Revised Federal Rule 23, Class Actions: Surviving Difficulties and New Problems Require Further Amendment

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I. INTRODUCTION

One of the most complex problems of federal civil procedure has been the attempt to permit suits by or against certain persons as representatives of a class. The first edition of rule 23 of the Federal Rules of Civil Procedure attempted to set forth, in terms of "jural relationships," the types of class actions that could be brought. It was hoped that his rule would delineate the situations amenable to, and the scope of judgments for, a class action. Case and commentary, however, found the tripartite classification of class actions so complex and obscure that one writer questioned "whether the world would be any the worse off if the class-suit had been left buried in the learned obscurity of Calvert on Parties to Suits in Equity."

Rule 23 was completely revised to describe in more practical terms the occasions for maintaining class actions, and to more precisely define the scope of persons included in the judgments. The new rule, which became effective July 1, 1966, clarifies much of the former confusion by wholly eliminating the tripartite jural classification and by establishing effect-oriented standards for class actions. Nevertheless, the new rule is itself complicated and creates a tripartite classification of its own. Distinct consequences result from a choice among these alternatives. It becomes important, therefore, to analyze to what extent the new procedure has alleviated the burdens of the former rule and examine the newly created problems. Insofar as uncertainties still

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1. See 3 J. Moore, Federal Practice ¶ 23.08 (2d ed. 1967); Moore & Cohn, Federal Class Actions, 32 Ill. L. Rev. 307, 314 (1937). Professor Moore was the chief architect of former rule 23 and, as such, his views have been accepted as authoritative interpretations.
4. 39 F.R.D. at 98.
5. For the complete text of the new rule 23 see the appendix infra.
exist, this Note suggests guidelines for creating judicial consistency and for further amendment of the rule.

II. CONTINUING PROBLEMS NOT RESOLVED
BY NEW RULE 23(a)

The class action originated in English equity as an alternative to compulsory joinder, in situations where it was impossible or impracticable because of the size of the class to get all interested parties before the court. The Chancellors also recognized the necessity of requiring that the member or members of the class before the court represent the common interests of all, and that such representation be fair and honest. In the United States, Equity Rule 48, and, subsequently, Equity Rule 38, embodied the essence of the English equity rules. They granted discretion to the courts to dispense with compulsory joinder of the remainder of the class if there were sufficient parties before the court to adequately and fairly represent the absent members.

Rule 23 of the Federal Rules of Civil Procedure, promul-
gated in 1938, incorporated the requirements of the earlier equity rules. A prerequisite to the bringing of a class action under rule 23 was that a class action had to meet the standards of one of subdivisions (1)-(3) of rule 23 (a). The 23 (a) (1) action, labeled by Moore as a “true” class action, spoke of “joint, or common, or secondary” rights; the 23 (a) (2) action involved “several” rights in specific property and was therefore described as a “hybrid” class action; the 23 (a) (3) action, the “spurious” class action, involved “several” rights and a common question of law or fact unifying the class members. This classification system, although initially hailed as salutary, soon came under increasing criticism as being confusing and conclusory. For example, an erroneous labeling of an action as “true,” when from a legalistic analysis it should have fallen into the spurious category, had serious consequences in that the aggregation of claims for federal diversity jurisdiction, the proper scope of judgments, notice of dismissal or compromise, and the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.


12. See J. Moore, supra note 1, ¶¶ 23.08–10. Professor Moore’s labels, while not adopted by the Advisory Committee, became almost universally accepted.


15. Claims in “true” class actions could be aggregated, while those in “hybrid” or “spurious” actions could not. See note 28 infra.

16. A judgment in a “true” class action was conclusive on all absent members; in “hybrid” actions, as to the absentees’ rights in the res before the court; in a “spurious action,” only on parties before the court. See 2 W. BARRON & A. HOLZOFF, FEDERAL PRACTICE AND PROCEDURE § 572 (Wright ed. 1961).

17. Notice of dismissal or compromise was mandatory in true class actions, but was merely permissive in hybrid and spurious class actions. See old rule 23 (c), supra note 11.

18. Under rule 24, the right to intervene depended on a judicial determination that the parties seeking to intervene would or might be
were all dependent upon the category in which an action was placed.

The new rule 23 was passed to eliminate the confusion surrounding the tripartite classification of the earlier rule and to obviate the danger of mislabeling an action. The new rule, however, follows the pattern, if not the philosophy, of the old rule by requiring a potential class suit to meet not only the requirements of old rule 23(a), as stated above, but also to fall within one of the categories of new rule 23(b). However, since the new rule 23(b) has three categories, the temptation might exist to apply the same legalistic analysis used under the prior rule. These new categories were not drafted in terms of the jural relationships among class members, but rather on the basis of the effects that class or nonclass action treatment would have on the legal rights of the parties. Nevertheless, the new rule 23 clarifies and simplifies the jurisdictional prerequisites for bringing class actions both by codifying and incorporating the prior requirements into new rule 23(a) and by redefining the types of actions which can be brought.

However, several problems found under old rule 23 have been forwarded to the new rule. Subdivision (a) of the Final Draft of new rule 23, 20 generally incorporates the traditional prerequisites of a class action. These prerequisites require that the class be so numerous that joinder of all members is impracticable, that common questions of law and fact exist as to all class members, that the representative parties' claims or defenses be typical of those of the entire class, and that the representative parties will fairly and adequately protect the class interests. The retention of these traditional prerequisites has perpetuated the necessity for certain difficult judicial decisions. For example, judicial determinations as to what number of possible parties is so numerous as to be "impracticable" have varied widely. 21 In one case four persons were sufficient to meet the impracticability

bound by the judgment. The varying effects on res judicata created by true, hybrid, and spurious actions thus created varying rights of intervention. This effect has been changed not only by amendment to FED. R. CIV. P. 23 but also by amendment to FED. R. CIV. P. 24. Rule 24 now permits intervention if the intervenor can show inadequacy of representation by the representative parties before the court. See 39 F.R.D. at 110 (1966).

