on grounds that bore remarkable resemblance to those supporting the use of the discredited in rem injunction in equity.[248] In sum, what may have begun as "spurious" injunctive class suits to protect individual personal

241. National Educ. Ass'n v. Board of School Comm'rs, 483 F.2d 1022 (5th Cir. 1973) is described, along with prior decisions as requiring "any complaint of discrimination within the scope of a pending school suit to be advanced by petition to intervene in that case." Davis v. Board of School Comm'rs, 517 F.2d 1044, 1047 (5th Cir. 1975). Thus, Mr. Davis was required by court order not to proceed with his individual claim of discrimination and was required to intervene to present his claim in the class proceeding. *Id.* at 1049.

But see Crowder v. Lash, 34 FED. R. SERV. 2d 1223, 1225, — F.2d —, — (7th Cir. 1982) (suggesting that prisoner's individual damage claim should not be appended to other prisoners' injunctive class suit, and that prisoner could not be required to intervene at risk of losing damage claim).

242. 405 U.S. 538 (1972).

243. 42 U.S.C. § 1983 (1976).

244. *Cf.* Trbovich v. United Mine Workers, 404 U.S. 528, 539 (1972) (legislative policy to place exclusive remedy in Secretary of Labor to contest union election is not undercut by intervention of union member who "may have a valid complaint about the performance of 'his lawyer' ").

245. For example, Baker v. Carr, 369 U.S. 186 (1962) was brought as a class suit prior to 1966 on behalf of voters similarly situated but would no doubt fit under Rule 23 (b)(2) after 1966.

246. 472 F.2d 261 (5th Cir. 1972).

247. *Id.* at 264.

248. *See id.* at 265-66. The *Hall* case is criticized in Rendleman, *Beyond Contempt: Obligors to Injunctions*, 53 TEX. L. REV. 873, 921-22 (1975); *see also* Note, *Binding Nonparties to Injunction Decrees*, 49 MINN. L. REV. 719 (1965) (indicating courts have exceeded their jurisdiction by applying injunctions to nonparties).

rights, ended up, in conjunction with the march of federal law,[249] as "mandatory" injunctive class actions under Rule 23(b)(2), with no rights to notice or to opt out.[250]

3. *The Permissive Class Action and the Member's Right to Opt Out: Total or Partial; Absolute or Conditional*

a. *Analogous Individual Litigation Procedural Rights*

If it is true that the power of a class member to exclude himself, or "opt out" was a procedural right newly created in 1966, it would be helpful to compare it to other known procedural rights and the standards governing them. For example, the power to opt out is in some respects the opposite[251] of a right or duty to intervene.[252] However, from another perspective, the power to opt out is exercisable at the absolute discretion of the member, whereas the permissive right to intervene is conditional upon a showing of inadequate representation.[253]

Somewhat parallel is the immunity of a defendant who is served with process, but is not subject to the jurisdiction of the court. Such a defendant may choose not to appear and remain silent, and despite the entry of default judgment, he may subsequently attack the judgment for being void.[254] Further, in individual litigation, if a defendant successfully resists an attempt to define or join an absent person as an involuntary party plaintiff under Rule 19 of the Federal Rules of Civil Procedure, the immu-

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249. *See* O. FISS, THE CIVIL RIGHTS INJUNCTION (1978); Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978) (viewing the federal march critically).

250. *See* Note, *Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2)*, 88 YALE L.J. 868 (1979) (the rule has fostered an "entity" class action).

251. *See supra* note 81.

252. *See* Trbovich v. United Mine Workers, 404 U.S. 528, 537-38 (1972); Davis v. Board of School Comm'rs, 517 F.2d 1044, 1049 (5th Cir. 1975).

253. The 1966 Rules Committee rejected both alternatives of intervention and conditional opt out in favor of absolute opt out. *See supra* note 82.

The minimal showing necessary for intervention is, however, that representation "may be inadequate." Calvert Fire Ins. Co. v. Environs Dev. Corp., 601 F.2d 851, 858-59 (5th Cir. 1979); New Mexico v. Asmodt, 537 F.2d 1102, 1106-07 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977); Nuesse v. Camp, 385 F.2d 694, 702 (D.C. Cir. 1967). Intervention into a non-class action gives the intervenor full status as a party, although there are arguments made that the courts have the power to create lesser statuses. Kennedy, *Let's All Join In: Intervention Under Federal Rule 24*, 57 KY. L.J. 329, 375 (1968); Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 HARV. L. REV. 721, 762 (1968). In class actions, however, since intervention is governed by both Rule 24 and Rule 23(d), 3B J. MOORE, *supra* note 63, at ¶ 23.90[1], the grant of intervention may lead the court to replace the original representative and class counsel with the intervenor and his counsel, or allow them to co-exist as co-representatives (if that is ever really possible), or more likely, to create a subclass, under Rule 23(c)(4)(B). See remand order in Woolen v. Surtran Taxicabs, Inc., 684 F.2d 324 (5th Cir. 1982) (discussed *infra* note 350).

A functional form of qualified opt-out also exists whenever, in response to notice in a mandatory class action, a putative member appears, and upon showing his different interest or antagonism to the representative, the court redefines the class to exclude the member or his interest. See Horton v. Goose Creek Ind. School Dist., 690 F.2d 470, 487 n.31 (5th Cir. 1982) and *Class Actions supra* note 87, at 1485-89, cautioning against it.

254. *See* Durfee v. Duke, 375 U.S. 106 (1963) (dictum); Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931) (dictum); Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments*, 87 YALE L.J. 164 (1977).

nity of the absent person is essentially similar to a power to opt out.[255] Again, if a party is able to resist a motion for consolidation of his case with another under Rule 42 of the Federal Rules of Civil Procedure, the immunity from being consolidated is analogous to a power to opt out.[256] Another functional equivalent is the immunity of a litigant from an injunction against proceeding in another court.[257]

In other contexts, the right to choose counsel,[258] the rights of creditors to keep certain claims out of bankruptcy proceedings,[259] and the option to raise a permissive counterclaim[260] can be viewed as substantial equivalents of the partial power to opt out. In short, the power to opt out, while conceived as an only child, was born into a large family of procedural relatives.

b. *Other Class Action Procedural Rights Linked to the Right to Opt Out*

Normally, the right to opt out is dependent on certification under Rule 23(b)(3). There are a number of other procedural rights which are often linked to the (b)(1)-(2) or (b)(3) category under which a class action is certified. For example, the right to jury trial often correlates with Rule 23(b)(3) rather than Rule 23(b)(2).[261] Courts also reason that because (b)(2) class members have no right to opt out, the (b)(2) member can be subjected to forms of discovery, to which a (b)(3) member could not.[262] A similar argument is made that counterclaims are compulsory against

255. Kidwell *ex rel.* Penfold v. Meikle, 597 F.2d 1273 (9th Cir. 1979) (to force joinder of an involuntary plaintiff there must be a relation "akin to a trust relationship"); Caprio v. Wilson, 513 F.2d 837 (9th Cir. 1975) (similar).

256. *See* Molever v. Levenson, 539 F.2d 996, 1003 (4th Cir.), *cert. denied*, 429 U.S. 1024 (1976).

257. The Eighth Circuit in *Kansas City Skywalk II* relied on the anti-injunction statute to reverse the order certifying the class under Rule 23(b)(1). If the class had been certified under Rule (b)(3), the state litigants could have exercised their power to opt out. Apparently the class members had no right to offensive collateral estoppel under Missouri law, so opt-out would not work a forfeiture of a right they did not possess.

258. *See infra* notes 357-59 and accompanying text.

259. Prior to the Bankruptcy Act of 1978, 11 U.S.C. §§ 101 *et seq.* (Supp. II 1978 & Supp. V 1981), the referee had summary jurisdiction over claims to property of the debtor. Other claims, over which the referee did not have summary jurisdiction, because they were claims within the plenary jurisdiction of the Article III district courts, could nevertheless be heard in bankruptcy by the referee without a jury by consent if the creditor entered a claim in the bankruptcy proceeding, rather than pursuing it in state or federal court. Katchen v. Landy, 382 U.S. 323, 336-37 (1966). But the 1978 Act eliminated the distinction between summary and plenary consent jurisdiction of the referee, and converted the jurisdiction arising by consent of the claimant into expanded jurisdiction granted as a matter of law to the new bankruptcy judge. In so doing, the Act violated Article III. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858, 2862 (1982). Under this analogy, the (b)(3) class member has the option to select his forum by totally opting out, whereas the former bankruptcy creditor, while partially bound to the extent of the referee's summary jurisdiction over property, exercised his option on other claims by not opting in. The bankruptcy analogy, however, shows the power to opt out is closely related to both personal and subject matter jurisdiction of the court over the claim of the class member.

260. The compulsory counterclaim is lost by failure to assert it, whereas the permissive counterclaim may be withheld or asserted at the option of the defendant. *See* Kennedy, *Counterclaims Under Federal Rule 13*, 11 HOUS. L. REV. 255 (1974).

261. *See infra* notes 311-16 and accompanying text.

262. *See* Robertson v. National Basketball Ass'n, 67 F.R.D. 691, 698 (S.D.N.Y. 1975).

(b)(2)[263] but permissive as to (b)(3) class members.[264]

The right to opt out itself has become an essential part of the judicial rationale in ruling upon adequacy of representation in (b)(3) certifications.[265] To illustrate further, some courts use the justification that because the members subjected to counterclaims might inadvertently not opt out, (b)(3) certification should be denied,[266] whereas other courts use the rationale that because the members can opt out, the class should be certified.[267]

c. *Failure to Respond: Inclusion and Preclusion*

If the court grants the right to opt out but the member fails timely to exercise it, the language and intent of Rule 23(c)(2) and (c)(3) are to produce inclusion in the class and preclusion of the member's alternative claims.[268] Taken in the context of the law prior to 1966, Rule 23 impliedly negates any duty of the (b)(3) member to opt in prior to trial, and clearly implies that the nonresponding class member has a specific right to be included in the class judgment by his passive act of silence.[269] Given these necessary implications, it becomes questionable whether either the court's power to fashion the content of discretionary notices,[270] or the court's power over notice and settlements,[271] or the court's power of discovery sanctions for nonresponse by parties,[272] or the court's power of (b)(2) certification, may override the class member's right to inclusion, by the court's

263. Weit v. Continental Ill. Nat'l Bank & Trust Co., 60 F.R.D. 5, 8 (N.D. Ill. 1973).

264. Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 485, 489-90 (S.D.N.Y. 1973) (absent passive (b)(3) members not subject to counterclaim).

265. *See infra* note 305.

266. *See, e.g.*, Carter v. Public Fin. Corp., 73 F.R.D. 488, 491, 493 (N.D. Ala. 1977) (because defendant's counterclaims were compulsory against 85 of 383 class members in default on loans, the court refused to certify because failure to opt out could result in judgments against them on counterclaims).

267. *See* Sarafin v. Sears Roebuck & Co., 73 F.R.D. 585, 588 (N.D. Ill. 1977) ((b)(3) certification was granted to 300,000 members of TILA class, statutorily limited to recovery of $100,000 or $.30 each, where class members' interest in individual recovery up to $1,000 each could be protected by opt-out under Rule 23(c)(2)); *see also* Fetta v. Sears Roebuck & Co., 77 F.R.D. 411 (D.R.I. 1977).

268. Supermarkets Gen. Corp. v. Grinnell Corp., 59 F.R.D. 512, 513 (S.D.N.Y. 1973), *aff'd sub nom.* Manhattan-Ward, Inc. v. Grinnell Corp., 490 F.2d 1183 (2d Cir. 1974); *see* FED. R. CIV. P. 23(c)(2)(B), (c)(3). The 1966 Committee Note to Rule 23(c)(3), however, acknowledges that the provision of Rule 23 "does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment." *Cf.* Crowder v. Lash, 34 FED. R. SERV. 2d 1223, — F.2d — (7th Cir. 1982) (inclusion in successful (b)(2) injunctive class does not bar member's individual damage action).

269. As previously noted, silence in fact may mean either consent or objection, but the Rule intends to choose the half-fiction that silence means consent. *Compare* Brennan v. Midwestern Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972) (dismissal of (b)(3) member claim prior to judgment for failure to file proof of claim, dissent by Judge Stevens) *and* Catena v. Capitol Indus., Inc., 543 F.2d 77 (9th Cir. 1976) (such an order is not appealable) *with* Bauman v. United States Dist. Court, 557 F.2d 650 (9th Cir. 1977) (pre-trial request for statement of claim from (b)(2) class members could be sent provided nonresponse did not result in dismissal of member's claim). *See also* Robinson v. Union Carbide Corp., 538 F.2d 652 (5th Cir. 1976), *modified*, 544 F.2d 1238 (5th Cir. 1977); *In re* U.S. Fin. Sec. Litig., 69 F.R.D. 24, 53-54 (S.D. Cal. 1975) (dictum approving authority to use opt-in in either (b)(3) or (b)(2) classes).

270. FED. R. CIV. P. 23(d).

271. *Id.* 23(e).

272. *Id.* 37.

imposition of exclusion, and possibly preclusion, for failure of a class member to respond to a court's inquiry prior to judgment.

The general principle of inclusion and preclusion is subject to equitable exceptions basically expressed in Rule 60(b).[273] Whereas a (b)(2) judgment without notice may be subject to attack by a member for inadequacy of representation,[274] the (b)(3)/(c)(2) notice with an unexercised opportunity to opt out may foreclose attack on adequacy of representation.[275]

IV. DENIAL OF THE RIGHT TO OPT OUT: THE FUNCTION AND PROCESS OF CERTIFYING THE RULE 23(B)(1) OR (B)(2) CLASS SUIT OR ISSUE

A. *The Simple Approach: Mutual Exclusivity of the Whole Action: Rule 23(b)(1), (2) or (3)*

The plain language of Rule 23 yields the plausible assumption that if the court is to certify an action as a class action, the court should certify the action under Rule 23(b) as either (1), (2), or (3). For example, in the early rounds of the *Eisen v. Carlisle & Jacquelin* cases, because everyone characterized the claim as being one primarily for past individual damages, the assumption was that the action either had to be certified as a (b)(3) class action or not certified at all.[276]

B. *Model (b)(0): Alternatives to Rule 23(1), (2) or (3)*

The logical possibility exists that the prerequisites for a class action can be satisfied under Rule 23(a) but the action still may not qualify as a class action under any of the three categories in Rule 23(b). Usually, however, when the courts deny class certification, they negate all or some of the prerequisites under Rule 23(a), in addition to finding that the further standards of Rule 23(b)(1), (2) or (3) are not met.[277] For example, in *Eisen v. Carlisle & Jacquelin*,[278] the trial judge first found a $70 claimant could not be an "adequate" representative under Rule 23(a)(4). After reversal on this point, and appellate findings that the prerequisites of Rule 23(a) were met,[279] the subsequent United States Supreme Court dismissal of the class action was based on the unwillingness of the representative to pay for cost

273. *See* Sagers v. Yellow Freight Sys., Inc., 21 FED. R. SERV. 2d 49 (N.D. Ga. 1975). *But see In re* Four Seasons Sec. Laws Litig., 525 F.2d 500 (10th Cir. 1975) (class member receiving notice of settlement but failing to opt out has no standing under Rule 60(b)). *Cf. In re* Four Seasons Sec. Laws Litig., 493 F.2d 1288 (10th Cir.), *cert. denied*, 419 U.S. 1034 (1974) (trial court did not abuse discretion in making finding under Rule 52(a) that member had effectively opted out).

274. *See* Gonzalez v. Cassidy, 474 F.2d 67, 74 (5th Cir. 1973); Johnson v. General Motors Corp., 598 F.2d 432, 437-38 (5th Cir. 1979).

275. *In re* Four Seasons Sec. Laws Litig., 502 F.2d 834, 843-44 (10th Cir.), *cert. denied*, 419 U.S. 1034 (1974).

276. Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968) [hereinafter cited as *Eisen II*].

277. *Dalkon Shield II* is illustrative. *See supra* notes 27-31. The precise grounds for denial of the class certification may have significance in relating the impact of the denial on subsequent proceedings; for example, arguments have been made that the tolling doctrine of *American Pipe* is limited only to denials for lack of numerosity. *See supra* note 158.

278. 41 F.R.D. 147 (S.D.N.Y.), *motion to dismiss appeal denied*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967) [hereinafter cited as *Eisen I*].

279. *Eisen II*, 391 F.2d at 566-67.

of mandatory notice, thereby negating Rule 23(b)(3)(D) manageability.[280] It is therefore conceivable for an action to meet the requirements of Rule 23(a) but not fully to satisfy any of the Rule 23(b)(1), (2), or (3) requirements.

