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John J. Madden
Denise G. Paully

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COMMENTS

MAKING THE CLASS DETERMINATION IN
RULE 23(b)(3) CLASS ACTIONS

I. INTRODUCTION

The 1966 amendment\(^1\) of the original rule 23\(^2\) was designed to substitute a
more functional approach to class action for the abstract conceptualism of the
old rule,\(^3\) which gave the court no adequate guide in deciding which of the three
types of class actions—true, hybrid or spurious—applied in a given case.\(^4\) Not
designed to set precise guidelines for the handling of a class action,\(^5\) it was the
new rule’s flexibility which was to be the critical factor in achieving the practi-
cal effects sought; its success, therefore, depended to a large extent on how the
district courts dealt with this flexibility.\(^6\)

One of the major purposes of the class suit device, the achievement of judi-

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1. Fed. R. Civ. P. 23 is set out in the appendix to this Comment.
2. For critical evaluations of original rule 23 see Kalven & Rosenfield, The Contempo-
   rary Function of The Class Suit, 8 U. Chi. L. Rev. 684 (1941); Keeffe, Levy & Donovan,
   Lee Defeats Ben Hur, 33 Cornell L.Q. 327 (1948); VanDercreek, The “Is” and “Ought” of
   Class Actions Under Federal Rule 23, 48 Iowa L. Rev. 273 (1963); Weinstein, Revision of
   Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433 (1960); Note, Federal
3. Advisory Committee’s Note on the Proposed Rule of Civil Procedure, 39 F.R.D. 98,
   98-99 (1966) [hereinafter cited as Advisory Committee Notes]; Wright, Class Actions, 47
   L.J. 1204, 1214-15 (1966) [hereinafter cited as Cohn]; Newberg, Orders in the Conduct
   of Class Actions: A Consideration of Subdivision (d), 10 B.C. Ind. & Com. L. Rev. 577,
   578 (1969) [hereinafter cited as Newberg]; Speech of Charles A. Wright, Third Judicial
   Circuit Conference, Sept. 9, 1966, in Proceedings of the Twenty-Ninth Annual Judicial Con-
   ference of the Third Judicial Circuit, 42 F.R.D. 437, 563 (1966) [hereinafter cited as
   Wright Speech].
4. See Advisory Committee Notes 98; cf. Preliminary Draft of Proposed Amendments to
   For historical overviews of class actions see Cohn 1213-28; Ford, The History and De-
   velopment of Old Rule 23 and the Development of Amended Rule 23, 32 Antitrust L.J. 254
   (1966); Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Fed-
   eral Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 375-400 (1967) [hereinafter cited as
5. See Advisory Committee Notes 99; Frankel, Some Preliminary Observations Concerning
   Civil Rule 23, 43 F.R.D. 39, 40 (1967) [hereinafter cited as Frankel]; Wright, Class
   Actions, 47 F.R.D. 169, 170-71 & n.7 (1970). Indeed, the trial court was invested with broad
   latitude in handling each case, in an attempt to insure the procedural fairness lacking under
   the original rule. See, e.g., Dolgow v. Anderson, 43 F.R.D. 472, 481 (E.D.N.Y. 1968), rev’d
   on other grounds, 438 F.2d 825 (2d Cir. 1970); Advisory Committee Notes 106; Frankel,
   supra at 45; Newberg 577.
6. One commentator has suggested that if the courts choose not to follow this flexible
   approach, the rule should be further amended. Ford, Federal Rule 23: A Device for Aiding
cial efficiency through the reduction of separate units of litigation,\textsuperscript{7} was of particular import to actions instituted under subdivision (b)(3). Such actions were designed to ensure economies of time, effort and expense.\textsuperscript{8} The class action brought under this subdivision was premised upon a commonality of legal or factual questions among the class members;\textsuperscript{9} the question of binding effect of the judgment, which had been left open under the original rule, was answered by providing that the judgment bound those persons who fit within the court's definition of the class.\textsuperscript{10} Under the old rule's spurious class action, absentees were required to "opt-in" to the class to avail themselves of the judgment. This "permissive joinder" provision was dealt with in the amendment by providing that all class members would be bound unless they took affirmative steps to exclude themselves—"opt-out"—from the class.\textsuperscript{11}


8. Advisory Committee Notes 102-03.

9. See Wright Speech, supra note 3, at 564.

10. Advisory Committee Notes 99. See 3B J. Moore, Federal Practice \[\S\] 23.02[1], at 125-26 (1974); Frankel 43; Wright, Class Actions, 47 F.R.D. 169, 181 (1970). Absent members have standing to attack the judgment purporting to bind them in a later suit, and it is the latter court which determines the res judicata effect of the judgment. Advisory Committee Notes 105-06. See Note, Proposed Rule 23: Class Actions Reclassified, 51 Va. L. Rev. 629, 658 (1965); cf. Note, Collateral Attack on the Binding Effect of Class Action Judgments, 87 Harv. L. Rev. 589 (1974).