20. 39 F.R.D. at 220.
requirement,\textsuperscript{22} while in another case 101 persons were not sufficiently numerous.\textsuperscript{23} It may be expected that the case law dealing with old rule 23 will continue to apply where the new rule has retained the traditional prerequisites. In any event, the new rule carries forward the liberal power of the court to make a case by case determination by providing for a court determination of whether the class action is to be maintained.\textsuperscript{24}

Another problem carried forward from old rule 23 by adoption of similar prerequisites for a class action is the determination of class homogeneity—the requirement that questions of law or fact must be common to the class. Some cases under the old rule hold that where a purported class is divided in its view toward the position of the representative members in the controversy, no class action will lie.\textsuperscript{25} Other courts have permitted class action treatment in spite of a broad divergence in the views of the class members.\textsuperscript{26} The latter cases might be reconciled with the former group in that a less substantial minority of the

\begin{itemize}
\item \textsuperscript{22} Perkins & Co. v. Diking Dist. No. 3, 162 Wash. 227, 298 P. 462 (1931).
\item \textsuperscript{23} Tobin v. Portland Mills Co., 41 Ore. 269, 68 P. 743 (1902). The court noted that impracticability of joinder had not been shown since affidavits had been obtained from each member of the class. The case, however, seems extreme, since impracticability does not mean impossibility. The test should be convenience of judicial administration.
\item Some cases imply that a very small number of representatives per se is not likely to adequately represent a very large class:
\item The great disparity in numbers between the [actual defendant appearing in the suit] and the remainder of the class of 5000 and more, is an important fact to be considered in determining whether defendant . . . is fairly representative of the class of 5000. . . .
\end{itemize}


\begin{itemize}
\item \textsuperscript{24} See Fed. R. Civ. P. 23 (c) (1).
\item A different approach was suggested in Weeks v. Bareco Oil Co., 125 F.2d 84 (7th Cir. 1941), where the court, citing Hansberry v. Lee, 311 U.S. 32 (1940), stated at 91: “The class suit, although binding on all members for whom the suitors may speak, is not binding upon those whose interests are at variance with the position taken by the true members of the class.” In Hansberry, the Supreme Court held that a class action did not lie where the antagonistic interests of the plaintiff class were so great that due process standards were not met. See Note, Proposed Rule 23: Class Actions Reclassified, 51 Va. L. Rev. 629, 638 (1965).
\item \textsuperscript{26} See, e.g., Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 914 (9th Cir. 1964); Elliott v. Federal Home Loan Bank Bd., 233 F. Supp. 578, 590–91 (S.D. Cal. 1964) (some dissidents in class of plaintiff stockholders); Tisa v. Potofsky, 90 F. Supp. 175, 181 (S.D.N.Y. 1950).
\end{itemize}
class dissented from the position of the representative in the latter. Rather than two opposing lines of cases, there seems to be a continuum upon which the courts will draw a line at some point when the disunity of the class exceeds these factors which unify it. However, because of the inherent difficulty in drawing the line, there is uncertainty as to when a class action is maintainable. This uncertainty has not been clarified in the new rule 23.

The question of whether class claimants can aggregate for purposes of acquiring federal jurisdiction also remains unanswered under the new rule. Since it is necessary that the amount in controversy equal or exceed $10,000 for federal jurisdiction, many class actions could not be brought in federal court unless the various class members could aggregate their claims to equal the required minimum. Aggregation was permissible under old rule 23 in cases where plaintiffs constituted the class, but only in the 23(a)(1) true class action. The claims of parties in the hybrid and spurious types of class actions could not be aggregated. The distinction turned upon the nature of plaintiffs' claims as joint or common in the true class action, and several in the hybrid and spurious categories. It was believed that a plaintiff class with several claims should not be aggregated because the action was in reality only an adjudication of individual actions. Whatever merit existed in denying aggregation under old rule 23 depended on the concept of jural relationships among members of a class, thus causing the type of action to depend not upon the effects of class treatment but upon the legal relationships among individuals.

The Fifth Circuit in Alvarez v. Pan American Life Insurance Co., stated in dictum that aggregation of claims is not permissible under new rule 23 to any greater extent than under the earlier version. Plaintiffs in a consolidated action, as members of a class, sought recovery of claims under insurance contracts for themselves and other Cuban nationals similarly af-