It is important to keep in mind what alternative remedies exist for class members if the court chooses to say that none of the Rule 23(b) categories is satisfied.[281] In the case of small claims, as in *Eisen*, presumably no claims at all will be pursued, or, less likely, some other non-class, private association, or governmental group remedy may be available.[282] But in a slightly different situation, if the individual claims are large enough to

280. 417 U.S. 156, 178-79 (1974) [hereinafter cited as *Eisen IV*]. It is possible to read the decision as implying that Mr. Eisen therefore was, or became, an inadequate representative under Rule 23 (a)(4) because of his inability and unwillingness to finance notice. This possibility was not lost on defendants who immediately attempted to discover financial assets of the representative, and the contingent fee arrangement in order to attack adequacy of representation. *See* Sanderson v. Winner, 507 F.2d 477 (10th Cir. 1974); *In re* Toilet Seat Anti-Trust Litig., 23 FED. R. SERV. 2d 900 (E.D. Mich. 1977); Kaye & Sinex, *The Financial Aspect of Adequate Representation Under Rule 23(a)(4): A Prerequisite to Class Certification?*, 31 U. MIAMI L. REV. 651 (1977); Comment, *Class Certification: Relevance of Plaintiff's Finances and Fee Arrangements with Counsel*, 40 U. PITT. L. REV. 70 (1978); Note, *Discovery of Plaintiff's Financial Situation in Federal Class Actions: Heading 'em Off at the Passbook*, 30 HASTINGS L.J. 449 (1978).

281. The language of Rule 23(a) does not consider alternative remedies. Rule 23 (b)(1) and (b)(2) do not expressly raise alternate remedies, although Rule 19(b), fourth factor, does. Rule 23(b)(3) directs the court to consider alternative remedies to the class action.

282. For a discussion of Justice Douglas' partial dissent, see *supra* text accompanying notes 172-78.

The possibility often exists for some kind of government action, but the practical political reality is often speculative. However, General Tel. Co., Inc. v. EEOC, 446 U.S. 318 (1980), held that the EEOC may seek class wide relief without compliance with the prerequisites to class certification as a representative under Rule 23(a), thus creating the possibility of a governmental class remedy which is more effective than the private class remedy. Compare this expansive treatment with the restrictive narrowing of the private remedy class action in General Tel. Co. S.W. v. Falcon, 450 U.S. 1036 (1982). But the court may also grant exemption from Rule 23(a) through the private organizational standing concept. *See* Zacharias, *supra* note 192; Note, *Organizational Representation Suits: Labor Unions May Attack Employment Discrimination Without Having to Meet Rule 23 Requirements*, 53 IND. L.J. 113 (1977).

The courts may also move in the opposite direction and by legislative interpretation read the Rule 23 class action out of the substantive remedies altogether and thereby require opt-in procedures consistent with the remedies at the time the original legislative wording was passed. La Chapelle v. Owens-Illinois, Inc., 513 F.2d 286 (5th Cir. 1975) (age discrimination in employment claims require individual party authorization). *See* Foster, *Jurisdiction, Rights and Remedies for Group Wrongs Under the Fair Labor Standards Act: Special Federal Questions*, 1975 WIS. L. REV. 295, 297 ("the class action provisions of Rule 23 . . . apply neither to the equity suits nor to damage actions under the Act"); Note, *The Class Action in Minimum-Wage Back Pay Suits: A Proposal to Increase the Efficiency of Private Enforcement of the FLSA*, 51 S. CAL. L. REV. 923 (1978) (advocates a (b)(3) opt-out class action approach); *see also* Quinault Indian Allottees Ass'n v. United States, 453 F.2d 1272, 1275-77 (Ct. Cl. 1972) (Rule 23 does not control in Court of Claims; an invitation to permissive intervention was found preferable to an opt-out); *supra* note 146. *Cf. In re* General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1134 n.50 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979) (accepting the argument that Rule 23, including its opt-out provisions, allows approval of fair class settlements over objections of class members, but refusing to endorse concept that Congress intended the standards to be less stringent for approval of Magnuson-Moss Warranty Act settlements); Comment, *The Magnuson-Moss Act Class Action Provisions: Consumers' Remedy or an Empty Promise?*, 70 GEO. L.J. 1399 (1982) (arguing Congress does not intend that Rule 23(c)(2) and *Eisen* individual notice should apply).

The State Attorney General, *parens patriae* provision of the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 15c(b)(1) (1976), requires notice by publication and provides a statutory opt-out that "any person on whose behalf an action is brought . . . may elect to exclude from adjudication the portion of the State's claim for monetary relief attributable to him by filing notice of such election . . . ." *Id.* § 15c(b)(2). *See also* VA. CODE § 59.1-9.15(c) (1982) (allowing Attor-

justify individual suit or joinder, the claims will probably be pursued and managed subject to whatever consolidation devices are available. In any event, the (b)(1)-(2) or (b)(3) category requirements and the two implicit procedural models which they mandate can be used as a two-edged sword—either as a justification to preclude use of other group procedural models within the Rule, such as pre-trial[283] or post-trial[284] opt-in models, or conversely, to authorize different group remedies models outside Rule 23 class actions.[285]

C. *Model (b)(1): Multiple Mandatory Parties to Claims Involving Entities or Limited Funds*

The language of Rule 23(b)(1) contemplates that the class members be persons, who but for their numerosity, would otherwise be necessary parties under Rule 19 of the Federal Rules of Civil Procedure.[286] In this light, it is difficult to see how Judge Wright in *Kansas City Skywalk I*[287] could justify (b)(1)(A) class treatment as to common law tort claimants for compensatory damages, when, in individual litigation, such claimants are not traditionally viewed as necessary parties.[288] It is significant that Judge Wright relied upon *Hernandez v. Motor Vessel Skyward*[289] but failed to note that, unlike the common law, admiralty in rem proceedings treat multiple tort claimants to the same ship accident as necessary parties.[290] The laudable part of Judge Wright's leap is that the time has come, with the arrival of comparative negligence (originally developed in ancient admiralty) when the common law, even in individual litigations, should also

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ney General to file suit on behalf of political subdivisions if notice and the option of exclusion are given).

In Reiter v. Sonotone Corp., 442 U.S. 330, 337 n.3 (1979), allowing noncommercial consumers standing to sue under the antitrust laws, Chief Justice Burger recites the amgibuous legislative history of the Sherman Act. It is interesting to speculate whether the 1966 Rule 23(b)(3) opt-out class remedy could be similarly viewed as being substantively excluded from the original Sherman Act of 1890. But too much legislative and judicial water has gone over the dam since 1966 to sustain an argument that Rule 23(b)(3) would otherwise work an impermissible change in the substance of the original anti-trust statute. *See supra* note 95.

283. *See* Pan Am. World Airways, Inc. v. United States Dist. Court, 523 F.2d 1073 (9th Cir. 1975) (discussed *supra* notes 125-32 and accompanying text).

284. *See* Peritz v. Liberty Loan Corp., 523 F.2d 349 (7th Cir. 1975).

285. The possibility always exists that the court may simply remove the suit from the governing standards of Rule 23 by statutory interpretation. *See supra* note 282.

286. The language is almost identical.

287. The Eighth Circuit did not rule on the merits of Judge Wright's class certification under Rule 23, but invalidated his order under the anti-injunction statute. *Kansas City Skywalk II*, 680 F.2d at 1184. Dissenting Judge Heaney did not agree with Judge Wright's certification under Rule 23 (b)(1)(A) as to compensatory damages. *Id.* at 1187 n.8.

288. *Id.* Multiple tort claimants basing claims on the same accident are not considered even necessary parties. *See* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968); McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707, 724 (1976). Nor are victims of defectively designed products. L. FRUMER & M. FRIEDMAN, *supra* note 37.

289. 61 F.R.D. 558 (S.D. Fla. 1973), *aff'd*, 507 F.2d 1278 (5th Cir. 1975). Judge Wright, however, acknowledged that *Hernandez* was based on a limited fund, and therefore his order allowed individual settlements to continue. *Kansas City Skywalk I*, 93 F.R.D. at 424-25.

290. Thus, admiralty will allow on defendant's motion in a wrongful death action the joinder of another victim of the same accident. *See* Davila Mendez v. Vatican Shrimp Co., 43 F.R.D. 294, 296 (S.D. Tex. 1966); *see also* M/S Bremen und Unterweser Reederci v. Zapata Off-Shore Co., 407 U.S. 1 (1972) (procedure in limitation of liability proceedings); G. GILMORE & C. BLACK, ADMIRALTY ch. X (2d ed. 1974).

treat multiple tort claimants to the same accident as necessary parties.[291] Judge Wright implicitly forecast this future development by stretching the language of Rule 23(b)(1)(A), at least in class situations, to meet the judicial need for unitary adjudication of claims from a mass disaster.[292] In other words, normally nonnecessary parties under Rule 19, are converted by sheer numbers and the excepting graces of Rule 23, into class members in the nature of necessary parties under Rule 23(b)(1)(A), even without the hypothecation of a limited common fund under Rule 23(b)(1)(B).

Judge Wright, in *Kansas City Skywalk I*, was on safer theoretical ground in certifying the punitive damage claims as a (b)(1)(B) class on the dual rationale that there should be only one unitary adjudication of the punitive claim and that it was in fact to a limited fund—the same bases used by the California federal trial court in certifying a nationwide class in *Dalkon Shield I*.[293] However, apart from substantively bootstrapping the one-punitive-claim theory, limitation of the trial issues only to punitive damages liability and amount is partly an illusion in relation to the compensatory claims. If no punitive liability is found, the members will supposedly still retain their various individual compensatory claims to pursue. If punitive damage liability is found, however, such a finding presumably must rest on a finding of ordinary liability on one of the compensatory claims.[294] Will the class members be able to take advantage of such a finding to use offensive collateral estoppel for their compensatory claims? Or, in effect by not opting in fully to try their compensatory claims as well, will the members forfeit any right to offensive collateral estoppel?[295] While such a solution makes a seductive partial attempt at unitary adjudication, limiting the class trial to the punitive claim may reraise some of the problems of one-way intervention in relation to the compensatory claims.

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291. *See* McCoid, *supra* note 288. *But see* George & Walkowiak, *Blame and Reparation in Pure Comparative Negligence: The Multi-Party Action*, 8 SW. U.L. REV. 1 (1976) (arguing that comparative negligence is manageable without resorting to compulsory joinder of all parties).

292. *See* Comment, *The Use of Class Actions for Mass Accident Litigation*, 23 LOY. L. REV. 383 (1977); Note, *Class Actions in New York: Recovery for Personal Injury in Mass Tort Cases*, 30 SYRACUSE L. REV. 1187 (1979).

293. *See supra* note 17 and accompanying text; *see also* Note, *Mass Liability and Punitive Damages Overkill*, 30 HASTINGS L.J. 1797, 1800-12 (1979).

294. *Kansas City Skywalk II*, 680 F.2d at 1187 n.8.

295. The answer should be that the members do not forfeit any offensive collateral estoppel that might be available under state law because the court's mandatory class certification order would limit the trial of issues to punitive liability and damages; therefore, the class members, like the shareholders in *Parklane Hosiery* would not forfeit offensive collateral estopel as to compensatory damages because they had no further opportunity to "intervene" in the first trial.

In Lemer v. Boise Cascade, Inc., 107 Cal. App. 3d 1, 4, 165 Cal. Rptr. 555, 558 (1980), the plaintiff had previously opted out of a federal (b)(3) class settlement of compensatory and punitive damages. The California Court of Appeals found the plaintiff could then recover in state court on a substantial punitive claim. *Id.* at 5, 165 Cal. Rptr. at 558-59. The argument is made that because there should be only one unitary claim to punitive damages against the defendant, the plaintiff who opted out should be barred from pursuing a subsequent punitive damages claim. Putz & Astiz, *Punitive Damage Claims of Class Members Who Opt-Out: Should They Survive?*, 16 U. SAN. FRAN. L. REV. 1, 18-40 (1981). In effect, the authors argue that in the prior federal settlement, the court should have certified the punitive claims under Rule 23(b)(1) or (b)(2) and the compensatory claims under Rule 23 (b)(3).

D. *Model (b)(2): Injunctive-Declaratory Relief Only; or Plus Monetary Restitution or Ancillary Legal Damages*

Concepts of joinder and res judicata primarily underlay the 1938 class action rules.[296] But the 1966 revision formally restated a new category, Rule 23(b)(2), based upon the nature of the remedy.[297] The prerequisites of Rule 23(a) and the (b)(1) and (b)(3) categories, still contain primarily procedural joinder standards. The (b)(2) category, however, does not follow the same parallelism, but shifts conceptually to the nature of the remedy sought. The result is that Rule 23(b)(2) places a substantive orange in the middle of a barrel of procedural applies.[298] To illustrate, prior to 1966, injunction suits against state agencies to end racial discrimination were categorized by some as spurious opt-in class actions.[299] The new Rule abstracted and restated these suits under the (b)(2) category, thereby potentially validating, as a matter of procedure, almost any injunction suit affecting a large group of people as a class suit.[300] More importantly, however, Rule 23(b)(2) did not grant the right to opt out, which otherwise might have followed if the (b)(2) category had remained faithful to its partial origin as a 1938 spurious opt-in class suit.[301]

The 1966 declaration of the (b)(2) suit also creates significant vector forces at work in the other parts of Rule 23. For example, the Rule 23(a) prerequisites supposedly contain neutral preconditions to any and all class actions, irrespective of the certification category under Rule 23(b). These Rule 23(a) standards, however, sometimes receive a liberal reading when the (b)(2) category is sought, but a strict reading when the (b)(3) category is invoked,[302] apparently, among other reasons[303] because a future injunc-

296. However, original Rule 23(a)(3) contained the requirement that "a common relief is sought."

297. The "common relief" requirement of the original Rule 23(a)(3) was dropped from the 1966 Rule 23(b)(3).

298. However, it should be noted that Rule 23(b)(2) also describes the substance of the original equity bills of peace in so far as they were prospective injunction decrees by or against groups where there was de facto consent of the members to representation by their leaders. *See* Yeazell, *supra* note 191.

299. *See supra* notes 238-39 and accompanying notes.

300. The 1966 Committee Note makes clear that Rule 23(b)(2) is not limited to civil rights cases.

301. The opinion of Judge Gray in Hall v. Werthan Bag Co., 251 F. Supp. 184, 186 (M.D. Tenn. 1966) is commonly said to have originated the doctrine that racial discrimination in employment is by definition class discrimination. In that case, he certified the class under former Rule 23(a)(3) as a spurious class suit for injunctive relief and noted that as to ancillary remedies for back pay and reinstatement, "intervention should be liberally allowed upon proper serving of notices and filing of pleadings." Subsequent treatment under the new 1966 Rule, if consistent, might have treated back pay remedies under Rule 23 (b)(3), thus granting members the pre-trial right to opt out, but instead Judge Gray's *per se* principle became the justification for the (b)(2) suit for monetary relief without pre-trial notice. *See infra* note 306. On the other hand, perhaps the modern (b)(2) class suit for monetary relief is more closely analogous to providing a procedural treatment similar to the minority pre-1966 spurious one-way intervention model, except perhaps where the plaintiff loses. *Id.*

302. *See* Rice v. Philadelphia, 66 F.R.D. 17 (E.D. Pa. 1974) (description of class was sufficient for injunction against alleged illegal pattern of police detention, but not for class action for damages).