11. One of the abuses which the amended rule sought to correct was the "one-way intervention" sometimes permitted under the old rule, whereby absent class members, who previously had not opted-in, were in some instances permitted to intervene after a judgment favorable to the class. By removing the necessity of a class member's intervention, the amended rule eliminated this problem. Advisory Committee Notes 105-06; see Newberg 578. However, the provision that all absentees were deemed members of the class unless they exercised their option to exclude themselves was one of the most criticized features of the rule prior to its adoption. See Committee on Federal Rules of Civil Procedure, Judicial Conference, Ninth Circuit—Supplemental Report, 37 F.R.D. 71, 76-77 (1965); part IV infra. As a practical matter, on the average less than one percent of those sent notice opt-out, Pomerantz, New Developments in Class Actions—Has Their Death Knell Been Sounded?, 25 Bus. Law. 1259, 1266 (1970) [hereinafter cited as Pomerantz], and only 10 to 15 percent of those remaining file claims once liability has been established or a settlement approved. Simon, Class Actions—Useful Tool or Engine of Destruction, 55 F.R.D. 375, 379 (1973) [hereinafter cited as Simon].
Although it was initially felt that the reasonably strict definition of the 23(b) (3) action would preclude the institution of a great number of suits under this subdivision,\(^12\) (b) (3) has become the primary vehicle employed to recover for financial injury to large groups of potential claimants.\(^13\) Because it provides a forum to victims of securities frauds, antitrust violations, and other consumer wrongs who otherwise would be without the élan or financial resources to institute individual actions, the class action device has been characterized as "one of the most socially useful remedies in history."\(^14\) This function of "taking care of the smaller guy" has come to be considered an additional purpose of the rule.\(^15\) Increasing criticism, however, has been based on the observation that the in terrorem effects of being sued by a large class of potential claimants are so overwhelming that even if a defendant has a fair chance of ultimately proving the plaintiff's claim to be frivolous, he is compelled to settle prior to trial.\(^16\)

Whether rule 23 has in fact accomplished its purposes is unresolved. Questions have been raised as to the potential abuse of the rule 23(b) (3) action by client solicitation through the use of the notice device;\(^17\) as to whether the absent class

\(^{12}\) Wright Speech, supra note 3, at 567. See Frankel, Amended Rule 23 From a Judge's Point of View, 32 Antitrust L.J. 295, 296 (1966).


\(^{14}\) Pomerantz 1259. See also Ford, supra note 6, at 504-05; Frankel, Amended Rule 23 From a Judge's Point of View, 32 Antitrust L.J. 295, 298 (1966); Kaplan, A Prefatory Note, 10 B.C. Ind. & Com. L. Rev. 497, 500 (1969).

\(^{15}\) See Ford 504; Frankel, Amended Rule 23 From a Judge's Point of View, 32 Antitrust L.J. 295, 298-99 (1966); Kaplan, A Prefatory Note, 10 B.C. Ind. & Com. L. Rev. 497, 500 (1969); Katarincic & McClain 430.


Although only approximately 10 to 15 percent of those who do not opt-out ever bother to file claims after settlement has been reached, one judge has noted that: "[a]s in any litigation, the pressure on the defendant to buy his peace through settlement cannot be totally eliminated. It exists in every individual litigation, and we all acknowledge and deal with it in settlements every day. The trial judge may, however, use his discretion to reduce the effect of possible abuse in these class actions, and when they are suitably controlled, the balance of possible abuse against social advantage, it seems to me, is tolerable." Weinstein, Some Reflections on the "Abusiveness" of Class Actions, 38 F.R.D. 299, 302 (1973) [hereinafter cited as Weinstein].

\(^{17}\) The notice requirement under (c) (2) can be abused by the class representative's counsel not only by the solicitation of new clients, but also by the solicitation of funds for fees and expenses from the absent class members. See Manual for Complex Litigation, 1 Pt.
members actually benefit through the (b)(3) action; and as to whether the amended rule in fact has achieved its objective of reducing litigation. Its prophylactic effect of providing the semi-public function of precluding a defendant from retaining the profits of illegal activity has been both praised as remedying "socially destructive conduct" and criticized as inconsistent with the purposes of rule 23 by effecting a shift "from compensation to confiscation.