28. See, e.g., Thomson v. Gaskill, 315 U.S. 442 (1942); Sturgeon v. Great Lakes Steel Corp., 143 F.2d 819 (6th Cir. 1944); Van DerCreek, supra note 13, at 295; Note, 46 COLUm. L. Rev. 818, 823 n.26 (1946).
29. See 3 J. MooRE, supra note 1, ¶¶ 23.08-10.
30. 10 Fed. Rules Serv. 2d 23a.62, Case 1 (5th Cir. 1967).
31. The court relied in large part upon Clark v. Paul Gray, 306 U.S. 583 (1939). The lack of authority in the new rule for a change in the aggregation rule did not permit the court of its own motion to make such a change. See also Booth v. General Dynamics Corp., 264 F. Supp. 465 (N.D. Ill. 1967) (permitting aggregation in suit by taxpayer against a public nuisance).
fected. The court, in a case decided pursuant to old rule 23(a) (3), held that plaintiffs' claims were several and distinct from claims of other contract holders and therefore could not be aggregated. The court indicated that aggregation of essentially separate claims under the new rule would be an unwarranted expansion of federal jurisdiction in violation of the traditional and exclusive power of Congress over the jurisdiction of federal courts. The case, however, seems incorrectly decided. Under the new rule, a class exists for the purposes of a class action solely out of utilitarian considerations. There remains no justification for distinguishing among types of class actions for the purposes of aggregation. Instead, once a class action is deemed proper, aggregation should be uniformly permitted as it promotes speedy and efficient adjudication of claims where individual suits would otherwise often be required.\textsuperscript{32}

The Advisory Committee's Note to the Final Draft states that the purpose of 23(b)(3) is to achieve economies of time, effort, and expense, and to promote uniformity of decision as to class members without sacrificing procedural fairness.\textsuperscript{33} Such a policy is clearly frustrated by the holding in \textit{Alvarez}. The argument of unwarranted expansion of federal jurisdiction is not persuasive since class actions have historically been available to confer federal jurisdiction where joinder has been impracticable. Moreover, under the \textit{Alvarez} reasoning, rule 23(b)(3) itself would also be an illegal expansion of federal jurisdiction from earlier rule 23(a)(3). Under the former rule 23(a)(3), potential class members were not parties to the action unless they specifically so requested whereas class members under new 23(b)(3) are included as parties to the action unless they request otherwise.

\textbf{III. PROBLEMS CREATED BY NEW RULE 23}

\textbf{A. THE SUBDIVISION (B) DISTINCTION OF NEW RULE 23}

Although new rule 23 would seem to have eliminated many of the jurisdictional difficulties of former rule 23(a)(1)-(3), the revision contains features which, in themselves, may breed undesirable varieties of litigation. The procedural differences between a 23(b)(3) action and a (b)(1) or (b)(2) action,\textsuperscript{34}

\textsuperscript{32} Cf. Simeone, \textit{supra} note 13, at 936, recommending that aggregation be permitted under all types of class actions under old rule 23.

\textsuperscript{33} 39 F.R.D. at 102.

\textsuperscript{34} In addition to the 23(b) procedural requirements, other subdivisions of rule 23 govern the procedural standards a court must
combined with the uncertain language of the draftsmen, might encourage losing parties, whether they be the party opposing the class, the class representatives, or class members previously absent, to appeal or to collaterally attack on the ground that the action was improperly categorized, and that this error materially prejudiced their rights in the lawsuit. Insofar as some of these differences within subdivision (b) are unnecessary, they should be avoided since they may well foster the type of confusing polemics which proliferated under the old rule.

Rule 23(b) (1) (A) permits class action treatment where individual adjudications with respect to each individual class member's action would, if permitted, establish incompatible standards of conduct for the party opposing the class. An example would be an action to declare a bond issue invalid or to adjudicate the rights of riparian landowners. Rule 23(b) (1) (B) permits a class action if individual adjudications would, as a practical matter, dispose of the interests of the other claimants similarly situated or would substantially impair their ability to protect their interests. Examples would be suits for corporate reorganization, to compel payment of a dividend, or to compel action by a trustee in relation to a trust res.

follow in any action which it accepts for class action treatment. Subdivision (c) (3) provides that in any class action, the court must include and describe those whom the court finds to be members of the class. This prevents class members from entering the case after judgment and participating in the award, as was possible in a spurious action under the old rule. See 39 F.R.D. at 105. Subdivision (c) (4) allows the court to divide a class into subclasses with respect to certain issues. Broad power to control the course of litigation is accorded the trial court by subdivision (d). The court may, among other orders, require notice to all class members, impose conditions on intervenors, and require that the pleadings be amended to eliminate certain persons. The court must approve all dismissals and compromises and require notice thereof to all members under subdivision (e).

35. Class members who were not represented in the class action should have the right of appeal as well as to attack collaterally, since direct attacks are preferable to collateral attacks, see Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 460 (1960), and because they satisfy the judicial test of appealability: "[A] party has an appealable interest only when his property may be diminished, his burdens increased or his rights detrimentally affected by the order sought to be reviewed." In re Michigan-Ohio Bldg. Corp., 117 F.2d 191, 193 (7th Cir. 1941).


Although the examples cited under 23(b)(1)(A) and (B) by the Advisory Committee mainly include suits for injunctive relief, suits for damages and the payment of monetary obligations are not foreclosed. Given sufficient incentive, judges might also fit a broader range of cases within the vague language of 23(b)(1). For example, where individual members of a class of creditors have claims against a fund insufficient to satisfy the aggregate amount claimed, judgment in the first suit should be, as a practical matter, dispositive of the rest within the meaning of (b)(1)(B). While rule 23(b)(2) explicitly applies only to suits for injunctive or declaratory relief, it is apparent the draftsmen would have likewise circumscribed 23(b)(1) had they so intended. Failure to do so demonstrates an intent to allow the courts leeway as to what types of damage actions are maintainable under 23(b)(1). New rule 23(b)(2) is equally susceptible to judicial expansion. Although this subsection was intended to cover primarily civil rights cases, arguably it is broad enough to cover all injunctive or declaratory class actions.