303. The origins of the (b)(2) suit have lead some courts to think that the class aspect is substantially irrelevant when the grant of a purely prospective injunction against a governmental defendant automatically, through the obligation of equal protection, adheres to the benefit of the

tion is thought to be inherently class relief, whereas past damages are thought of as an essentially individual remedy.[304] On the other hand, when the defendant attacks the plaintiff's adequacy of representation because of conflicts of interest with the class under Rule 23(a)(4), the courts sometimes turn to Rule 23(b)(3) to justify certification, because the conflict can be cured by the members' right to opt out.[305]

The formal distinction between Rule 23(b)(2) and (b)(3) is contained in the Rule language itself, accompanied by the 1966 Rules Advisory Committee's Notes. That language and the Note suggest a rule of thumb distinction, using the line between nonmonetary and monetary relief to distinguish (b)(2) from (b)(3) classes. However, this rule of thumb was short-lived because pure injunctive relief was soon accompanied by ancillary monetary relief in the form of equitable restitution. The leading case of *Wetzel v. Liberty Mutual Life Insurance Co.*[306] illustrates this theory validating Title VII class suits for back pay, under Rule 23(b)(2) without pretrial notice and right to opt out under Rule 23(b)(3). It was only a short step further to allow this form of monetary relief in the (b)(2) suit even where the injunctive aspect had been mooted out.[307] It is also said that Rule 23(b)(2) may be used where damages can be said to be ancillary to the equitable relief.[308] It is important to note that to the extent that the

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class members. Bailey v. Patterson, 323 F.2d 201, 206 (5th Cir. 1963), *cert. denied*, 376 U.S. 910 (1964); *see* Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976); Davy v. Sullivan, 354 F. Supp. 1320 (M.D. Ala. 1973) (liberal construction of numerosity in (b)(2) suit). For criticism of the view that a special need is required to add the class aspect to a suit seeking an injunction, see Note, *The "Need Requirement": A Barrier to Class Actions Under Rule 23(b)(2)*, 67 GEO. L.J. 1211 (1979). A more practical policy difference is that the courts were willing to end segregation of the schools in the future but not to grant damages for past wrongs. O. FISS, *supra* note 249, at 86-93. The same pragmatic preference for future relief could be true as to many practices newly declared to be illegal. See views of Judge Friendly, cited in Eisen v. Carlisle & Jacqueline, 479 F.2d 1005, 1020 n.28 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974), opining that "[s]omething seems to have gone radically wrong with a well-intentioned effort" and therefore favoring prospective injunctive class actions and alternative remedies as opposed to federal court small claims monetary remedies generating ruinous awards and attorney's fees.

304. There is a paradox here in that the (b)(2) standards are considered "less severe" than the (b)(3) standards, and an action should be certified under Rule 23 (b)(2) if possible. Van Gemert v. Boeing Co., 259 F. Supp. 125, 130 (S.D.N.Y. 1966) (subsequent litigation discussed *supra* notes 428-38 and accompanying text). Yet (b)(2) certification decreases the procedural rights of the members. The substantive equitable ends appear to justify the procedural means.

305. For example, see antitrust class suits, Brown v. Cameron-Brown Co., 50 U.S.L.W. 2265 (E.D. Va. Oct. 16, 1981); Rental Car of N.H. Inc. v. Westinghouse, 496 F. Supp. 373 (Mass. 1980); and a securities case, Blackie v. Barrack, 524 F.2d 891, 911 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976).

306. 508 F.2d 239 (3d Cir.), *cert. denied*, 431 U.S. 1011 (1975). The case origins before 1966 would require intervention, either pre or post-trial. *See supra* note 301. But in race discrimination cases the (b)(2) precedent has become dominant, producing the equivalent of a one-way intervention model when the plaintiff wins. For example, the trial court in Gay v. Waiters' & Dairy Lunchmen's Union, 549 F.2d 1330, 1334 (9th Cir. 1977) was reversed for denying a class certification on the grounds of lack of numerosity. The trial court had suggested as an alternative, that a notice be sent to class members inviting them to intervene. *Id.* at 1332. This in effect would have been something like a pre-1966, Rule 23(a)(3) spurious class pre-trial opt-in procedure, but not the post-trial one-way intervention authorized by a minority of courts.

307. Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975), *noted in* 37 OHIO ST. L.J. 386 (1976); Washington v. Walker, 75 F.R.D. 650, 653-54 (S.D. Ill. 1977); Harriss v. Pan Am. World Airways, 74 F.R.D. 24, 46-47 n.23 (N.D. Cal. 1977); *see* Arkansas Educ. Ass'n v. Board of Educ., 446 F.2d 763, 768 (8th Cir. 1971).

308. *See* Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556

plaintiff is victorious and monetary relief is granted in a (b)(2) suit, the result is often substantially similar to one-way intervention under the old spurious class suit.[309]

Although Rule 23(b)(3) on its face is silent as to relief,[310] the Rule 23(b)(2) express criterion of injunctive relief impliedly assigns damage claims to Rule 23(b)(3).[311] For various reasons,[312] and perhaps in part because the courts think class damage claims may present difficult management problems in according the right to jury trial,[313] the courts are generally more hostile to certifications under Rule 23(b)(3).[314] The new (b)(2) category, by stressing the nature of the relief, has generated a law-equity test,[315] whose application is always elusive, and at best, difficult to divine. Needless to say, such a test may have little to do with whether members should have the right to notice and the total or partial right to opt out when important individual remedial rights, whether monetary or not, are at stake.[316]

F.2d 682 (2d Cir. 1977) (rejecting (b)(2) certification because it could not realistically be contended that damages were ancillary or appurtenant injunctive relief, but granting (b)(1) certification).

309. *See supra* note 306. If the plaintiff is not victorious, it may still be somewhat speculative how binding the result is in absence of notice.

310. The prior spurious class action Rule 23(a)(3) required that "a common relief" be sought.

311. "The subdivision does not extend to cases in which the approximate final relief relates exclusively or predominantly to money damages." 1966 Advisory Committee Note, FED. R. CIV. P. 23(b)(2).

312. Two speculative reasons are that some courts think the class aspect is irrelevant to the grant of an injunction which will automatically inure to the benefit of a class, *see supra* note 303, and that prospective declaration of rights in many substantive areas requires satisfaction of lesser standards than an award of past damages. Wood v. Strickland, 420 U.S. 308, 321-22 (1975) (to support damage claim there must be a violation of a known and declared constitutional right).

313. The United States Supreme Court opinion in Ross v. Bernhard, 396 U.S. 531, 541 (1970), declaring right to jury trial on legal issues in a stockholder derivative suit, states "it now seems settled in the lower federal courts that class action plaintiffs may obtain a jury trial on any legal issues they present."

314. See discussion of management problem, *infra* text accompanying notes 386-416. Certification under Rule 23(b)(2) may also eliminate management of notices and responses.

The hostility reflects itself either in certifying under Rule 23(b)(2), *see supra* note 304, or in not certifying as a class at all. *See supra* note 99. *But see supra* note 306.

315. *See, e.g.*, Fertig v. Blue Cross, 68 F.R.D. 53 (1974) (denying certification in antitrust suit asking both injunctive and damage relief); Albertson, Inc. v. Amalgamated Sugar Co., 62 F.R.D. 43 (1973) (antitrust). *But see* Brandt v. Owens-Illinois, Inc., 62 F.R.D. 160 (1973) (securities § 10(b)(5) claim is predominantly for damages not certifiable under Rule 23(b)(2), but contract claim could be certified under Rule 23(b)(2)).

The difficulty in categorizing forms of monetary relief as legal or equitable is demonstrated by comparing Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) (plaintiff could not avoid jury by casting claim as an equitable accounting), Curtis v. Loether, 415 U.S. 189 (1974) (defendant had jury trial right on civil rights housing discrimination claim), and Lukemas v. Bryce's Mountain Resort, Inc., 538 F.2d 594 (4th Cir. 1976) (no (b)(2) class certification of claims for rescission of real estate lot purchases), with Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) (defendant has no jury trail right on Title VII back pay claim) and SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90 (2d Cir. 1978) (no jury trial in SEC suit for rescission of stock sale and return of proceeds to purchasers).

See also the analogous legal-equitable dividing line under the eleventh amendment state immunity between nonallowable, direct past monetary relief in the nature of damages in Edelman v. Jordan, 415 U.S. 651 (1974), and the allowable, prospective, indirect, monetary relief in the form of judicially ordered notice to welfare recipients to file claims. Quern v. Jordan, 440 U.S. 332 (1979).

316. *See* Rosen, *supra* note 35. *But see* Denbeaux, *supra* note 39, at 302-03: "If notice for binding litigation is not required by constitutional due process but only by the federal rules, then changing the theory of the pleading may preclude the need for notice."

E. *Model (b)(3): The Permissive, Absolute Opt-Out Class Action*

The (b)(3) class standards and procedure tend to present a "Catch 22" situation. There are two polar extreme models in which Rule 23(b)(3) tends to operate quite differently as a practical matter, depending on the size of the claims. Both of these models, however, tend to trigger self-destruction of the class. In the case of very small claims, it is probable that few members will opt out or even respond. Nevertheless, as *Eisen v. Carlisle & Jacquelin*[317] perversely mandates, Rule 23(c)(2) requires expenditure of a cost for protection of procedural rights which will not be exercised. In the absence of such financing, the class action and the protection of the members' substantive rights are defeated.[318] In the case of the other polar extreme, air crash wrongful death claimants for example, the odds are that the individual lawyers may opt their client members out to retain control,[319] so that the class composition under Rule 23(b)(3) will be substantially defeated. That leaves the effective operation of Rule 23(b)(3) to the middle ground, where the size of the damage claims is somewhere between small (but not too small) and large (but not too large). In such middle ground, the cost of notice to inform members of their right to opt out can be financed or finessed—but the hope is that the members will not exercise the right in substantial numbers.[320]

F. *Hybrids: Models (b)(1)-(2) and (b)(3); Partial Class Actions*

Class actions law would be difficult enough if the Rule 23(b) categories and the implicit procedural models which they mandate were mutually exclusive as to the whole action. However, since Rule 23(c)(4)(A) allows certification of partial class actions as to particular issues,[321] the courts are invited to experiment in the hope of creating new resilient hybrids, by certifying some issues under one category, other issues under another category, and yet other issues not at all. Given the disposition of plaintiffs and defendants to proliferate issues, courts are daily presented with an infinite variety of separable issues with which to conduct the experiments in different procedural models. In certifying varying class treatment as to separable issues, the courts are thereby creating new forms of collateral estoppel law. The policy of this new trend runs contrary to the traditional res judicata goal compelling resolution of all issues between parties in one action. Rather, more like stare decisis, the modern class certification is aimed at making separable issue resolution mandatorily

317. 417 U.S. 156 (1974).

318. *See supra* text accompanying notes 102-07.

319. This was one reason the Ninth Circuit gave for decertifying the (b)(3) *Dalkon Shield* class. 34 FED. R. SERV. 2d 646, 655, — F.2d —, — (9th Cir. 1982). *But see In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 790-92 (E.D.N.Y. 1980) (plaintiffs' lawyers implicitly favored the class certification because the case was too big for any one claimant and lawyer). Opt-out may have the effect of foreclosing any offensive collateral estoppel, however.

320. *See supra* note 319.

321. Judges are allowed further flexibility in the form of delay of the determination, tentative certifications and retroactive modification of certification or noncertification. Rule 23(c)(4)(A) allows the court to maintain the class action only as to particular issues, and Rule 23(c)(1) allows orders to be conditional and to be altered or amended before decision on the merits.

binding on everyone, while leaving open other issues, such as individual members' monetary claims, to be disposed of by other procedural models.

Attempts to use the (b)(1) or (b)(2) categories and the (b)(3) as to different issues and claims within the same action are usually premised on a desire to avoid the mandatory pre-trial notice and opt-out rights of Rule 23(c)(2), or other barriers of the (b)(3) category.[322] Strategically, sometimes the avoidance motivation may come from plaintiffs; sometimes from the defendants, sometimes from the courts. It is tempting for a trial court to propose to bifurcate a prior liability determination under Rule 23(b)(2), and to follow it with a later (b)(3) suit as to damage issues.[323] However, such a bifurcation may really be an illusory (b)(3),[324] because, with no pre-trial notice or opt-out, if no liability is found, a subsequent notice is mooted. Whereas if upon trial, liability is found, presumably no class member will want retroactively to opt out of that determination and the procedure will become a post liability opt-in proceeding in order to prove up monetary relief or damages.[325] If, however, the (b)(2) liability finding results in only a partial victory, or is otherwise limiting as to the total amount of monetary relief, the right to opt out in the second stage may become significant.[326] Because even a victory for a plaintiff also carries preclusion of any additional remedy, and there are some in every crowd

322. In addition to the *Dalkon Shield I* and *Kansas City Skywalk I* opinions, see Brandt v. Owens-Illinois, Inc., 62 F.R.D. 160 (1973) (contract claim certified as (b)(2) suit; § 10(b)(5) claim certified as (b)(3) suit).

323. Harriss v. Pan Am. World Airways, Inc., 74 F.R.D. 24, 37-38 (N.D. Cal. 1977) (bifurcation of liability and relief phase in (b)(2) suit).

Bifurcation of the (b)(2) suit into a liability and relief stage, or a (b)(2) (no notice and no opt-out) and (b)(3) phase (notice and opt-out) should be distinguished from bifurcation of liability and damage phases in a straight (b)(3) suit. For example, Alabama v. Blue Ridge Body Co., 573 F.2d 309 (5th Cir. 1978) demonstrates proposed bifurcation of liability from damages in a straight (b)(3) action. However, in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), while the first injunction suit by the SEC was not a class action, it was the equivalent of a (b)(2) suit, and was allowed preclusive effect in a pending stockholder's class action for damages to which right of jury trial attached.

324. In Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977), the Third Circuit reversed the trial court's refusal to certify a (b)(3) anti-trust class action, but left undisturbed the trial court's holding that a § 16 injunction class suit under Rule 23(b)(2) could not be used to defeat the jury trial right of § 4 damage claimants to opt out under rule 23(b)(3). 62 F.R.D. 124, 134 n.13 (E.D. Pa. 1973).

325. The analogy here is to (b)(2) suits which after a determination of liability provide opt-in to prove up back pay claims. *See* Robinson v. Union Carbide Corp., 538 F.2d 652 (5th Cir. 1976), *modified*, 544 F.2d 1258 (5th Cir.), *cert. denied*, 434 U.S. 822 (1977).

In Samuel v. University of Pittsburgh, 538 F.2d 991, 996-97 (3d Cir. 1976), the Third Circuit reversed as an abuse of discretion the failure of the trial judge, after certifying a (b)(2) class suit and finding a nonresident tuition differential unconstitutionally based, to order the restitution of tuition to class members, and was not concerned with the eleventh amendment problem. *See* Hillis v. Stephen F. Austin State Univ., 486 F. Supp. 663 (E.D. Tex. 1980).

In contrast, ordinarily the court cannot achieve a return to post-trial one-way intervention for the plaintiff in a (b)(3) action by delaying the class certification until after the plaintiff's trial victory and then ordering an opt-in, because *Eisen* and the language of Rule 23(c)(2) generally mandate that the class certification decision be made prior to trial. Peritz v. Liberty Loan Corp., 523 F.2d 349, 351 (7th Cir. 1975).

326. In Airline Stewards and Stewardesses Ass'n v. American Airlines, Inc., 490 F.2d 636, 642-43 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974), the Seventh Circuit reversed the (b)(2) certification with no right to opt out of a class settlement negotiated by a union for both present flight attendants and those already discharged for pregnancy. The court held that the claims of the discharged flight attendants (including back pay) should have been certified from the beginning as a (b)(3) class, thereby giving them the right to opt out. *Id.* at 643.

who will not be satisfied, the later opportunity to opt out may undercut the court's power to impose a unitary final solution.

A different variation involved the attempt by some courts to delay the class certification and therefore to delay the (b)(3)/(c)(2) notice until after trial. In *Katz v. Carte Blanche*,[327] the Third Circuit thought that the Truth-In-Lending Act action, if a class action at all, was a class action under Rule 23(b)(3). Rather than certifying under Rule 23(b)(2), the court instead proposed to allow the (c)(2) notice to be delayed until after a liability determination on an individual claim upon the defendant's stipulation that if liability were found, the defendant would be bound, but if no liability were found, the class would not be bound. This and other delay devices attempting to recreate a return to the one-way intervention model, in the absence of satisfying (b)(1) or (b)(2) standards, are probably suspect in light of *Eisen v. Carlisle & Jacquelin*.[328]

G. *A Regression: Model (b)(2) with Permissive or Mandatory Pre-trial Opt-In*

Certification under Rule 23(b)(2) gives the court maximum discretion under Rule 23(d) not to send notice, or to send less than individual notice, and to shape the procedural rights of the members, including the total elimination, qualification, or grant,[329] of the right to opt out. The question is, does the (b)(2) certification also allow the judge to impose a permissive or even a mandatory opt-in requirement on the members prior to trial?[330] That is, the member, after notice, must opt in prior to trial to take advantage of a victory.[331] A pre-trial opt-in requirement, if mandatory to the fullest extent, puts the member in an even worse position than he was in as a spurious class member under the majority view of the 1938 rule prior to 1966.[332] Even if the opt-in is merely permissive, then the intervenor is still in a substantially poorer position than the pre-1966 one-way post judgment intervenor under the minority view, and in a worse position than the present (b)(3) member who can take advantage of victory by remaining silent.[333] It would seem extraordinary to put such a construction on the

327. 496 F.2d 747, 756-57 (3d Cir. 1974) (en banc), *cert. denied*, 419 U.S. 885 (1974).