Rule 23(b)(3) is potentially the broadest in scope of the (b) subdivisions. For a class action to be warranted, it requires only that common questions of law or fact predominate over questions affecting the members as individuals, and that such a class action would be superior to other methods of adjudication. In practice, however, it is likely that (b)(3) will probably be the least used. Although all (b)(1) and (b)(2) actions will be (b)(3) actions, the courts may hold (b)(3) to embrace only those actions not cognizable within (b)(1) and (b)(2) because (b)(3) imposes three restrictive elements not contained in (b)(1) or (b)(2) actions which limit its utility. First, a class action under (b)(3) must be superior to other methods of adjudication. Exactly how rigid this requirement was intended to be is not clear. The result of this vagueness may preclude

38. One writer has suggested, however, that (b)(1)(A) and (B) will be seldom used in suits for damages, since in normal contract or tort suits for damages, either the persons affected are not sufficiently numerous to form a class or the only binding factors present are common questions of law or fact, thus placing the action within 23(b)(3). Note, Proposed Rule 23: Class Actions Reclassified, 51 VA. L. REV. 629, 646 (1965).


40. 39 F.R.D. at 102.


42. The Advisory Committee mentioned test actions and consolidated actions as “superior” methods. 39 F.R.D. at 103. A more re-
many class actions not maintainable as such under either (b) (1) or (b) (2). The numbers and types of precluded cases may go well beyond the examples cited by the Advisory Committee, thereby narrowing the availability of class action treatment to the situation which existed under old rule 23.43 This restriction seems strangely redundant and arguably unnecessary in light of the safeguards of 23 (a), especially 23 (a) (1). Second, 23 (c) (2) imposes a greater notice requirement on all (b) (3) actions which, though desirable from the point of view of fairness, makes the (b) (3) option more burdensome to the representative parties and may thereby encourage them to save expenses by attempting to avoid (b) (3). Finally, the notice pursuant to (b) (3) must advise each member that he will be automatically excluded from the class action if he so requests by a specified

restricted scope was suggested by Note, Recovery of Damages in Class Actions, 32 U. Cm. L. Rev. 768, 782-85 (1965) (no class action where large-scale joinder, administrative action, or consolidation of trials available).

43. Under old rule 23 unincorporated associations could sue or be sued as a class. See, e.g., Tunstall v. Brotherhood of Locomotive Firemen, 148 F.2d 403 (4th Cir. 1945); White v. Quisenberry, 14 F.R.D. 348 (W.D. Mo. 1953). New rule 23.2 purports to deal directly with unincorporated associations and allows them to proceed or be proceeded against as a class. However, the relationship of rule 23.2 to rule 23 is unclear. No guidance appears as to whether rule 23.2 is a classification apart from rule 23, except as it specifically refers to 23(d) and (e), or whether the terms of 23.2 are cumulative to rule 23. Because the requirements of 23(a) were thought necessary for due process reasons to maintain a class action it would seem that rule 23.2 should incorporate rule 23 at least to that extent.

Complete incorporation of rule 23 might, however, limit class action treatment of unincorporated associations. Assuming the entire rule 23 is incorporated, some cases dealing with unincorporated associations will be dealt with under 23(b) (3) and therefore be subject to the “superiority” requirement. However, since class action treatment of unincorporated associations has been viewed as merely an alternative to treatment under rule 17(b), see Tunstall v. Brotherhood of Locomotive Firemen, supra; Kaplan, Suits Against Unincorporated Associations under the Federal Rules of Civil Procedure, 53 Mich. L. Rev. 945, 955 (1955), the class action may not be “superior” to a suit against the entity under 17(b) and therefore may not be available where 17(b) applies. Of course, the tactical advantages of proceeding by class action, may serve to satisfy the “superiority” requirement in some 23(b) (3) cases. For example, under the Tunstall doctrine, if A, a resident of state X, desires to sue an unincorporated association in state Y, he may do so by class action in federal court if he can find association members in state Y, even though the association itself would not be found present there. See Developments in the Law—Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983, 1086 (1963). In this situation a rule 23(b) (3) might be superior to a suit against the association in its own state.
The decision by a court as to which category of subdivision (b) is most appropriate brings forth conflicting considerations. On the one hand, because the automatic exclusion rule of 23(c) (2) presents the possibility of successive lawsuits, courts may seek to avoid (b) (3), and may attempt to stretch the language of (b) (1) and (b) (2) to accommodate cases properly within the intended scope of (b) (3).45 In Van Gemert v. Boeing Co.,46 Boeing published notice that all debentures issued in 1958 that were not converted into stock by a certain date would be redeemed in accordance with the terms of the debenture issue. Several debenture holders who had not redeemed on time brought separate actions for relief. Boeing moved for a court order declaring the suit to be a class action, thus obviating nine pending suits in federal courts. In addition, Boeing asked that the action be classified under (b) (1) or (b) (2), but not under (b) (3), presumably to prevent class members from excluding themselves and to require all parties to be bound by the judgment. The court granted Boeing's request, holding that a (b) (3) action would permit separate litigation, unduly burdening the judicial system and contravening the stated purpose of 23 (b) (1). The court concluded that where the stricter requirements of (b) (1) or (b) (2) are met, (b) (3) is not applicable as it would run the serious risk of negating the very purpose for which (b) (1) and (b) (2) were promulgated.47

On the other hand, section 23(b) (3) also presents a contrary temptation to the courts. A member of the class in a (b) (1) or (b) (2) action, desiring to avoid being bound thereby, might subsequently appeal or collaterally attack the judgment on three grounds: that the action was properly a (b) (3) action—he should have been afforded the opportunity to be excluded as a matter of right; that another type of proceeding would have

44. Fed. R. Civ. P. 23(c) (2). The purpose of this clause is to protect the interests of individuals in pursuing their own litigation. 39 F.R.D. at 104-05. This consideration was deemed so important that the statement of (c) (2) in the Preliminary Draft to the effect that “...the court shall exclude those members who...request exclusion, unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy...” was changed in the Final Draft to read: “...the court will exclude him from the class if he so requests by a specified date...”. Fed. R. Civ. P. 23(c) (2).