328. *See* Peritz v. Liberty Loan Corp., 523 F.2d 349 (7th Cir. 1975); Note, *Question of Class Status Should Be Postponed When Test-Case Alternative is Superior to Immediate Class Certification*, 88 HARV. L. REV. 825, 832-34 (1975).

329. Bauman v. United States Dist. Court, 557 F.2d 650, 659-60 (9th Cir. 1977). There is a division in authority whether the court has authority to grant the absolute right to opt out of a (b)(2) class. *See* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 249, 252-53 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975) (advocating no right to opt out); Walker v. Styrex Indus., 21 FED. R. SERV. 2d 355, 358 (M.D.N.C. 1976) (allowing opt-out); *see also supra* note 231.

330. In Bauman v. United States Dist. Court, 557 F.2d 650, 658 (9th Cir. 1977), the Ninth Circuit refused to issue a mandamus against a trial judge's order of pre-trial notice in a (b)(2) class acton allowing a right to opt out and requesting a short statement of discrimination or non discrimination. *See also* Harriss v. Pan Am. World Airways, Inc., 74 F.R.D. 24, 52 (N.D. Cal. 1977).

There is no disagreement that after a determination of liability, the court may require an opt-in as part of distributing the relief. Robinson v. Union Carbide Corp., 538 F.2d 652, 663 (5th Cir. 1976).

331. This feature would be common to both a permissive and a mandatory opt-in.

332. That is, if a loss were to bind the nonintervening member as well, the unfairness might raise a due process problem. *Cf.* Shaffer v. Heitner, 433 U.S. 186 (1977).

333. *But see* Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), *cert.*

1966 revision.[334] Nevertheless, because mandatory pre-trial opt-in is what in effect has always been required of claimants to property in some in-rem proceedings, because there is substantial lobbying in favor of the permissive pre-trial opt-in class action,[335] and because the discovery rules may provide residual authority,[336] Rule 23(b)(2) may be the vehicle for accommodating permissive or mandatory pre-trial opt-ins without an amendment of the Rule or without finding Rule 23 inapplicable.[337]

V. MEMBER'S RIGHT TO OPT OUT OF SETTLEMENTS

Rule 23(e), governing settlements of class actions, places discretion in the court by requiring that "notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." In the case of settlement of an action which would be certified as a (b)(1) or (b)(2) class action, no direct conflict arises with Rule 23(e) for basically, as in a (b)(1) or (b)(2) suit, the court is granted discretion to resolve the type of notice and the content of procedural rights. However, if the action would only be certified as a (b)(3) class action, the implication is that (c)(2) notice and right to opt out are mandatory, and just because a settlement is posed, the court may not use its discretionary power in Rule 23(e) to override the potential application of Rule 23(c)(2), and the right to opt out.

A proposed settlement of the representative's individual claim before class certification presents the issue whether any notice is required to the class. While there is debate concerning the circumstances which will excuse notice to the class,[338] nevertheless, it is agreed that any attempt at settlement of the class claim requires some form of notice under Rule 23(e).[339]

A proposed class settlement theoretically occurs at two significantly different times: before or after a class certification. If no class certification has been made, but the court is of the view that the class would be certified as a (b)(3) action, then it may create a temporary settlement class and in sending the first notice should grant the right to opt out of the proposed

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denied sub nom. Herriman v. Midwestern United Life Ins. Co., 405 U.S. 921 (1972) (construing the discovery rules to allow a dismissal of members' claims for failure to file a pre-trial proof of claim form).

334. *See* Robinson v. Union Carbide Corp., 538 F.2d 652 (5th Cir. 1976), *modified*, 544 F.2d 1258 (5th Cir. 1977). The majority construed a notice as an impermissible opt-in prior to trial, whereas Judge Wisdom, concurring, construed the notice as possibly creating a permissible two-step procedure: (1) the member is given the opportunity to opt out under Rule 23(c)(2); if he does not, then (2) he is required to present factual information to the court under Rule 23 (d). *Id.* at 1261 (Wisdom, J., concurring).

335. *See infra* note 445.

336. *See* cases cited *supra* note 333; *supra* note 334.

337. The same result can be reached by legislative interpretation. *Cf.* La Chappelle v. Owens, 513 F.2d 286 (5th Cir. 1975).

338. McArthur v. Southern Airways, Inc., 556 F.2d 298 (5th Cir. 1977) (action filed as class suit could not be amended to drop class claim, in order to settle individual claims without notice to class), *vacated on other grounds*, 569 F.2d 276 (5th Cir. 1978).

339. Almond, *Settling Rule 23 Class Actions at the Precertification Stage: Is Notice Required?*, 56 N.C.L. REV. 303 (1978).

settlement.[340]

At the opposite extreme, if the court has already certified the class action as a (b)(3) action, and notice has been sent, but the member has not exercised his option to opt out within the time period, and a settlement is then proposed, then it would appear the member is now in the same position as the member of a class, certified or uncertified as a mandatory (b)(1) or (b)(2) class.[341] Unless the court reopens the right to exclusions from the class settlement, such a person will be bound, but has not waived his right to adequate representation and may therefore raise objections to the court's approval of a settlement, and may appeal the overruling of those objections.[342] However, the objector will not often prevail in the appellate court because of the wide discretion given the trial court to approve settlements.[343]

Therefore, the appropriate category, or the projected status, of the action or issue as a (b)(1)-(2) or (b)(3) class question is a significant factor in deciding whether the member will have merely the status of an objector, or will have the power to exclude himself from the settlement. Two cases illustrate this point.

In *Airline Stewards & Stewardesses Ass'n Local 550 v. American Airlines*,[344] because the retired flight attendants had interests different from those of currently employed flight attendants, the appellate court reasoned backwards to conclude that the suit had been improperly certified under Rule 23(b)(2). The court noted that the retired flight attendants should have been granted the right at the outset under Rule 23(b)(3) to opt out, and a subsequent settlement purporting to bind them could be upset on appeal. In contrast, in *Reynolds v. National Football League*,[345] the appellate court rationalized that the antitrust suit seeking injunctive and mone-

340. Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp., 323 F. Supp. 364 (E.D. Pa. 1970), *discussed in* Dole, *The Settlement of Class Actions for Damages*, 71 COLUM. L. REV. 971, 996 (1971); McGough & Lerach, *Termination of Class Actions: The Judicial Role*, 33 U. PITT. L. REV. 455, 456-58 (1972); *see* West Virginia v. Charles Pfizer & Co., 314 F. Supp. 710, 722-24 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971), *discussed in* Wolfram, *The Antibiotics Class Actions*, 1976 AM. B. FOUND. RESEARCH J. 253 (1976); *see also* H. NEWBERG, *supra* note 88, at § 2620C (section entitled "Combination Notice of Class Maintenance and Settlement").

341. The class member in this position is like a shareholder in the settlement of a shareholder derivative suit. See the classic treatment in Houdek, *The Settlement and Dismissal of Stockholders' Actions—Part I*, 22 SW. L.J. 767 (1968), and Houdek, *Part II: The Settlement*, 23 SW. L.J. 765 (1969).

342. *In re* General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1121, 1134 n.50 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979); Saunders v. Naval Air Rework Facility, 608 F.2d 1308, 1312 (9th Cir. 1979) (granting the right to opt out of a (b)(2) class settlement cannot foreclose the standing of the member to object to the settlement); Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 32-33 (3d Cir. 1971) (failure to opt out does not preclude objector's appeal to review settlement).

343. *E.g.*, Marshall v. Holiday Magic Inc., 550 F.2d 1173, 1178-79 (9th Cir. 1977) (failure to exercise opt-out in (b)(3) action imposes fair class settlement on member). *See* McGough & Lerach, *supra* note 340, at 458-65; Note, *Factors Considered in Determining the Fairness of a Settlement*, 68 NW. U.L. REV. 1146 (1974).

344. 490 F.2d 636, 642-43 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974). *Cf. In re* General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1121, 1137 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979) (members of a subclass who had not opted out had standing to appeal and overturn a settlement imposing an improper condition that members release their state claims, even though 99.97% of the class supported the settlement).

345. 584 F.2d 280, 284-85 (8th Cir. 1978).

tary relief had properly been certified as a (b)(1) or (b)(2) class suit. Therefore, the retired football players had no absolute power to opt out and were bound by a monetary settlement of their antitrust claims, when their appellate attack on the adequacy of representation and fairness of the settlement failed. There is good reason to question the *National Football League* result. Granting that the restructuring of the league required a mandatory settlement as to the future, thus overriding the absolute right of any individual player or player group not to be bound, nevertheless, the settlement of individual past damages claims should have been subject to Rule 23(b)(3), allowing individuals, particularly retired players, to opt out. This was a proper case for bifurcating the issues between Rule 23(b)(1)-(2) and (b)(3), even though those issues appeared in a settlement, rather than in the trial of the case.[346]

VI. MEMBER'S RIGHT TO APPEAL ORDERS DENYING THE RIGHT TO OPT OUT

The *Dalkon Shield II* jurisdiction rested upon the trial court's certification order under 28 U.S.C. section 1292(b),[347] and the *Kansas City Skywalk II* jurisdiction was based upon the trial court's grant of an injunction under 28 U.S.C. section 1292(a).[348] Were these class certifications also appealable as final orders by the class members within 28 U.S.C. section 1291? The question is of great significance because a trial judge may choose to insulate his (b)(1) or (b)(2) class certification order by refusing to certify the question for appeal under section 1292(b),[349] and the class certification may not involve an injunction against pending state proceedings.[350]

In the continuing struggle over class actions, the appealability of orders granting or denying class certification has become of vital practical importance to the plaintiff, the defendant and the trial court. In 1978, the United States Supreme Court in *Coopers & Lybrand v. Livesay*,[351] held

346. *Cf.* United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975) (a government § 707 practice or pattern suit could not create through a consent decree a back pay fund binding on the employee except by the employee's acceptance and release); Johnson v. General Motors Corp., 598 F.2d 432 (5th Cir. 1979) (prior private injunction decree could not bind back pay claims without notice); Crowder v. Lash, 34 FED. R. SERV. 2d 1223, — F.2d — (7th Cir. 1982) (prior injunctive decree not binding on subsequent damages action without notice).

347. 34 FED. R. SERV. 2d 646, 647, — F.2d —, — (9th Cir. 1982).

348. 680 F.2d 1175, 1179 (8th Cir.), *cert. denied sub nom.* Stover v. Rau, 51 U.S.L.W. 3355 (U.S. Nov. 9, 1982).

349. Judge Wright in *Kansas City Skywalk I* refused to certify the appeal under 28 U.S.C. § 1292(b) (1976). 680 F.2d at 1179.

350. The *Kansas City Skywalk II* court rejected the plaintiff's argument that the particular certification order did not constitute an injunction. *Id.* at 1180.

The author of this Article was counsel for appellant in Woolen v. Surtran Taxicabs, Inc., 684 F.2d 324 (5th Cir. 1982). There, the trial court certified a (b)(2) federal antitrust class action, and simultaneously denied the appellant's alternative request for exclusion or intervention. *Id.* at 333-34. The appellant sought appellate review of the order on the basis of 28 U.S.C. §§ 1291, 1292(a) & 1651 (1976). 684 F.2d at 329-30. The Fifth Circuit took jurisdiction under § 1291 on the grounds that the trial court had erroneously denied intervention of right into the class action. *Id.* at 331. The court did not reach the question whether there was appellate jurisdiction to review the denial of right to exclusion, but did find there was no trial court abuse of discretion sufficient to mandamus the trial judge under 28 U.S.C. § 1651.

351. 437 U.S. 463, 646-65 (1978).

that the denial of a motion for certification of a (b)(3) class action is not an appealable, final order by the plaintiff within the meaning of section 1291. Such an order leaves the individual claim alive, and even if as a practical matter the order sounds the "death knell" of the individual claim, this practical impact is nevertheless not enough to make the denial of class certification a collateral order within the limits of the tests set forth in *Cohen v. Beneficial Industrial Corp.*[352] Simultaneously, the Court in *Gardner v. Westinghouse Corp.*[353] held that an order denying class certification is not appealable under section 1292(a)(1) as the denial of an injunction to the class. The Court further indicated that orders granting class certifications are interlocutory and nonappealable as well.[354]

A number of general issues were generated by *Coopers* and *Westinghouse*. First, as a general matter, because *Coopers* and *Westinghouse* cut back on a liberal reading of *Cohen*, a number of orders which had developed to be collateral orders under the *Cohen* doctrine may now be suspect under the ruling in *Coopers* and *Westinghouse*. But aside from this general fallout, and more to the point, in class actions if an order would otherwise be a final, collateral order, but is based upon findings made in, and intertwined with, a class certification ruling, is the order still appealable in spite of *Coopers* and *Westinghouse*? Some orders, although made in and intertwined with a class certification proceeding, no doubt had to survive *Coopers* and *Westinghouse*. For example, *Cohen* itself was a shareholder derivative suit, a form of true class action. If the trial court in *Cohen* had made an affirmative shareholder derivative certification that Mr. Cohen was an adequate representative of the shareholders and could sue without filing a bond, the denial of a bond to the defendant under state law would still be an appealable order, even if the class certification were not. Thus, some types of orders intertwined in the class certification ruling would still be final appealable orders even after *Coopers* and *Westinghouse*.[355]

In *Firestone Tire & Rubber Co. v. Risjord*,[356] a consolidation of four products liability actions, the Court found that the denial of a motion by defendant to disqualify the lead plaintiff's counsel for conflict of interest was not an appealable order because the injury to the defendant was not irreparable and could be remedied by later appeal, after judgment. But *Risjord* involved denial of a motion to disqualify counsel. The grant of a motion to disqualify counsel, however, had previously been treated by the courts of appeals as a final collateral order because the practical impact on

352. 337 U.S. 541, 545-47 (1949).
353. 437 U.S. 478, 480-81 (1978).
354. *Id.*
355. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172 (1974), prior to *Coopers*, had allowed appeal of the trial court's order to the defendant to pay for 90% of the cost of the notice mandated by the trial court's class certification order. If an appealable order is entwined with a nonappealable class certification, it may raise the question of pendent appellate jurisdiction. *See infra* note 382.
356. 449 U.S. 368, 379 (1981). The decision in Zylstra v. Safeway Stores, Inc., 578 F.2d 102, 104 (5th Cir. 1978) properly anticipated the nonappealability of an order refusing to disqualify class counsel under 28 U.S.C. § 1291 (1976), but took jurisdiction under 28 U.S.C. § 1292 (1976) and ordered disqualification. *See also* North Am. Acceptance Corp. Sec. Cases v. Arnall Golden & Gregory, 593 F.2d 642 (5th Cir. 1979) (refusing appealability of order refusing to disqualify class counsel).

the party and counsel disqualified is more severe.[357] This has raised the issue, where a trial court, without reaching the class certification ruling, enters an order disqualifying class counsel for a conflict of interest. Is such an order appealable under *Cohen* or not appealable under *Coopers* and *Risjord*? The Fifth Circuit, in *Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[358] decided that such an order was appealable on the theory that, unlike a refusal to disqualify, the impact of a disqualification is immediately assessable by the appellate court. The *Duncan* court indicated that the loss to a party improperly forced to change to a second counsel would be virtually impossible to redress through the advocacy of a second losing counsel on a later appeal.[359]

In addition to treating the problems of qualification of class counsel, the Circuit courts after *Coopers* and *Westinghouse* are developing a split in authority as to the appealability of orders in nonclass actions denying the right to appointment of counsel.[360]

Orders granting disqualification of counsel and orders denying appointment of counsel bear a strong analogy to the denial of the right to opt out. The class member who is denied the right to opt out in effect has his chosen counsel disqualified, and has the class attorney imposed upon him. Such class member thus is in the same practical position as a person whose counsel has been disqualified or who has been refused the appointment of counsel. These types of cases should provide significant authoritative analogy for resolving the member's right to appeal a denial of the right to opt out. A stronger analogy, however, is intervention.

As previously noted, the right to intervention can be viewed functionally as the opposite of the right to opt out. Federal appellate courts in the past have had to choose whether section 1291 provides jurisdiction for denials of intervention, and have reached the conclusion that denials of the absolute right to intervention are appealable, whereas denials of permissive intervention are not.[361] Case law prior to *Coopers* and *Westinghouse* therefore allowed appealability of denials of intervention in class actions at

357. 9 J. MOORE, B. WARD & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 110.13[10] (2d ed. 1982) [hereinafter cited as 9 J. MOORE].

358. 646 F.2d 1020, 1027 (5th Cir. 1981), *cert. denied*, 454 U.S. 896 (1982), *followed in In re* Coordinated Pre-Trial Proceedings, 658 F.2d 1355 (9th Cir. 1981). *See* Armstrong v. McAlpin, 625 F.2d 433, 440, 441 (3d Cir. 1980) (en banc) (dictum), *vacated*, 449 U.S. 1106-07 (1981).

In re Fine Paper Antitrust Litig., 617 F.2d 22, 25-26 n.5 (3d Cir. 1980) does not address the right to appeal the denial of right to intervene or opt out because the trial court's refusal to disqualify for conflict of interest in class counsel was appealed by defendant after affirmative class certification and was therefore a "mere pretense for delay." *Id.* at 28.

359. 646 F.2d at 1027.

360. *See* Ray v. Robinson, 640 F.2d 474, 477 (2d Cir. 1981); Bradshaw v. Zoological Soc'y, 662 F.2d 1301, 1304-05 (9th Cir. 1981). *Contra* Cotner v. Mason, 657 F.2d 1390, 1391-92 (10th Cir. 1981); Randle v. Victor Welding Supply Co., 644 F.2d 1064 (7th Cir. 1981) (per curiam).

361. 9 J. MOORE, *supra* note 357. However, the right to intervention is in part the opposite of the right to opt out. Accordingly, this relationship implies that the appellate courts will now have to decide the analogous dilemma for the right to opt out, that is, conceivably the denial of the right to opt out, where the right is absolute will be an appealable order, but where the denial is one of a permissive right to opt out only, then the order will be nonappealable. As in the case of intervention, this illogically, but functionally, requires the appellate courts to examine the merits concerning the question of adequacy of representation of interests in order to decide the question of appealability. *See also* Cullen v. New York State Civil Serv. Comm., 566 F.2d 846 (2d Cir. 1977).

the pre-trial stage.[362] In opposition to this prior case law, it can now be argued that a denial of intervention into a class action is intertwined with the class certification finding that the plaintiff is an adequate representative of the class and that the denial is therefore a nonappealable order under *Coopers* and *Westinghouse*.[363] Nevertheless, the case law after *Coopers* and *Westinghouse* appears to reaffirm that the denial of the right to intervene in a (b)(2) class action is an appealable order at the time when the certified class action is pending, because the denial leaves the attempted intervenor no alternative remedy.[364] It may also be argued that the class member may intervene after judgment to appeal,[365] or that the trial judge might modify his order.[366] Although these alternatives had always been open to any intervenor of right, never before *Coopers* and *Westinghouse* had they precluded the appealability of the denial of intervention before trial.

Assuming that the pre-trial denial of the right to intervene in a class

362. United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 825, 841 (5th Cir. 1975); Calhoun v. Cook, 487 F.2d 680, 682-83 (5th Cir. 1973); 3B J. MOORE, *supra* note 63, at ¶¶ 23.90[1], 23.97; 7A C. WRIGHT *supra* note 188, at §§ 1799, 1802.

363. That is, the class representative "adequately" represents the class under Rule 23(a)(4) and the intervenor therefore is not "inadequately" represented under Rule 24(a). The Fifth Circuit rejected this argument in Woolen v. Surtran Taxicabs, Inc., 684 F.2d 324 (5th Cir. 1982). *See supra* note 350; *infra* note 367.

364. Adams v. Baldwin County Bd. of Educ., 628 F.2d 895 (5th Cir. 1980). There, the denial of right to intervention to parents attempting to create a subclass in an ongoing school desegregation suit was an appealable order and was reversed:

> When parents move to intervene in school desegregation cases, the important constitutional rights at stake demand a scrupulous regard for due process considerations. . . . This Court has determined that intervention, rather than a separate action, is the proper vehicle for parents claiming inadequate representation to assert their rights. Denial of a plea in intervention, therefore, often will deprive those parties of their only opportunity to be heard.

Id. at 897.

The court in Piambino v. Bailey, 610 F.2d 1306, 1320 (5th Cir. 1980), reaffirmed after *Coopers* the doctrine of Stallworth v. Monsanto Co., 558 F.2d 257, 263 (5th Cir. 1977) that denial of right of intervention is an appealable order. *See* Foster v. Gueory, 655 F.2d 1319 (D.C. Cir. 1981) (denial of right to intervention in pending action where class certification had been refused was appealable and reversed); Smith v. Pangilinan, 651 F.2d 1320 (9th Cir. 1981) (denial of defendant's right to intervene in pending class action was appealable order). *See also In re* General Motors Corp. Engine Interchange Litig., 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979) (objecting subclass member could appeal under 28 U.S.C. § 1291 order approving subclass settlement in pending class action); McKay v. Heyison, 614 F.2d 899 (3d Cir. 1980) (denial of intervention was appealable but it was accompanied by dismissal of the class action); Fresno v. Andrus, 622 F.2d 436 (9th Cir. 1980) (while not formally a class action, it was the functional equivalent, where denial of intervention of right prior to trial was an appealable order).

365. *See* Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); Note, *Post Judgment Motion to Intervene to Appeal Denial of Class Certification is Timely*, 1978 B.Y.U. L. REV. 189. The right to intervene, however, is subject to the duty of timeliness. Piambino v. Bailey, 610 F.2d 1306, 1320-21 (5th Cir. 1980). The United States Supreme Court in United Airlines, Inc. v. McDonald, 432 U.S. 385, 394 (1976), decided that the class member has a right to intervene after a final judgment but did not mandate that a putative class member must wait until after final judgment in the (b)(2) class suit to intervene, and that indeed, the member has a duty to intervene when it first becomes clear the representative will not protect his interests.

366. It may be argued under the rationale of *Coopers* that since the class certification is always subject to modification by the trial judge, and he must continuously monitor the adequacy of representation, he could later find the representation inadequate and grant the intervention. Therefore, the order is not final.

action is still an appealable order after *Coopers* and *Westinghouse*,[367] the more subtle question for our purposes is whether the certification of a class under Rule 23(b)(2), rather than under Rule 23(b)(3), resulting in a denial of the right to opt out, constitutes an appealable order.[368] It would seem apparent that as between the plaintiff and defendant, the decisions in *Coopers* and *Westinghouse* foreclose appealability at this stage, because both plaintiff[369] and defendant[370] have the right to a later appeal as a matter of automatic right.

However, as to a class member affected by the order,[371] the answer should be different. It is fundamental that orders are not appealable or unappealable as final decisions in the abstract, without consideration of the practical impact on the person affected by the order.[372] Where the practical position of the person denied opt-out is more analogous to that of a person denied right of intervention,[373] of a person whose counsel has been disqualified,[374] or of a person who has been denied appointment of counsel,[375] the denial of the right to opt out at the pre-trial stage should be considered an appealable order by the person denied the right to opt out.[376] This should be so even if the certification as a (b)(2) or (b)(3) class action is not appealable by the plaintiff or defendant.

On the other hand, one court decided in effect that if the trial court correctly denies the class member's right to opt out by certification of a mandatory class action, the order appointing another member's attorney as class counsel is not an appealable order, provided that the court allowed

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367. The Fifth Circuit in Woolen v. Surtran Taxicabs, Inc., 684 F.2d 324, 330 (5th Cir. 1982) (discussed *supra* note 350), held that denial of intervention of right into a class action is an appealable order because the class certification decision finding adequacy of representation under Rule 23(a)(4) is one matter tentative and modifiable before final judgment under Rule 23(c)(1). However, the decision finding adequacy of representation under Rule 24(a)(2), and therefore denying intervention is a different decision, not modifiable and therefore final under 28 U.S.C. § 1291 (1976 & Supp. V 1981).

368. The Fifth Circuit, in Woolen v. Surtran Taxicabs, Inc., 684 F.2d 324 (5th Cir. 1982), did not reach this issue. *See supra* notes 350, 367.

369. *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980). *Cf.* Bauman v. United States Dist. Court, 557 F.2d 650 (9th Cir. 1977) (plaintiff cannot obtain mandamus to overturn trial judge's grant of opt-out rights in sex discrimination (b)(2) class suit because plaintiff has sufficient appellate remedy after judgment).

370. Segers v. Yellow Freight Sys., Inc., 529 F.2d 721 (5th Cir. 1976) (defendant may challenge adequacy of plaintiff's representation on appeal).

There is prior authority in *In re* Four Seasons Sec. Laws Litig., 493 F.2d 1288, 1291 (10th Cir.), *cert. denied*, 419 U.S. 1034 (1974) that orders granting opt-out are appealable by defendant where result was to allow opt-outs to pursue individual suits against defendants. However, there otherwise would have been a final judgment. *See also In re* Int'l House of Pancakes Franchise Litig., 536 F.2d 261 (8th Cir. 1976).

371. Where the court has granted the right to opt out, but rules the member has not exercised it, thus binding the member to a final judgment, the order is appealable by the member. National Student Mktg. Litig. v. Barnes, 530 F.2d 1012 (D.C. Cir. 1976). However, an otherwise final judgment was also involved and this case does not therefore address the situation where the court rules in pre-trial proceedings that the member has no right to opt out of the prospective trial.

372. *In re* Beef Indus. Anti-trust Litig., 607 F.2d 167, 172-73 (5th Cir. 1979), *cert. denied*, 452 U.S. 904 (1981).

373. *See supra* note 364.

374. *See supra* note 358.

375. *See* cases cited *supra* note 360.

376. Of course there are other analogies which favor nonappealability, for example, an order overruling an objection to personal jurisdiction, an order joining a party, or an order consolidating cases. *See supra* text accompanying notes 251-59.

the member's counsel to participate in the case.[377] Thus, the reasonable prediction can be made that the courts will not adopt a clean "yes" or "no" rule on the member's right to appeal the denial of the right to opt out. As with the cases on denial of right to intervention, the appellate courts will, utilizing circular logic, make the answer to appealability turn first on whether the action is properly maintained as a mandatory class action, and second, if it is, whether, on the facts, the class representative and class attorney will effectively represent the class member's interest. Following the analogy to intervention, if this inquiry shows the denial of the right to opt out or intervene, appealability and reversal will be found; otherwise, the appeal of the order will be dismissed as nonfinal.

The certification of a class action as a (b)(1) or (b)(2) class suit rather than a (b)(3) class suit, should also be appealable under 28 U.S.C. section 1292(a)(1) as a matter of law, on the theory that implicitly the order denying the right to opt out is an injunction against the class member from proceeding with his own action.[378] However, this conclusion may be evaded by noting the absence of a formal injunction and by viewing the certification order simply as an order in an ongoing proceeding, like a consolidation order,[379] and turning the question into one of substantial effect on all the facts. Thus, the majority in *Kansas City Skywalk II* was able to find jurisdiction under section 1292(a) because the substantial effect of the trial court's express order prohibiting members' settlement of punitive damage claims was to enjoin their pending proceedings in state court.[380] Without citing the case, the Eighth Circuit aligned its result with the latest restatement of the tests set forth in the United States Supreme Court's decision in *Carson v. American Brands, Inc.*[381] There, the Court found there was denial of an injunction under section 1292(a) when the trial court refused to approve a class action settlement of a Title VII injunction suit.[382]

If the order certifying a class action as a (b)(1) or (b)(2) class suit, rather than a (b)(3) class suit, thereby denying the right of the class mem-

377. Cullen v. New York State Civil Serv. Comm., 566 F.2d 846 (2d Cir. 1977).

378. A main functional purpose of certification under Rule 23(b)(1) or (b)(2) is to make the action a mandatory or partially mandatory action and to negate the right of the member to the opt out under Rule 23(c)(2). Woolen v. Surtran Taxicabs, Inc., 684 F.2d 324 (5th Cir. 1982); Sperry Rand Corp. v. Larson, 554 F.2d 868 (8th Cir. 1977).

Conversely, a class (b)(2) certification narrowly defining and excluding members, otherwise unappealable, is reviewed upon appeal of the injunction granted. Payne v. Travenol Laboratories, Inc., 33 FED. R. SERV. 2d 1582, 1587, — F.2d — (5th Cir. 1982). *But see infra* note 382.

379. Levine v. American Export Indus., Inc., 473 F.2d 1008, 1009 (2d Cir. 1973) (recognizing, however, an exception for "exceptional circumstances"); *see also supra* note 353.

380. 680 F.2d 1175, 1179-80 (8th Cir. 1982).

381. 453 U.S. 79 (1981). The three part test is: (1) Did the order have the "practical effect" of an injunction?; (2) Does the order cause "serious, perhaps irreparable consequences"?; and (3) Can the order be "effectively challenged only by immediate appeal"? *Id.* at 83. The test thus bears close resemblance to the test for a final collateral order under 28 U.S.C. § 1291 (1976 & Supp. V. 1981).

382. *Pendent Appellate Jurisdiction*—A different issue is presented when, assuming an appealable order is present (such as an injunction), the appellate court must choose whether to review an additional otherwise nonappealable order (such as a class certification). Kershner v. Mazurkiewicz, 33 FED. R. SERV. 2d 429, — F.2d — (3d Cir. 1982) (en banc) (denial of class certification, a nonappealable order, in this case was not reviewable, rejecting application of theory that appellate jurisdiction was pendent to review of appealable order under § 1292(a)(1), denying injunction).

ber to opt out is not appealable as a final collateral order under section 1291 or as an injunction under sections 1292(a), then there is some authority that the trial court's decision may constitute such an abuse of discretion as to allow mandamus under 28 U.S.C. section 1651.[383] This conclusion would be fortified by viewing the denial of the right to opt out as the denial of a constitutional right to due process of law[384] or right to jury trial.[385]

VII. THE RULE 23(B)(3) CLASS OR NON-CLASS CONSOLIDATION ALTERNATIVE TO THE RULE 23(B)(1) OR (B)(2) LARGE CLAIMS CLASS ACTION

One can sympathize with all the trial judges who, like Judge Wright when he looked out upon the *Kansas City Skywalk I* cases, have said to themselves, "The Court intends to try this lawsuit only once and to bind all parties to determinations made at that single trial."[386] Such a reaction led Judge Wright into error in using the (b)(1) category class suit for a mass tort.[387] It is submitted, however, that as Judge Wright recognized, a similar result may be partially obtained by certification under Rule 23(b)(3) and, even as to those who opt out, by patiently using the various powers of the court to consolidate and schedule pending cases for trial.[388]

In *Vincent v. Hughes Air West, Inc.*,[389] before the Ninth Circuit had rejected class actions for air crash disasters,[390] the trial judge in an air crash case ordered all cases consolidated for the sole purpose of determining liability.[391] The judge appointed a plaintiffs' liaison counsel to chair a meeting of plaintiffs' attorneys to select committees and to agree upon a

383. McDonnell Douglas Corp. v. United States Dist. Court, 523 F.2d 1083, 1087 (9th Cir. 1975). Mandamus was sought but not ruled upon in *Kansas City Skywalk II*. 680 F.2d at 1177.

An appeal from such an order denying opt-out under 28 U.S.C. § 1291 (1976 & Supp. V 1981) has been treated as a petition for mandamus. Hartland v. Alaska Airlines, 544 F.2d 992, 1001 (9th Cir. 1976). There is residual authority to treat an appeal as a petition for mandamus, even though the procedure has not been followed. Frederick L. v. Thomas, 578 F.2d 513, 516 n.6 (3d Cir. 1978).

The Fifth Circuit in Woolen v. Surtran Taxicabs, Inc., 684 F.2d 324, 330 (5th Cir. 1982), although reversing a denial of intervention into a (b)(2) class, declined to exercise mandamus to order the trial court to recertify the action as a (b)(3) class thereby giving the appellants the right to exclusion. *See also* DeMasi v. Weiss, 33 FED. R. SERV. 2d 1, — F.2d — (3d Cir. 1982) (class certification and order compelling discovery of physicians' incomes not reviewable by mandamus).

384. The class member might raise a sufficient conflict of interest with the class representative to deny due process of law. *See* Hansberry v. Lee, 311 U.S. 32 (1940).

385. *See* Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Goldman, Sachs & Co. v. Edelstein, 494 F.2d 76 (2d Cir. 1974).

386. 93 F.R.D. at 420.

387. It must be remembered, however, that the two judge majority of the Eighth Circuit only invalidated the order on the grounds of the anti-injunction statute, and seemed to be sympathetic to Judge Heaney's position in dissent that Rule 23(b)(1) could be used this way. *Kansas City Skywalk II*, 680 F.2d at 1184 n.14.