45. In these cases defendants would prefer separate trials to the possible adjudication of massive liability at a single stroke. See, e.g., Kronenberg v. Hotel Governor Clinton, 41 F.R.D. 42 (S.D.N.Y. 1966).


47. Id. at 131.
been superior; or that notice was not given to all class members. To avoid the possibility of reversal on these points, courts might be tempted to construe (b) (1) or (b) (2) cases to fall within the vague language of (b) (3).48 This dilemma could be eliminated if the consequences of the choice of (b) (1), (b) (2), or (b) (3) were more nearly parallel.

This is not to suggest that there are not valid differences between the (b) (1) and (b) (2) actions on the one hand and the (b) (3) action on the other. The 23 (b) subdivisions seem to be an embodiment of the distinctions proposed by Chafee between "Solid Class Suits," and "Invitations To Come In."49 In Chafee's hypothetical "Solid Class Suit," the interdependence of interests made it necessary that all class members be in the action from start to finish, be bound by the judgment, be able to appeal from an unfavorable judgment, and generally be treated as named parties.50 The "Solid Class Suit" corresponds to the (b) (1) and (b) (2) actions. In essence, the (b) (1) and (b) (2) cases may be regarded as extensions of rule 19, which provides for the joinder of those parties the court finds essential to a fair adjudication of all interests concerned. Thus, in (b) (1) and (b) (2) cases, exclusion of class members should be discouraged and the superiority requirement is therefore not necessary.

The other type of class suit, "The Invitation To Come In," would as a matter of convenience, but not necessity, allow unnamed persons to enter the action prior to judgment, yet permit persons to remain unaffected if they elected against entry. The "Invitation To Come In" corresponds to the (b) (3) cases. Unlike the (b) (1) and (b) (2) cases, where a determination will necessarily affect outsiders, (b) (3) is designed for cases in which hardships exist for the outsiders, or in which the existence of separate claims and liabilities would call for active participation by the individuals concerned. The (b) (3) device would be analogous to both rule 24, permissive intervention, and rule 20, voluntary joinder.51 Since it rests solely on a policy of judicial convenience,

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48. See 39 F.R.D. at 103 (1966) (no exhaustive elaboration of kinds of cases within purview of (b) (3) ).
49. Z. CHAFFEE, SOME PROBLEMS OF EQUITY 259-95 (1950). The Advisory Committee's Note to the Final Draft frequently cites Professor Chafee's work and rule 23 itself corresponds with the dual classification which he proposed.
50. Id. at 283.
51. FED. R. Civ. P. 20(a) permits voluntary joinder of persons asserting joint, several, or alternative rights in the transactions or occurrences at issue and if common questions of law or fact will arise in the action. The common rights and liabilities need not be identical,
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(b) (3) would seem proper in allowing such individuals to exclude themselves.

However, the potential difficulties of misclassification of actual cases would seem to outweigh these theoretical distinctions. To remedy this problem, it would be desirable to require notice to all class members in all class actions, to eliminate the automatic exclusion rule which applies to (b) (3), and to substitute a discretionary exclusion rule.

1. Notice

Subdivision 23(c) (2) requires that the best practicable notice be given to all class members in all (b) (3) cases. There is no such requirement in (b) (1) or (b) (2) cases although the court has discretionary power under 23(d) (2) to force the class representatives to give notice to members of the class who are absent. Although most commentators have recommended a mandatory notice provision for all class action cases, the Advisory Committee adopted the limited notice requirement, presumably to allow the trial judge greater flexibility and to reduce needless expense. Problems surrounding the notice requirement are illustrated by a recent (b) (3) action where the court required individual notice to each of fifteen hundred certificate holders of a corporation, asking whether they desired exclusion from the action. After receipt of this information, the court went beyond the standards of 23(c) (2) and required further notice to remaining members, requesting statements of individual claims. Failure to submit this information would result in a dismissal of the action as to them.

However, as it is not necessary that judgment be given for or against all the persons uniformly.

52. This notice provision is more stringent than that of the Preliminary Draft, which merely specified reasonable notice. 34 F.R.D. 325, 366 (1964).
55. Id. In another recent 23(b) (3) case, the court ruled that plaintiff could not bring a class action on behalf of himself and all other "odd-lot" purchasers on the New York Stock Exchange against defendants for antitrust violations. The court decided that notice to the hundreds of thousands of other class members would be impractical, since to satisfy due process standards, notice would have to be some-
Although it is not required, it is suggested that courts require notice in all class actions under the new rule unless entirely impracticable or prohibitively expensive, thereby estopping those class members who ignore the notice from appeal or collateral attack on the basis of misclassification. In addition, mandatory notice in every case would ease due process difficulties and facilitate a precise determination of res judicata effects.