388. *See supra* note 22. As to those that opt out in favor of state actions, it is not inconceivable that coordination with the state court could produce a joint state-federal trial, if the federal and state judges could come into agreement.

389. 557 F.2d 759 (9th Cir. 1977).

390. *Id.* at 767-68. *See* McDonnell Douglas Corp. v. United States Dist. Court, 523 F.2d 1083, 1085 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

391. The trial court had first certified one action as a class action under Rule 23(b)(1) and (b)(2), thereby denying the right to opt out. Petition of Gabel, 350 F. Supp. 624 (S.D. Cal. 1972); *see* Note, *supra* note 131.

plan for the conduct of discovery, trial of the case, costs and fees.[392] A majority of the lawyers approved a plan selecting lead counsel committees and agreeing to let the court determine the method and amount of payment to lead counsel.[393] As the cases moved toward settlement, the lead counsel obtained an order from the court requiring that five percent of each settlement be paid into a "Special Class Fund," to cover costs and fees of lead counsel.[394] After the defendants agreed to liability and most cases were settled, the court after hearings, substantially disbursed the $450,000 fund to the committee of lead counsel.

The Ninth Circuit reversed the fund award as to two claimants, one who did not file a lawsuit,[395] and one whose settlement was made prior to the fund order,[396] but sustained the remaining award over objection of other nonlead counsel on a theory of quasi-contract and restitution. The court reviewed the history of the court's power to appoint lead counsel and to restrict activities of nonlead counsel as it had been developed and had been set forth in the 1970 Manual for Complex Litigation.[397] The Ninth Circuit unequivocally endorsed this power, even in the absence of a certified class action.[398] While the *Hughes Air West* case validates the lead counsel power as to the pre-trial stage only, there is no good reason in the long run why the power cannot be extended into the consolidated trial of the common liability issues even in the absence of a certified class action, or in a (b)(3) action where some remain but may have opted out.[399]

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392. *Hughes Air West*, 557 F.2d at 763-64. The *Kansas City Skywalk I* federal and state trial judges had organized coordinated committees prior to the class certification. *Kansas City Skywalk II*, 680 F.2d at 1177.

393. 557 F.2d at 764. Judge Green in the wrongful death cases arising from the Washington D.C. Air Florida plane crash into the Potomac River approved a 3% fund. Legal Times, June 7, 1982, at 6.

394. 557 F.2d at 764.

395. *Id.* at 765.

396. *Id.* at 766.

397. The current Manual, as amended June 1981, treats the subject in sections 190-92, and is confined to the conduct of pretrial proceedings. MANUAL FOR COMPLEX LITIGATION §§ 190-92 (June 1981). Section 4.53, entitled "Selection of Lead Trial Counsel," says, "the court may proceed on its own initiative to designate lead counsel, preserving the right of counsel for other parties to examine a witness or to present further contentions without repetition." *Id.* § 4.53. However, there are no citations to case authority on lead trial counsel.

398. *Hughes Air West*, 557 F.2d at 773-74. *See also In re* Air Crash Disaster at Florida Everglades, 549 F.2d 1006 (5th Cir. 1977). *Cf. In re* Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975, 34 FED. R. SERV. 2d 1171, — F.2d — (2d Cir. 1982) (after consolidated trial victory for 36 plaintiffs, 17 settled "without costs" so that the total taxable costs of $39,000 required a pro rata reduction in the amount to be recoverable by nonsettling plaintiffs).

399. *See supra* note 397. *But see* McCoid, *supra* note 288 (posing the varying procedural approaches and barriers to bringing about a compulsory one-package trial even outside the class context).

Thus, it may legitimately be argued that between the three main options: class with no opt-out, class with opt-out, or no class at all, inadequacy of alternative consolidation remedies mandates (b)(3) certification, because it will pressure members to remain in the class. For if a class is certified under Rule 23(b)(3), then the member's exercise of the right to opt out, some commentators think, will forfeit the member's right to use offensive collateral estoppel. This forfeiture is reached by reasoning that the purpose for creating opt-out was to eliminate one-way intervention, and therefore by opting out of binding effect, the member should be estopped later to utilize offensive collateral estoppel to assert binding effect to the member's advantage. *But see supra* note 166. This forfeiture by opt-out is also fortified by the "easy joinder" factor considered in Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330-31 (1979): a plaintiff should not be allowed to use offen-

The ultimate demise of the privity requirement,[400] the possible forfeiture of offensive collateral estoppel for opting out, and the possible forfeiture of a toll on the statute of limitations should also put pressure on the individual litigant's lawyer to consent to the plan for consolidated trial or to the class action plan.[401] There is a subtle but substantial difference in the power of the individual lawyer and member to control their own case in a (b)(3) class or consolidated cases, as opposed to their power in a (b)(1) or (b)(2) class, and that interest should be respected.

If consolidated trial through lead counsel is possible, then the bifurcated trial devices developed in class actions[402] can also be made effective

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sive collateral estoppel if the plaintiff foregoes an opportunity to join the previous litigation, and presumably opting out would be equivalent to foregoing an opportunity to join.

The argument can also be made that opt-out of a (b)(3) class should forfeit a claim to punitive damages. *See supra* note 295. If after (b)(3) certification many members did opt out, their cases would still be subject to the consolidation powers of the court. Even if the members do not have a strong interest in controlling their cases (presumably a Rule 23(b)(3)(A) reason for denying class treatment) that interest can be protected by opt-out under Rule 23(c)(2) and there is therefore no reason to deny class treatment. Even in such large cases there is good reason to impose the (b)(3) class action because it may cause forfeiture of offensive collateral estoppel to those who do opt out. Perhaps the (b)(3)(A) standard should now be reconsidered in a new light. That is, until now the (b)(3)(A) standard has been construed against the question whether to have class action at all. If the interest in individual control is high, the standard urges that no class action be certified. *See* 1966 Advisory Committee Note, FED. R. CIV. P. 23(b)(3)(A). The standard can now be interpreted to say that certification should be made under Rule 23(b)(3) rather than under Rule 23(b)(2), and by so doing it may now formally cause the forfeiture of the offensive use of collateral estoppel if a member does opt out. *See also infra* note 453. *But see supra* note 167. The same analysis can also be made as to the statute of limitations.

400. *See* George, *Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action*, 32 STAN. L. REV. 655 (1980). Professor George's prediction may be seen at work in a Fifth Circuit decision binding non party airlines to a prior decision against a city enjoining it from closing an airport. *See supra* note 165.

401. At least as to permissive intervention, "[t]he rule is general that persons who might have made themselves parties to a litigation between strangers, but did not, are not bound by the judgment." Gratiot State Bank v. Johnson, 249 U.S. 246, 249 (1919), *discussed in* 1B J. MOORE & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.419[3-3] (2d ed. 1982). However, the United States Supreme Court in dictum raised the possibility that deliberate failure to intervene of right might bind the person as if he had been a party. Provident Bank & Trust Co. v. Patterson, 390 U.S. 102, 114 (1968). Commentators urge such an expanded consequence of nonintervention in relation to res judicata and collateral estoppel to achieve the objective of modern party rules to bring in "all persons naturally interested in the subject of the action." Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1480-81 (1968). In light of these types of urgings, the concept of mandatory intervention legislation has been endorsed. McCoid, *supra* note 288, at 720 (citing Comment, *Nonparties and Preclusion by Judgment: The Privity Rule Reconsidered*, 56 CALIF. L. REV. 1098, 1122-32 (1968)). In Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), the Court also states that one factor to be employed in determining whether a person should be denied the offensive use of collateral estoppel is whether that person could easily have joined in the earlier action. *Id.* at 330-31. Thus, if the Court is moving in the dual direction that failure to intervene will bind a nonintervenor to an adverse result, and also will foreclose the nonintervenor from taking offensive collateral advantage of a favorable result, a similar dual pressure will build to pressure a class member from exercising the absolute right to opt out. In addition, in light of this dual pressure, courts may move in the direction of blunting the absolute right to opt out by certification of partial (b)(1) or (b)(2) class actions as to particular issues under Rule 23(c)(4)(A). *See* Putz & Astiz, *supra* note 295 (advocating this position for punitive damage claims). However, if the courts do this, they should then respect the right to notice and give an opportunity for a qualified total opt-out upon a showing, or a partial opt-out, or else grant a subclass which will allow the member to participate in the class representation through a different representative and counsel. *See also* George, *supra* note 165, at 682 n.139.

402. For example, *In re* Gypsum Cases, 386 F. Supp. 959, 963 (N.D. Cal. 1974) appears to have been ultimately certified as a class action. But it began as a nationwide filing of 140 cases with 5,500 named plaintiffs and proceeded by stipulation that the court could designate the first

and perhaps even more effective, through a consolidated test trial case. For even if a class action is certified, unless there is a waiver of jury trial and a test case on the issue of both liability and damages, there can be difficult problems in certain areas of the law in attempting to bifurcate damages from liability.[403] For example, the Ninth Circuit in *Dalkon Shield II* reasoned that the inability to separate liability from individual proximate causation of injury on some claims precluded certification.[404]

There is some indication in the older authorities that one jury must decide both liability and damage phases of the trial.[405] The clearly better reasoned modern thinking on the subject, however, is that there is no constitutional requirement in the seventh amendment that the same jury hear both the liability and the damage phases, provided the issues are separable.[406] However, in recognition of the possibility that an appellate court could later find the issues were not separable in a particular class action case, such as an antitrust price-fix,[407] other courts have added to the concept of bifurcating the two phases of the trial, the concept of using the same jury and recalling it to hear the damage phase after a determination of a liability phase. For example, Judge Merihge of the Eastern District of Virginia in *Pruitt v. Allied Chemical Corp.*[408] certified a class action on behalf of various subclasses constituting components of the seafood industry for damages against the defendants for their alleged discharge of keopane in the Chesapeake Bay and James Rivers. Judge Merihge, by prospective order, indicated that the liability phase would be bifurcated from the damage phase and that the same jury would be recalled at the second stage.[409]

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case or cases and the first issue to be tried. *Id.* The court selected six cases and stayed discovery in all other cases, and after a bifurcated trial determined liability, followed by further discovery and a trial as to damages, entered a $3,000,000 judgment as to six dealers. *See* Wall Prods. Co. v. National Gypsum, 357 F. Supp. 832 (N.D. Cal. 1973). The court then appointed a liaison counsel for plaintiffs and liaison counsel for defendants, and entered a partial summary judgment against defendants from denying liability to designated classes, and designated representative case and representative counsel for each further class. This process led to an eventual settlement. *In re Gypsum Cases*, 386 F. Supp. at 965.

403. *See* Sharp v. Coopers & Lybrand, 457 F. Supp. 879 (E.D. Pa. 1978).

404. 34 FED. R. SERV. 2d 646, — F.2d — (9th Cir. 1982).

405. *See infra* note 406.

406. See the forceful and well-reasoned opinion on this position in 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2391 (1971). *See also* H. NEWBERG, *supra* note 88, §§ 4640, 7524, 7524c (citing instances where numerous courts have endorsed the concept of split trials in class actions; at least these courts have entered prospective orders ordering split trials prior to the trial on the theory that a proof can be devised showing generalized nature of injury to the class as a whole, independent of showing individual class member damages in a second phase); Comment, *Bifurcation of Liability and Damages in Rule 23(b)(3) Class Actions: History, Policy, Problems and a Solution*, 36 SW. L.J. 743 (1982).

407. The difficulties in separation are great. Alabama v. Blue Bird Body Co., 573 F.2d 309 (5th Cir. 1978) (reversing class certification; the problem in antitrust comes from attempting to separate the fact of damages as an element of liability, from the amount of damages). However, the problems are not always insuperable. *See* Martin v. Bell Helicopter, 85 F.R.D. 654 (D. Colo. 1980).

408. 28 FED. R. SERV. 2d 903, 922 (E.D. Va. 1980).

409. "The damages phase of the trial, if any be appropriate, may be referred to a Special Master appointed to conduct hearings on the class members damages." *Id.* at 917. Judge Merihge continued in footnote 8 "It is unclear whether, under Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 495, 51 S. Ct. 513, 75 L. Ed. 1188 (1931), the same jury that tries the issue of liability must try individual damages as well." *Id.* at 917 n.8. Judge Merihge further noted:

Nevertheless, to avoid altogether the problem of bifurcating liability from damages,[410] a better solution may be to try a sample of pilot test cases within the class action both as to liability and damages.[411] This proposed procedure allows the court the important advantage of staying damage discovery as to other plaintiffs or class members.[412] Both the plaintiffs and defendants may be bound to the result.[413] If there is a victory in the trial of the sample consolidated cases, the the court will proceed into a second phase of discovery of damages of other plaintiffs or class members. In a second trial before a different jury, liability will be established by offensive collateral estoppel and the issues of damages to the class members or other consolidated plaintiffs will be tried to the jury through a master's report.[414] It may be that this two-jury device has received implicit approval in *Parkland Hosiery Co. v. Shore*[415] when the United States Supreme Court found that the prior injunction trial court determination of the liability issues did not, through offensive collateral estoppel, deprive the defendant of his right to jury trial on the damage claims.[416]

VIII. RESTATING THE RIGHT TO OPT OUT

A. *Factual Operation of Opt-Out or Opt-In*

Courts in certifying mandatory (b)(1) or (b)(2) classes have often assumed, without asking, that the members approve and authorize the action

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United States District Judge William H. Becker suggests that the jury could be excused temporarily while a Master makes findings on all individual damages. The jury would then be recalled to hear the Master's report and any other evidence offered before reaching separate verdicts on the damages of each class member under the doctrine of *Ex parte* Peterson, 253 U.S. 300 (1920). Becker, The Class Action Conflict—a 1976 Report, 75 F.R.D. 167, 190 (1976).

Id. at 917.

410. *See supra* notes 390-94 and accompanying text.

411. Even outside the class action; this appears to be the solution proposed by the Ninth Circuit in *Dalkon Shield II*, 34 FED. R. SERV. 2d 646, 653, — F.2d —, — (9th Cir. 1982): "[Subclassing] appears to offer little advantage over a few test trials that may produce more settlements than would a lengthy and complicated trial of consolidated cases."

412. *See In re* Gypsum Cases, 386 F. Supp. 959 (N.D. Cal. 1974).

413. *Id.* The Ninth Circuit in *Dalkon Shield II*, however, assumes that collateral estoppel cannot be imposed, but that practical settlement economics will produce the same result. 34 FED. R. SERV. 2d at 652-53, — F.2d at —.

414. See also the procedure used in Nisley v. Union Carbide & Carbon Corp., 300 F.2d 561 (10th Cir. 1961), *cert. dismissed*, 371 U.S. 801 (1963), where prior to 1966 the one and only jury found damage formulas subsequently administered by a master to class members' claims. *See also supra* note 74 and accompanying text.

415. 439 U.S. 322 (1979). There is tenuous authority for the power of the court to enter an order that the consolidated cases will be governed by the result of the test case. *See* 3B J. MOORE, *supra* note 63, at ¶ 23.45[3]. *See also* Windham v. American Brands, Inc., 565 F.2d 59, 67-72 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978) (because of, in part, the problems of bifurcation, a test case was the preferable way to proceed); Katz v. Carte Blanche Corp., 496 F.2d 747, 758-62 (3d Cir. 1974) (approving use of test case to determine liability, which decision, with consent of defendant, will be binding in subsequent class action determination).

416. In fact this solution improves upon the sequence of procedures approved in Parklane Hosiery Co. v. Shore, 439 U.S. 322, 332-33 (1979). In that case, liability was first decided by a judge, based on equity jurisdiction over the S.E.C. injunction, and this determination was to be followed by collateral estoppel and a jury determination of damages. *Id.* at 337. However, under the solution proposed here, both the test plaintiffs and defendant will have a right to a jury trial in the test case as to both liability and damages, and the rest of the plaintiffs and defendants will have the right to a jury trial in the second trial before a second jury as to damages.

taken by the class representatives and class lawyers. Courts in denying or granting (b)(3) actions sometimes speculate how members would respond. In addition to tabulating the results in individual reported cases,[417] a little is now empirically known to predict how the class members will in fact respond to notice and the right to opt out.[418] As a general average proposition, one might say relatively few will opt out.[419] But so much depends on the facts, the size of the claim, the method and content of notice,[420] the type of class member, and the out-of-court communications to which the member is subjected, that it is difficult to generalize.