Notice in all cases will, in combination with the other fairness safeguards of rule 23, help ensure that due process standards are met, thereby enabling judgments to be binding on absent class members. The constitutionality of a judgment binding on class members who did not receive actual notice is unclear. Two earlier Supreme Court cases, *Smith v. Swormstedt*\(^5\) and *Supreme Tribe of Ben Hur v. Cauble*,\(^6\) held that a judgment could be binding on all class members without mentioning actual notice as a requirement. A later case, *Hansberry v. Lee*,\(^6\) held that a judgment did not bind defendants in a subsequent suit because their interests were so antagonistic to the representatives of the class who were plaintiffs in the prior suit that the due process requirement of adequate representation of absentees' interests was not met. Equivocal dictum in the opinion, however, indicated that procedures which ensured a full and fair consideration of the common issues might allow a judgment to be binding on absent class members.\(^5\) It is unclear from this language whether actual or constructive notice to class members is an essential element of a fundamentally fair procedure.\(^6\)

*Mullane v. Hanover Bank & Trust Co.*,\(^6\) a case decided subsequent to *Hansberry*, indicates that reasonable notice is essential to acquire jurisdiction in all types of actions.\(^5\) The issue in *Mullane* was the constitutionality of published notice to benefit-
ciaries of a trust, prior to an accounting by a corporate trustee. It is distinguishable from *Hansberry*, however, in that adequate notice to trust beneficiaries seems to be more clearly required in order that they may appear to protect their individual interests. However, this necessity is not so clear in a class action where the class representatives are charged with adequately representing the class members. *Mullane* is also distinguishable in that the Court was dealing with sufficiency of service of process for purposes of personal jurisdiction. In such cases, a stricter standard of notice should be applied than in class actions, where the concern is not jurisdictional but rather estoppel of class members from later attacking the judgment in addition to lessening the danger of collusive suits.

On the other hand, the distinction between the *Mullane* situation and class actions becomes less clear when it is considered that in the class action itself—not in subsequent litigation seeking to upset the judgment in the class action—purported class members have a strong interest in being apprised of the proceeding in order to be able to challenge the composition of the class, the adequacy of representation, or individual status as class members. Furthermore, authority already exists which indicates that the *Mullane* rule is applicable to new rule 23. The court in *Eisen v. Carlisle & Jacquelin* suggested that in a rule 23(b)(3) action the *Mullane* doctrine meant that press advertisements to a purported class consisting of thousands of persons would not pass the due process test. However, class action treatment in *Eisen* was denied, *inter alia*, because individual notice to identifiable class members was impractical due to the size of the class.

Mandatory notice in every class action would ease the more limited due process problem of the binding effect of a judgment. However, class action treatment in *Eisen* was denied, *inter alia*, because individual notice to identifiable class members was impractical due to the size of the class.

In some cases the parties opposing the class may not themselves have the incentive to contest the adequacy of representation of the class if they think they have a strong claim or defense or that the class representatives would not pursue the best interests of the class as a whole. *Cf.* Richardson v. Kelly, 191 S.W.2d 857 (Tex. Civ. App. 1946). Because of the danger that plaintiffs may pick weak members of the defendant class for suit some writers have urged more rigid standards for suits against defendant classes. See Z. Chafee, *Some Problems of Equity* 237–42 (1950); Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 Colum. L. Rev. 818, 827–29 (1946).

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63. Reasonable notice in all cases would benefit class members not actually before the court by enabling them to contribute more resources for adequate class representation, or to contest, if they felt necessary, the appropriateness of the class action.

64. 41 F.R.D. 147, 151 (S.D.N.Y. 1966).
in a class action upon members who were not present.\textsuperscript{65} Although the binding effect of a judgment in the class action can be tested only in a subsequent action,\textsuperscript{66} if notice is given in all cases, questions of res judicata are less likely to be raised at a later time and, if raised, will be more satisfactorily answered. Notice in every case will facilitate findings by courts that class members who later challenge the judgment of the class action had an opportunity to appear and contest the validity of class treatment and, having failed to seize that opportunity, are bound by the decision.

It is arguable that the advantages of reducing the possibility of attack for misclassification and of binding those parties who received actual notice are outweighed by the burdens of imposing mandatory notice in (b)(1) and (b)(2) cases. Certainly if individual service of process were required, the burden would be prohibitive in many cases. However, in class actions the due process notice requirement could be satisfied by a lesser standard, such as mailed notice. \textit{Mullane} should not require more as the purpose of notice is not to acquire jurisdiction, but merely to facilitate res judicata determinations and to lessen the danger of collusive suits. In cases in which notice by mail would be overly burdensome as, for example, in taxpayers' suits, notice could be given by publication. Although published notice per se would probably bind only those class members who read the notice\textsuperscript{67} and would thus not be valuable for res judicata, it would preclude attempts at reversal on the ground that the action was a (b)(3) action which would make lack of notice reversible error. Courts, therefore, should require notice in all class actions under their discretionary subdivision (d) power, and such notice in (b)(1) and (b)(2) cases should not have to meet the best possible test of \textit{Mullane}, but merely be the best practicable notice to effectuate the policies surrounding class actions under new rule 23.

2. \textit{Exclusion}

Subdivision 23(c)(2)(A) allows a class member who has received notice in a (b)(3) action to request the court to exclude

\textsuperscript{65} It should be noted that new rule 23(e) requires notice of dismissal or compromise in all class actions, whereas old rule 23 required such notice only in true class actions. See note 11, supra. Consistency suggests that notice of the pendency of all class action is as desirable as notice of compromise or dismissal.

\textsuperscript{66} See 39 F.R.D. at 106.

\textsuperscript{67} Allocating the burdens of proof on such an issue is beyond the scope of this Note.
him from the class. In all (b) (1) and (b) (2) cases the court has discretion to include or exclude individuals as class members. The discretionary power to exclude individuals was applicable in all cases in the Preliminary Draft and it is submitted that the rule should be amended to restore such discretion in the interest of avoiding a possible ground of attack.

An argument against the automatic exclusion rule is that in jurisdictions where mutuality has been abolished, class members who have excluded themselves will be free to sit on the sidelines with impunity awaiting a favorable judgment with which they can bind the defendant, yet remain unbound by an adverse judgment. Assuming this to be true, the same deplorable result as seen in the one-way intervention in spurious actions under old rule 23 would be present. However, this problem, as its originator later recognized, can be alleviated. Res judicata is a flexible concept and need not be used in an automatic manner to produce aberrational results. Rather, the import of the Bernhardt doctrine is to allow issue preclusion in a subsequent action only if the party against whom the collateral estoppel is sought had a full and fair opportunity to litigate the issue in the first action. If it should appear that unfairness would result in any

68. This power is implicit in 23 (c) (3) which requires the court in (b) (1) and (b) (2) cases to include and describe those whom it finds to be members of the class.

69. Note 44 supra.

70. The doctrine of mutuality will not permit a party to the second suit to claim that his opponent is bound by an issue litigated in a prior suit unless such party would also be bound had the decision of such issue gone the other way. Some states, following Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892 (1942), have abolished the doctrine. See Appendix to Currie, Civil Procedure: The Tempest Brews, 53 Calif. L. Rev. 25, 38-46 (1965). Courts in these states hold that where there is identity of issues between two suits, a party against whom judgment has been rendered in one suit is bound thereby in the other suit, even though his adversary who invokes the prior adjudication was not a party to the suit in which the judgment was rendered, and would not have been bound had the decision gone the other way. See Moore & Currier, Mutuality and Conclusiveness of Judgments, 35 Tul. L. Rev. 301 (1961), criticizing the abolishment of mutuality.

71. See 39 F.R.D. at 105.

72. See Currie, supra note 70, recanting the fears which he had earlier voiced in Currie, Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine, 9 Stan. L. Rev. 281 (1957).


way by application of collateral estoppel, due to variances in local law, collusion, or compromise in the initial suit, then the overall test of fairness would not be met. Furthermore, it is suggested that class members who take advantage of the automatic exclusion rule to remove themselves from the class action should be deemed to have waived any right to an application of collateral estoppel in their favor. Such a rule would eliminate the incentive for plaintiffs to remove themselves to the sidelines in anticipation of a favorable result, creating unfairness for the defendant and thwarting the policy of judicial expediency.

It is submitted that the policy of judicial convenience, on which class actions are based, at least in part, dictates discretionary exclusion in all cases. The automatic exclusion rule deprives the trial judge of much of the flexibility in controlling the course of litigation imparted by subdivision (d) by denying him the authority to prevent the danger of a needless succession of harassing lawsuits. Although it may be argued that judicial power to prevent class members in the (b)(3) action from excluding themselves in appropriate circumstances is an undue extension of judicial authority at the expense of party initiative, such a power is no greater than that exercised by the court under other federal rules. Rule 42 vests power in the trial court to consolidate trials involving common questions of law or fact. Rule 19 grants the court power to require joinder of persons as a prerequisite to maintenance of an action. No sound reason seems to exist for not also vesting the trial court with the discretion to decide whether or not class members may exclude themselves in a (b)(3) action.


The most recent case espousing this view is B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 278 N.Y.S.2d 596, 225 N.E.2d 195 (1967), which abolished the mutuality retirement in New York and permitted an offensive use of collateral estoppel. The test was held to be whether defendant had fully litigated in the first action those issues which were applied against him in the second action.


It seems to me that [the amendments relating to class suits] place too much power in the hands of the trial judges and that the rules might almost as well simply provide that 'class suits can be maintained either for or against particular groups whenever in the discretion of a judge he thinks it is wise.' The power given to the judge to dismiss such suits or to divide them up into groups at will subjects members of classes to dangers that could not follow from carefully prescribed legal standards enacted to control class suits.
In opposition to a uniform discretionary exclusion rule, it might be argued that the burden on the trial judge would be unduly increased if he had to consider the merits of a large number of class members' claims for withdrawal. However, this ignores the fact that many class members, without valid reasons for excluding themselves, may subsequently become involved in litigation, all of which might have been prevented had the trial judge in the first instance had the power to keep these members in the class action.

B. Conversion into Class Actions under New Rule 23

An important point about which new rule 23 is silent is whether a suit brought as a nonclass action may be converted to a class action. A distinction may be drawn between conversion on motion of the party opposing the class and conversion on the court's own initiative. The Preliminary Draft of the new rule explicitly provided that conversion could be had in either case. However, commentary on the Preliminary Draft was virtually unanimous against the power of the court to convert to a class action on its own initiative. The objections were based on the theory that parties should have the sole initiative to determine whether they should appear as individuals or class representatives and on the hypothesis that conversion would work a substantial prejudice upon the individual forced to become a class representative. Although the clause of the Preliminary Draft authorizing conversion dealt with both court and party conversion, the commentary was strangely silent with respect to conversion upon motion of a party.

The Final Draft omitted the specific authority to convert. In addition, subdivision (d) (4) of the Preliminary Draft, which gave the court power to require the pleadings to be amended to

76. Subdivision (c) (1) of the Draft provided in part that:
Where necessary for the protection of a party or of absent persons, the court, upon motion or on its own initiative at any time before the decision on the merits of an action brought as a non-class action, may order that it be maintained as a class action.