In the *Antibiotics Antitrust Actions*,[421] for example, where notice by publication was attempted to some 75 to 100 million individual consumers in 43 states, requests for exclusion were received from 42 individual consumers, but some 38,000 individuals filed claims for damages. In contrast, in the other seven states where individual notice was sent to nine million households, 10,000 requests for exclusion[422] were received and, upon a second notice after settlement, a large number of individual claims for damages were filed and received.[423] Professor Duval finds that in antitrust class actions certified under Rule 23(b)(3), the defendants often exert pressure on class members and this significantly reduces class size through requests for exclusion.[424] The Georgetown empirical study concludes, as might well be expected, that the use of an opt-in procedure, rather than an opt-out procedure, also significantly reduces the size of the class.[425]

The difficulty of obtaining class response even after a successful judgment is shown in *Boeing Co. v. Van Gemert*.[426] There Van Gemert brought a class action on behalf of himself and other nonconverting de-

417. For example, only .03% of the class either opted out or objected to the proposed settlement but were able to overturn it on appeal in *In re* General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1137 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979). *See also* H. NEWBERG, *supra* note 88, at §§ 2475 *(Class Action Exclusion Levels Experienced)* (no table), 2695 *(Proof of Claim Response Rate Levels)* (table 1) (1977 & Supp. 1982).

418. *See* Bernstein, *Judicial Economy and Class Actions*, 7 J. LEGAL STUD. 349, 354-60 (1978) (statistical sample study of cases showing judicial time is well spent in relation to obtaining results for individual members in federal class claims cases). *See also* Duval, *supra* note 54, at 1309-22 (describing the results of seven class antitrust settlements). *But see* Duval, *The Class Action as An Antitrust Enforcement Device: The Chicago Study Revisited*, 1979 AM. B. FOUND. RESEARCH J. 449, 456-63 (concluding in a later evaluation that little was directly achieved for class members in this total sample of cases). *Cf.* Jones, *An Empirical Examination of the Resolution of Shareholder Derivative and Class Action Law Suits*, 60 B.U.L. REV. 542 (1980).

419. Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L. J. 1123, 1149-50 (1974).

420. *See* Sarafin v. Sears, Roebuck & Co., Inc., 73 F.R.D. 585, 588-89 (N.D. Ill. 1977) (notice had to include information that class member would receive less under TILA limit, than if he opted out to file individual suit).

421. Wolfram, *The Antibiotics Class Actions*, 1976 AM. B. FOUND. RESEARCH J. 251, 281-83. The responses from retailers and wholesalers were significantly different.

422. *Id.* at 343.

423. *In re* Coordinated Pretrial Proceeding in Antibiotic Antitrust Actions, 410 F. Supp. 659 (D. Minn. 1974). *See* King, *Auditing Claims in a Large-Scale Class Action Refund—The Antibiotic Case*, 22 ANTITRUST BULL. 67 (1977).

424. Duval, *supra* note 54, at 1339-40; *see* Berry, *supra* note 95; *see also* Krehl v. Baskin-Robbins Ice Cream Co., 78 F.R.D. 108, 116 (C.D. Cal. 1978) (improper for defendant to solicit opt-out from uncertified class and therefore class member opposition to suit was irrelevant to adequacy of plaintiff's representation at class certification stage).

425. *See* Note, *supra* note 419, at 1150.

426. 444 U.S. 472 (1980).

benture holders against Boeing. Van Gemert complained that Boeing had violated federal securities statutes and New York state laws by failing to give adequate notice to the debenture holders concerning Boeing's offer to redeem the debentures.[427] Boeing had permitted the conversion of the debentures, but only for a very short period of time.[428] The suit sought damages for the class in the amount of the difference between the amount for which their debentures could be sold on suit-day ($1.5 million) and the value of the shares into which the debentures would have been converted ($4 million).[429]

It is not clear under which subdivision, (b)(2) or (b)(3), the trial court had certified the class, but presumably it was a (b)(2) certification. After twelve years of litigation, the district court found Boeing liable and assessed damages in the amount of more than three million dollars to the class as a whole.[430] Each individual recovery was to carry its proportionate share of the total amount allotted for attorneys' fees, expenses, and disbursement, under the theory of quantum meruit recovery out of a common fund.[431]

Boeing appealed from the final judgment on the ground that attorneys' fees could not properly be recovered from the unclaimed portion of the fund.[432] When this case reached the United States Supreme Court, in spite of the extended efforts of a special master and a professional search firm, the owners of only forty-seven percent of the unconverted securities, or $706,600 out of $1,544,300, had received their proportionate share of the judgment.[433] Boeing argued that to award attorneys' fees from the unclaimed funds would be improper since the attorneys had not benefited any members of the class who failed to file for their share. The Court rejected this argument, however, and affirmed the court of appeals' finding that each class member, whether claiming or not, had a "present vested interest in the class recovery" and that absentee class members had in fact received a benefit from the class action judgment fund, regardless of whether such fund was claimed or unclaimed.[434] The final untidy result of the *Boeing* case was perhaps to leave about half of the unclaimed damages with the defendant because of the inability either to locate or to induce half the class to file claims, but to assess attorneys' fees against the whole fund, including the unclaimed portion, which might revert back to Boeing.[435]

427. *Id.* at 474.
428. *Id.*
429. *Id.*
430. *Id.* at 475-76.
431. *Id.* at 476.
432. *Id.* at 477.
433. *Id.* at 478 n.4.
434. *Id.* at 477-82.
435. The question, however, was left open. *Id.* at 481-82 nn.7-8. See also *Critics Assail "Unproductive" Class Action*, Legal Times, Feb. 21, 1983, at 1, col. 4, reporting, in rounded figures, that of a $900,000 shareholder class settlement, because of inability to induce members to file claims, only $100,000 was distributed to class members, $230,000 was paid to the class attorneys and $540,000 reverted back to the defendants. The report asserts that the defendants made the settlement offer high enough to sustain the plaintiff attorney's fee award, while anticipating there would be substantial reduction in the amount of the settlement actually distributed. *But see Left-*

The difference between sending people money and requiring them to file a claim for it can be quite significant. The United States Supreme Court apparently used this difference in *Quern v. Jordan*[436] to reach a halfway house between total eleventh amendment immunity of the state for past welfare payments illegally withheld, and a judgment for full compensation to the class members. The Court, in a five-to-four compromise, mandated the state to send what functionally resembled an opt-in notice to the class, telling them that they could individually file for past benefits wrongfully withheld. This compromise is based on unarticulated predictions that fewer than all welfare recipients will affirmatively act to file administrative claims for their withheld payments and questionably raises cynicism to the level of constitutional policy.[437]

B. *Legislative Proposals*

The inability of either side in the debate concerning Rule 23(c)(2) to muster a change in opt-out is demonstrated on the legislative scene as well. In 1972, a special committee of the American College of Trial Lawyers conducted a survey, and called for the replacement of the opt-out procedure with an opt-in procedure.[438] But a more detailed study commissioned by the Senate Commerce Committee rebutted many of the criticisms leveled at the operation of Rule 23(b)(3) and (c)(2).[439] The student authors of an imaginative, exhausting *Harvard Law Review* Note also in 1976 moved further in the opposite direction by urging that the permissive opt-out class action be dropped in favor of all mandatory class actions.[440]

In 1978, under the Carter administration, a legislative initiative[441] was made to resolve this dispute in part by separating out small claims class actions into "public actions" and by treating other (b)(3) claims as "compensatory" class actions. Under this scheme in small claims "public" class action cases, pre-trial notice to class members would be eliminated in favor of notice to the United States Attorney General,[442] and in the case of a

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over Settlement Monies Form New Foundation, Legal Times, Feb. 4, 1983, at 4 (Northern District of Illinois set up $6 million foundation with money left over from $20 million folding carton antitrust settlement).

436. 440 U.S. 332, 346-49 (1979).

437. Those who don't ask don't get.

438. American College of Trial Lawyers, Report and Recommendations of the Special Committee (1972).

439. *See* Note, *supra* note 419; *see also* Bernstein, *supra* note 418.

440. See *Class Actions*, *supra* note 87, at 1626, urging collapse of the three categories in Rule 23(b) and that "extension of the right to opt out ought to be generally disfavored," although the judicial power to grant discretionary opt-out should be retained. *Id.* at 1628. The 1966 Rules Committee considered, but rejected a conditional opt-out, *supra* note 82, but Kansas has adopted a conditional opt-out. Shutts v. Phillips Petroleum Co., 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978) (discussed *supra* notes 214-21 and accompanying text).

441. S. 3475, 95th Cong., 2d Sess., 124 CONG. REC. 27,859 (1978) was introduced by Senators Kennedy and De Concini. The bill was drafted by Mr. Stephen Berry in the Office for Improvements in the Administration of Justice, of the United States Department of Justice after Berry had directed extensive interviews, doctrinal, and empirical research. *See* Berry, *supra* note 95.

442. S. 3475, 95th Cong., 2d Sess., § 3002(a), 124 CONG. REC. 27,859 (1978).

recovery, post-judgment notice would be made to class members.[443] To balance this bone for the plaintiffs, the bill then threw a scrap to the defendants by repealing the mandatory opt-out notice of Rule 23(c)(2) as to all other (b)(3) actions, and replacing it with discretion in the trial judge to order either an opt-in or an opt-out notice governed by certain standards.[444] Because a slight majority of federal district judges was thought to favor the use of pre-trial opt-in over opt-out,[445] these standards would have great significance in attempting to create a more rational dividing line than is now present in Rule 23 between the cases where opt-out should be recognized. Thus, section 3013(e) of Senate Bill 3475 provided two tests: whether the amount of the class members' injury makes it feasible for them to pursue their interests separately and whether they have sufficient resources to conduct their own litigation.[446] Apparently, if the answer to these two questions is in the affirmative, then the judge should order an "opt-in" form of notice under which class members would be excluded unless they request to be included.[447] In oversimplified terms,

443. Administered by the Administrative Office of the United States Courts. *Id.* § 3006(c), 124 CONG. REC. at 27,859, 27,863.

444. *Id.* § 3013(e), 124 CONG. REC. at 27,859.

445. *See* 6 CLASS ACTION REPORTS 2, 19 (1978) (of 148 United States District Judges responding to a questionnaire, 98 or 66%, favored replacing the opt-out provisions of Rule 23 with an opt-in requirement. Left to their own devices, unrestrained by Rule 23, the judges might follow the practice of the Court of Claims, which designs class action criteria from all the standards in Rule 23(b)(1), (2) and (3), and shapes the procedure to the specific case. The Court of Claims thus rejected opt-out in favor of a notice and opportunity for permissive intervention. Quinault Allottee Ass'n v. United States, 453 F.2d 1272 (Ct. Cl. 1972).

446. S. 3475, 95th Cong., 2d Sess., § 3013(e), 124 CONG. REC. 27,859 (1978) provides:

> At or immediately after the preliminary hearing the court in its discretion shall determine whether some or all injured persons will be excluded from or included in the class only if they so request by a specified date. In determining whether persons shall be excluded from the class unless a specific request to be included is made, the court shall consider whether there is a substantial likelihood that—
>
> (1) the amount of their injury or liability makes it feasible for them to pursue their interests separately; and
>
> (2) those persons have sufficient resources, experience, and sophistication in business affairs to conduct their own litigation. The court shall promptly thereafter give notice reasonably necessary to assure adequacy of representation of all persons included in the class and fairness to all such persons. Such notice shall describe the persons, if any, by name or category who are to be excluded from the action unless a request to be included is made. The judgment, whether or not favorable to the class, will include all persons who remain in or enter the action pursuant to this subsection.

See also N.Y. CIV. PRAC. LAW & RULES § 904(a) (McKinney 1976) providing that in actions brought primarily for injunctive or declaratory relief, notice of the pendency of the action need not be given unless it is necessary to protect the interests of the class members and cost will not prevent the action, but that § 904(b), in all other class actions, reasonable notice of the commencement shall be given, and § 904(c), the content of the notice, including the right to exclusion, will be left to the court's discretion under standards similar to § 3013(e), that is, the cost of giving notice, the resources of the parties, and: "III. The stake of each represented member of the class, and the likelihood that significant numbers would desire to exclude themselves from the class or appear individually, which may be determined, in the court's discretion by sending notice to a random sample of the class." *Id.* § 904(c).

Needless to say, these attempts, while nice sounding, muddle together the two different concepts of notice and consent and subject them both to the discretion of the judge. For example, if a judge rightly decided not to send notice because he thought no one would want to opt out but a class member showed up and demanded the right to exclusion, the first decision under the standard would improperly decide the second question.

447. The section also made vague whether individual notice was required and who should pay for it.

the compromise offered a three-way split: to eliminate pre-trial notice altogether in small claims class actions; to require opt-out notice for medium size class claims; and to require opt-in for large claims. Even though the bill was cosmetically changed and renamed to gain more political support and was thus reintroduced as the Small Business Judicial Access Act of 1979,[448] it was swept aside in the Reagan wave and will not likely be soon heard from again.[449]

It is significant to note that the Uniform Class Action Act, in responding to this and similar issues, continues to require opt-out notice, but eliminates notice for claims under $100, and allows the court to consider costs in fashioning a reasonable notice other than individual notice. However, the Act continues to impose costs on the plaintiff.[450]

Another set of judicial standards for distinguishing between the viability of individual claims apart from the class action, can be gleaned from the decisions that developed the death knell doctrine prior to its demise.[451] It would seem that these standards could be borrowed for purposes of reformulating when the right to opt out should be granted.[452] Another approach, rejected by the 1966 Rule drafters, is to make the right to opt out conditional upon a showing why the representation of the class member's interest will not be adequate.[453]

C. *Corollaries*

Recognition or nonrecognition of the right to opt out has important procedural impact, not only on the potential due process interests of the class members, but on the interests of the plaintiff, of the defendant, and of the court in achieving a unitary binding adjudication. The procedural

448. H.R. 5103, 96th Cong., 1st Sess. (1979). *See* Berry, *supra* note 95, at 322.

449. Professor Miller took the view that the bill was an overreaction to the problems and that the courts could work things out under existing Rule 23 without the necessity of reform legislation. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979). *See also* Note, *Reforming Federal Class Action Procedure: An Analysis of the Justice Department Proposal*, 16 HARV. J. ON LEGIS. 543, 580 (1979) (recommending exception to lack of diversity jurisdiction in mass disaster class action cases where there is a need for a federal forum).

450. *See* Comment, *Manageability Under the Proposed Uniform Class Action Act*, 31 SW. L.J. 715, 730-33 (1977).

451. *See* cases cited in Coopers & Lybrand v. Livesay, 437 U.S. 463, 469-73 (1978). For a good restatement of these standards, see Note, *Civil Procedure—Class Actions—Prejudgment Order Denying Class Action Status is not Appealable*, 1979 WIS. L. REV. 292.

452. Rule 23(b)(3)(A) directs the court to consider the "interest of the individual member in controlling his own action." As the stake of the individual increases, presumably the justification for (b)(3) class treatment decreases to a point where no class action should be certified at all. As to lesser stakes, the individual's interest in control is protected by the right to opt out under Rule 23(c)(2). The significance between noncertification and certification and exercise of opt-out, however, is that with certification the member gains protection of the statute of limitation, but upon opt-out may forfeit offensive collateral estoppel and statute of limitations.

Judge Heaney, in dissent in *Kansas City Skywalk II* performs an interesting feat of logic in finding that the (b)(3)(A) standard, which would dictate no class action at all, not even a (b)(3) opt-out class, nevertheless is irrelevant to the choice whether to certify under Rule 23(b)(1). 680 F.2d at 1188-89. What he in effect says is that while it is relevant that the *Kansas City Skywalk* class members have the strongest possible interests in individual control, those interests are simply overridden by the compulsive need for unitary adjudication of punitive damages in this instance. *See supra* note 399.

453. *See supra* note 82.

right to opt out is also often linked at the substantive level to profound jurisprudential questions concerning the methods necessary for establishing individual consent and authority of the court to adjudicate group rights and to fashion group remedies.