77. See, e.g., Judicial Conference of the Ninth Circuit, Report of Civil Procedure, 36 F.R.D. 209, 225 (1964); Judicial Conference of the Ninth Circuit, Supplemental Report, 37 F.R.D. 71, 82, 84, 91 (1965). These reports illustrate negative reactions of various bar groups to the proposal that courts, of their own initiative, could force private litigants into a class action.


include allegations of class representation, was eliminated. Arguably the broad language contained in subdivision (d) of the Final Draft might be interpreted to allow conversion. Specifically, 23(d)(3) permits the court to impose conditions on representative parties and 23(d)(5), which was added to the Final Draft, allows the court to make orders “dealing with similar procedural matters.” However, subdivision (d) may not expand the court’s power in this respect since it becomes operative only in the conduct of actions to which rule 23 applies. Rule 23 does not apply until an order under (c)(1) is made declaring the action to be a class action and such an order, by terms of (c)(1), may be made only in actions brought as class actions.

Notwithstanding this “legislative history,” an individual action was converted into a class action upon motion of the party opposing the class in Van Gemert v. Boeing Co.80 The court apparently assumed that its power to convert was beyond question as it did not address itself to the matter. If so, its power must have been derived from the general provisions of 23(d), as suggested above, or possibly from rule 21, which allows the court to drop or add parties on its own initiative or on the initiative of a party. Assuming the Boeing case was properly decided, it is arguable that the policies underlying conversion would allow the court to convert on its own initiative. To the extent that opposition to the Preliminary Draft was based on the potential hardship on parties forced to become class representatives, it will make little difference whether they are forced to represent absentee class members as a result of the court’s initiative or by motion of the opposing party.

To the extent the objections were based on inroads against party initiative this policy has been undercut in other areas of federal procedure. Under rule 19, of which rule 23 is in reality an extension,81 the court may order joinder of parties if their absence would prejudice the absentees’ interests or the interests of parties already before the court. Rule 21 allows the court to add or drop parties on motion of a party or on its own initiative. Further, persons may intervene in an action under rule 24 as a matter of right in some cases or at the discretion of the court in others, while rule 42 allows the court to consolidate trials involving common questions of law or fact. Inasmuch as rule 23 is an integral element in the federal multiparty procedural struc-

ture, considerations of party initiative should be no less subject to judicial control than under the related rules.

In one sense, compulsory conversion into a class action pursuant to rule 23 impinges on party initiative to a greater extent than do the provisions of rules 19 or 42. Under those rules, the court may merely add other parties who will represent themselves. In converting to a class action, a court would be requiring one party to represent an entire class, willingly or unwillingly. This might place a number of additional burdens on the representative party, including additional legal fees and the costs of notifying class members.

There is a strong policy of judicial convenience which would be furthered by allowing the court to convert to class actions. Such conversion might, apart from dismissal, be the only open avenue in the face of a holding that a nonclass action involves essential parties who cannot be served or are too numerous to be joined pursuant to rule 19. The danger of judicial exercise of this power beyond the instance where conversion is an alternative to dismissal is slight. Subdivision (c)(1) of the Preliminary Draft stated that conversion could be employed only where necessary. The Advisory Committee intended the device to apply only in exceptional situations. If this usage of conversion is correct, representative parties are not being coerced into representing absentee persons any more than in cases of threatened dismissal for failure to join indispensable parties. Moreover, protection of absentee interests will not be imperiled in light of the safeguards of 23(c) and 23(d) which impose a continuing duty upon the court to examine the propriety of class action treatment throughout the course of litigation. Finally, the distinction between party and court conversion could prove meaningless since the court may informally suggest to the parties a motion for conversion.

It would seem that conversion should be allowed at the request of a party. However, it seems wise to deny this power to the court on its own initiative in view of the strong reaction

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84. 34 F.R.D. at 386.
against that notion, which seemingly caused elimination of the sentence from the Final Draft, the availability of dismissal, and the probability that few courts will be faced with such an unavoidable decision. In any event, rule 23 should be amended to resolve this ambiguity.

IV. CONCLUSION

The new rule 23 consists of sound principles and generally workable rules. Its flexibility provides a suitable framework for courts to balance the conflicting policies of individual interests versus judicial convenience. Two general criticisms can be advanced. In the first instance, the attempt to revise the confusing and complex categories of old rule 23 has resulted in the creation of new, albeit slightly less confusing categories. The fact that serious consequences turned upon mislabeling an action under the old rule was perhaps the greatest weakness of that device. To avoid the same criticism, the new rule should be revised to eliminate the consequences of mislabeling a (b)(1) or (b)(2) action as a (b)(3) action, lest mislabeling spawn new varieties of litigation. Courts might mitigate the present defects by requiring notice to all class members in (b)(1) and (b)(2) cases. Beyond this, the requirement of (c)(2) that in a (b)(3) action any class member shall have the right to remove himself from the case should be amended so that power is vested solely in the trial judge in each instance. In addition the rule should be amended to clarify whether the court may, on its own initiative, convert a nonclass action into a class action. Since the necessity for such power is not apparent and the opposition thereto is great, arguably courts should not have such power. Further amendment is necessary, however, to determine whether, upon motion of either party, the court may convert a nonclass action into a class action. Expediency dictates that such power be provided, and judicial necessity dictates such amendments be forthcoming.
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. As amended Feb. 28, 1966, eff. July 1, 1966.