On other levels, the right to opt out has a connection with economic regulation of the attorney-client relationship, and denial of the right to opt out is a function of the judge's power to select one counsel over another.[454] The size of the class member's stake or his interest in control has not been determinative of the member's right to opt out, except to defeat class certification altogether.[455] Rather, the judicial choice whether to recognize the absolute or partial right to opt out is formally but only indirectly and partially governed by procedural categories which express degrees of necessity for mandatory joinder. The choice is also governed by substantive standards relating to the necessity for unitary judicial remedies. The analysis of these multiple procedural and substantive interests[456] and other jurisprudential factors lies at the heart of the choice.[457]

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454. All class actions raise the central issue whether the class representative and the class counsel will adequately represent the interests of the class members. This issue in turn should trigger an inquiry into the conflict of interests between the representative, class counsel and class members. However in (b)(3) actions, this search is partially nullified because the class member is given an absolute veto power over the selection of the class representative and class counsel by the power to opt out. In contrast, in the mandatory (b)(1) and (b)(2) class actions, the class member and the class member's attorney lose this veto power, and in order to assert control, must mount an attack on the class representative and class counsel, raising some conflict of interest in order to establish that their representation may be inadequate and therefore that the class member and his counsel have a right to intervene to take over control of the action or in the alternative to gain subclass status. *See* Sperry Rand Corp. v. Larson, 554 F.2d 868, 873-75 (8th Cir. 1977) (attack unsuccessful on mandamus). Thus, it can be seen that in the mandatory class action, where the court denies the absolute veto power of the right to opt out, the court generates a political struggle for control of the action simultaneously on two levels: one on the lay representative level of factional interests within the class, and the second on the attorney level of competition between attorneys for control of the action and attorney's fees. The judge in the (b)(1) or (b)(2) mandatory action has more power in selecting the representative and the lawyer who will be in control and recipient of the attorney's fees.

455. *See supra* note 452. Most courts, unlike Judge Heaney, *see id.*, assume that if the claim is for damages, then large claims under Rule 23(b)(3)(A) simply defeat certification altogether. McDonnell-Douglas Corp. v. United States Dist. Court, 523 F.2d 1083, 1087 (9th Cir. 1975).

456. For example, the Third Circuit in Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974) articulates the obvious, when in discussing Rule 23(b)(3) superiority determinations, the court states: "Superiority must be looked at from the point of view (1) of the judicial system, (2) of the potential class members, (3) of the present plaintiff, (4) of the attorneys for the litigants, (5) of the public at large, . . . (6) of the defendant [and (7)] of the issues." *Id.* at 760. Because the right to opt out is an essential feature of (b)(3) certification, the quotation applies equally as well to the determination whether to recognize the total or partial, conditional or absolute, right to opt out.

"Above all, the 'class suit' is a rainbow concept, merging many shades and forms of multiple claim litigation into one summary phase." Quinault Allottee Ass'n v. United States, 453 F.2d 1272 (Ct. Cl. 1972) (Davis, J.) (collapsing (b)(1)-(2) and (b)(3) standards and rejecting opt-out in favor of an invitation to permissive intervention).

457. The right to opt out is an essential facet of individual control in group litigation, and consequently of attorney, judicial and legislative power over representation. As Professor Yeazell says:

> [U]ntil the twentieth century nobody—or at least nobody but the widely ignored Frederic Calvert—talked about representation, even though the political history of the period involved major upheavals justified and opposed in terms of representation. Only in the last fifty years have we begun to discuss class actions in such terms. But we have done so only by incorporating, without acknowledgment, two conflicting visions of representation into the same procedural rule. Yet somehow, under the pressure of events, courts

On the surface of formal judicial opinions applying the express procedural standards of Rule 23, the courts also use traditional concepts from other areas of the law to justify the choice. These linkages to other legal concepts form circular truisms, which do not really justify, but rather attempt to rationalize, and put a conservative restraint on the imposition of mandatory group remedies as an exception to the traditional system of rules governing individual adjudication. In addition to the formal standards of Rule 23, ten practical corollaries[458] may be stated to focus on the related legal concepts which are implicated in the judicial choice whether

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have fashioned the device into a sporadically effective means of dealing with groups as various as the disgruntled tenantry of the parish of Wem and the victims of refrigerator sales fraud. However untidy the doctrine, that's not a bad track record for a device no one understands.

Yeazell, *Part II*, *supra* note 191, at 1121.

458. The ten practical corollaries are as follows:

1. Under party joinder concepts, if numerous persons were not involved, would the class members be considered necessary or indispensable parties whose joinder could be compelled, or would they be considered merely permissive parties? If they are in the nature of indispensable parties, no right to opt out should be recognized; if necessary, the partial right to opt out may be created; if merely permissive, the absolute right to opt out should be granted.

2. Under personal jurisdiction concepts if numerous persons were not involved, could an absent nonresident class member's interest be bound through traditional quasi-in-rem or in rem power, or would the interest be immune from jurisdiction? To the extent a nonresident class member's interest would be subject to jurisdiction, no right to opt out should be recognized, but to the extent a nonresident's interest would be immune from jurisdiction, the right to opt out should be granted.

3. Under subject matter jurisdiction concepts, if numerous persons were not involved, could the amount of the individual claims be aggregated or included by ancillary concepts to meet a jurisdictional amount requirement? If so, there is no right to opt out; but if the claims cannot be aggregated, there is a right to opt out.

4. Under collateral estoppel concepts, if numerous persons were not involved, would the absent person in the position of a class member be bound by privity to an adverse ruling? To the extent the person would not be bound, the right to opt out should be recognized.

5. Under equity jurisdiction concepts, if only single parties litigation were involved, would the court have power to enjoin the parties from litigating the same issues in another court? If so, there should be no right to opt out; if not, the right to opt out should be granted.

6. Although it should be relevant, under economic concepts, the average monetary amount of the class member's claim and the number of members in the class are legally irrelevant to the right to opt out; the small size of the claim and large size of the class do not eliminate the right to opt out; conversely, the large size of the individual claim and the small size of the class do not guarantee the right to opt out.

7. Under consolidation concepts applicable to individual party litigations, are there alternative methods available to try the class members' claims efficiently, through liaison counsel, test cases, bifurcation of liability and damages and offensive collateral estoppel? If so, then the right to opt out should be accorded.

8. Under substantive law concepts, is a prospective remedy necessary to vindicate substantive policy; can the actual consent and authority from the class members be presumed and thus a majority consent be judicially imposed; can the absence of conflict of interest and homogeneity of the interest fairly insure adequacy of representation of that interest; is there an overriding need for a unified judicial resolution; is the nature of the claim such that the plaintiff's lawyer would be allowed face-to-face solicitation of the claim in the public interest; if so, then no right of the class members to opt out need be recognized.

9. Under remedies concepts, if numerous persons were not involved, would the plaintiff be entitled to an injunction and equitable monetary relief without triggering the right to trial by jury, or does the nature of the relief give rise to the right to jury trial? If the relief is equitable there should be no right of the class member to opt out; but if the right to jury trial exists, the right to opt out should be accorded.

10. Under appealability concepts, if a class member is denied the right to opt out by erroneous class certification of a (b)(2) action rather than a (b)(3) action the denial should be an appealable order by the member, but the certification as a (b)(2) class rather than a (b)(3) class should not be an appealable order by the plaintiff or defendant.

to treat the action or an issue as a mandatory, a partially mandatory, or a permissive class action or issue and therefore whether to grant the right to opt out.

IX. CONCLUSION

The creation of the class member's power-duty of exclusion, or right to opt out, is a formal recognition of a person's interest in selecting counsel and through this choice, in controlling one's own litigation. The formal declaration of this right necessarily carries its own limitation, which essentially are the procedural and substantive needs of the court to impose unitary binding adjudication. The right and its limits are formally, but only eliptically, defined by all of the standards in Rule 23, but more particularly, by the Rule 23(b) standards, which define the difference between Rule 23(b)(1)-(2) and (b)(3). If the court in applying these standards does choose to override the right to opt out by certification of an action or an issue under Rule 23(b)(1) or (b)(2), then the destruction of the member's right to opt out gives rise to its opposite: the right, and perhaps the duty, to intervene. However, unlike the absolute right to opt out, the right to intervention is conditional upon a showing by the member that existing class representation and class counsel may be inadequate. Further, the grant of intervention into a class action more often results, not in full, controlling representative party status, but rather in some form of subclass status. Apart from the power completely to override the right to opt out, the court also has the power to create the partial right to opt out by certification of partial class actions as to separable issues, and should have the power to create conditional rights to opt out.

In 1966, the Rule reformers conceived the new procedural right to opt out, ostensibly on the modest and understandable expectation that opt-out would eliminate the evil of one-way intervention. In contrast to the simplicity of its procreation, the birth of the opt-out right caused unexpected discomfort to the whole class action family embodied in Rule 23. Even though one-way intervention is no longer seen as an evil, now that the right to opt out has been born, ignoring it will not make it go away. Resolution of the right to opt out has become an essential link in the series of concrete procedural steps necessary to authenticate the authority of the class action attorney and representative, and to validate the power of the court itself to adjudicate and impose a group remedy.

The *Kansas City Skywalk I* and *Dalkon Shield II* decisions present more than enough policy reasons why federal courts ought to have the power to treat the mass tort or products liability occurrence as a mandatory class action or issue with no right in the members to opt out. However, in the absence of new authorizing legislation, the United States Supreme Court's *Eisen v. Carlisle & Jacquelin* and *Zahn v. International Paper Co.* applications of Rule 23(b)(3)/(c)(2) to individual damage claims, present a formidable set of precedential hurdles to overcome. Even though the 1966 rule embraced a new, flexible class action theory, enabling the federal judiciary to take an active role in imposing a binding unitary result on community disputes and on separable issues, nevertheless the

1966 rule did not change the permissive nature of the (b)(3) class action with respect to requiring consent of individual class members. The rule only converted the method of obtaining and proving the individual member's consent for representation, from the former permissive intervention to the present requirement of a failure to opt out.

As shown in the *Kansas City Skywalk* and *Dalkon Shield* litigation, the best hope for a trial judge successfully to avoid this absolute veto, opt-out right of class members had been to impose a partially mandatory class action by hypothecating one punitive damage or projected bankruptcy fund. But even this limited attempt at showing absolute need for unitary adjudication to override the right to opt out was rejected by the Eighth and Ninth Circuits as a form of a punitive tail wagging the compensatory dog, or as a premature, closet declaration of the defendants' bankruptcy. The trial courts' rationale, positing compelling need for unitary adjudication and the hope that representation would be adequate, could not override the traditional rights of the individual to choose counsel, and to control one's own action. Implicitly, neither could such a justification allow the trial court to intrude upon the marketplace of competition between attorneys and their freedom to choose remedies for their clients—at least not in diversity cases.

The courts had three main options: the partially mandatory class action, a permissive class action, or no class action at all in favor of consolidation remedies instead. The Eighth Circuit's *Kansas City Skywalk II* remand was more supportive of a permissive (b)(3) action in a single mass accident than the Ninth Circuit's reluctant acknowledgement in *Dalkon Shield II* of Rule 23(b)(3)'s utility for products liability claims arising over a period of time. But certification of a (b)(3) class action in both cases, would at least have the virtue of staying the statute of limitations, providing representation and binding effect to otherwise unrepresented claimants, and giving the trial court additional management power not available under consolidation powers. Certification of (b)(3) class suits would not be an idle gesture because there would be pressure on the class members and their lawyers not to opt out in order not to forfeit the potential right to use offensive collateral estoppel and the toll of the statute of limitations.[459]

The *Kansas City Skywalk* and *Dalkon Shield* cases did not decide whether a class certification order denying the right to opt out is appeala-

459. The Eighth and Ninth Circuits were not constitutionally compelled to respect the right to opt out at the expense of the unitary adjudication represented by the mandatory class action. The Constitution allows mandatory class actions, provided that some combination of notice and adequacy of representation are accorded and jurisdictional standards are met. The opt-out right recognized arises from the interpretations of the Rule. But because the language of Rule 23(b)(1) is locked into the language of Rule 19, the appellate conclusion had to follow that persons who are not treated as necessary parties in non-class litigation, could not be converted, by their sheer number, without more, into a mandatory class. Only if the underlying premise of the common law tort system in punitive damages cases is judicially evolved into that similar to admiralty law, or a new form of anticipatory bankruptcy is recognized, could the trial courts' decisions as to Rule 23(b)(1) be allowed to stand. The trial courts in *Kansas City Skywalk I* and *Dalkon Shield I* did not attempt to rely upon the concept of a defendant's bill of peace as the basis for a bifurcated, partial (b)(2) injunctive, declaratory judgment class as to punitive or compensatory liability, saving the damages claims for later (b)(3) treatment, but such an attempt no doubt would have met the same fate as the (b)(1) certifications.

ble as a final decision. It may be conceded that a certification of a class action, or an issue as a (b)(1) or (b)(2) category, rather than as a (b)(3) category should not be an appealable order either by the plaintiff or defendant. Nevertheless, the order should be appealable by the person denied the right to opt out. The person denied the right to opt out finds himself essentially in the position of a person denied the right to intervene and should therefore be entitled to appeal because of the absence of an effective practical remedy after a final judgment in the trial court.

In contrast to *Eisen*, which left the class remediless, the *Kansas City Skywalk II* and *Dalkon Shield II* reversals of the partial, mandatory class certifications are not earth-shattering decisions in relation to a failure of substantive justice, because there are viable alternatives. *Kansas City Skywalk II* left open the possibility of a (b)(3) permissive class suit, and *Dalkon Shield II* assigned the problem to the trial court's consolidation remedies. Whether trials on the merits in such suits are ultimately held under the umbrella of a (b)(3) class suit, or in a non-class, consolidated trial format, the better trial management method may be not to bifurcate liability from damages, but to use a test jury trial of sample claims both as to liability and damages, followed by collateral estoppel and other jury trials as to damages.

The state court multistate class action *Miner v. Gillette Co.*, in a different way than the *Kanas City Skywalk* and *Dalkon Shield* actions, also shows that the right to opt out is a function of jurisdictional limits on judicial power to organize and to create classes. By first granting and then dismissing certiorari in *Miner* the United States Supreme Court properly recognized that a pre-trial order for nonresident opt-out notice, which order would be unappealable by a federal defendant under 28 U.S.C. section 1291, is also unripe under 28 U.S.C. section 1257. The subtle implication is that the defendant has been denied standing to raise the pre-trial jurisdictional objection on behalf of the nonresident members. After a trial victory for the plaintiff, the defendant will be bound by the silent consent of the nonresident members who failed to opt out, even though the same members should personally retain the option to attack collaterally any adverse judgment on the grounds this silent opt-out consent could not be imposed on them in absence of their minimum contacts with the forum. Among the hypothetical parade of horribles which can be projected is the scenario in which 50 competing, national, multistate opt-out class actions are brought on the same claims and all members remain silent in response to the fifty notices. Nevertheless, the result implied by *Miner* is proper because it is consistent with *Eisen*, with the demise of mutuality in *Parklane Hosiery Co. v. Shore*, and with the ultimate vindication of one-way intervention. On the other hand, this dilemma of interstate federalism perhaps can only be solved by the United States Supreme Court constitutionally requiring pre-trial opt-in as to nonresident class members who have no minimum contacts with the forum.

The continuing three-choice federal debate whether to replace the present permissive pre-trial opt-out class procedure with, on one extreme, the permissive opt-in class procedure, or, at the other extreme, the post-

trial opt-in class procedure, is largely directed at small claims cases such as *Miner*. The debate is somewhat irrelevant to the *Kansas City Skywalk* and *Dalkon Shield* large claim situations, in which trial courts unsuccessfully attempted to impose mandatory class status on represented claims. The fourth view that the system ought to abandon the consent theory and the permissive class suit by eliminating opt-out and permissive class suits in favor of mandatory class actions, is an advanced notion which may one day prevail. This view, however, probably requires either a change in the Rule itself or else specific jurisdictional and substantive grants to place this much power in the federal judiciary.

It is unfortunate that upon certification of a class action under Rule 23(b)(3), both parts of Rule 23(c)(2) become mandatory, that is, both individual notice and the absolute right to opt out. To the extent that escape from this rigidity is welcome, a narrow road is sometimes open in the case law for trial courts to certify partial class actions under Rule 23(b)(1) or (b)(2). The *Kansas City Skywalk* and *Dalkon Shield* cases show that in the case of substantial individual tort claims, the route is narrow indeed. However, when the trial courts do travel that route, in order legitimately to reach their goal of unitary binding adjudication on a separable issue, they must be vigilant to accord an effective form of pre-trial notice to the class members, and to provide them opportunity to intervene and to participate in the representation, or else, upon a proper showing, to opt out. In this way the ancient principle of respect for an individual's consent and control of representation, as formally declared in Rule 23(c)(2), can be accommodated to the modern need for efficient unitary adjudication of group rights.

APPENDIX

FEDERAL RULE OF CIVIL PROCEDURE, RULE 23: CLASS ACTIONS

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) **Determination by Order Whether Class Action to be Maintained: Notice, Judgment; Actions Conducted Partially as Class Actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) 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. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) **Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (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 or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.