In apparent anticipation of the myriad of complex problems which this innovative rule would almost inevitably generate, the revisers invested the trial court with broad discretionary powers to conduct the litigation fairly and deal with the problems of managing such large, complex cases. It is at this level where

2 J. Moore, Federal Practice pt. 1, § 1.41, at 28 (1973) [hereinafter cited by section and page as Manual]; 3B J. Moore, Federal Practice §§ 23.45[1 n.1, at 701 & § 23.45[3 n.7, at 802 (1974); Katarincic & McClain 430; Note, Federal Rules of Civil Procedure: Rule 23, The Class Action Device and Its Utilization, 22 U. Fla. L. Rev. 631, 639 (1970). The opt-out provision has led one commentator to observe that the rule is not only a device for solicitation, but also one for conscription. Pollock 742 (noting that "the great mass of class members know nothing of the class suit, exercise no genuine choice, and (at least in consumer class actions) typically receive no share of the proceeds even if the case is ultimately settled." Id. at 744.).

18. See Pollock. It has been alleged that the only person who benefits from a class action is the attorney who brings it. See Blecher, Is the Class Action Rule Doing the Job? (Plaintiff’s Viewpoint), 55 F.R.D. 365, 366 (1973) [hereinafter cited as Blecher]; Handler 9-10; Katarincic & McClain 430. In fact, the revision of rule 23 led one plaintiff's attorney to write: "let me...welcome you back to the affluent world of endless depositions, national discovery programs and large retainers." Donelan, The Advantages and Disadvantages of a Class Suit Under New Rule 23, As Seen by the Treble Damage Plaintiff, 32 Antitrust L.J. 264 (1966).

Concern has been expressed that since the rule combines great incentive for unprofessional conduct by lawyers with little potential to benefit their clients, it seriously threatens public confidence in the judiciary and the bar. Simon 390-94. One commentator, however, has argued that "the instances of abuse by counsel seem to be so few as not to be worthy of serious discussion." Miller, Problems of Giving Notice in Class Actions, 58 F.R.D. 313, 334 (1973).

19. Critics have observed that far from reducing litigation, (b)(3) actions have flooded the courts. ACTL Report 13; Simon 377. Suits are now maintained as class actions which would never have before been brought as individual actions because each individual claim is too small. See, e.g., 3B J. Moore, Federal Practice §§ 23.45[3], at 802 (1974); Katarincic & McClain 435; Pollock 742. But see Kaplan, A Prefatory Note, 10 B. C. Ind. & Com. L. Rev. 497 (1969); Weinstein 300.

20. Blecher 374. See 3B J. Moore, Federal Practice §§ 23.45[3], at 808 (1974); Homberger, State Class Actions and the Federal Rule, 71 Colum. L. Rev. 609, 642 (1971); Katarincic & McClain 430; Pomerantz 1260; Weinstein 305. To others, however, this is not sufficient justification for class actions in light of the tremendous burdens imposed on the courts and the small benefit derived by class members. See, e.g., ACTL Report 22; Handler 6-8. But it can be argued that whenever the law is enforced effectively and a guilty defendant brought to justice, all society derives a benefit, at least indirectly; benefit cannot be defined solely in terms of immediate financial gain.


these issues must be addressed and resolved, and where the viability of rule 23 ultimately will be determined:

To the judiciary must be committed the responsibility for balancing all of the competing interests: the innocent defendant should not be raped; the avaricious lawyer should not be rewarded and the guilty defendant must not be permitted to profit.23

Both fairness to the parties and preservation of the economies of time and expense can be achieved most effectively through a circumspect approach to the class determination—24 the point during the litigation at which the court decides whether to allow the suit to proceed as a class action. It is at this pre-trial stage where the court must balance these “competing interests” and it is suggested that a broad-based, closely supervised discovery and pre-trial procedure is the most effective vehicle for attaining this goal. Without rushing head-long into the initial class determination, the trial court should ensure that it has before it an adequate factual foundation upon which to decide whether class treatment is appropriate, thereby dispelling frivolous or abusive suits at their inception, and providing those with meritorious claims the forum to which they are entitled.

Although it would be disingenuous to assume that one’s disposition toward the use of these pre-trial procedures would not be influenced by his attitude toward the class action device generally, it is suggested that the discriminating application of the various discovery techniques can most efficiently achieve the balance necessary to accomplish the rule’s objectives while preserving procedural fairness. The major areas of controversy relating to the class determination center on the point in the litigation at which the class determination is to be made, the viability of the “conditional” allowance of the class, the burden and quantum of proof necessary to support a class certification, and the responsibility of the representative party, the opposing party and the absent class members to respond to the various forms of discovery. It is through the application of the various techniques discussed below that, in making the class determination, the courts can ensure that all the requirements of the rule have been satisfied before “unleashing the powerful forces which a class determination necessarily produces.”25

II. WHEN THE CLASS DETERMINATION IS TO BE MADE:
THE VIABILITY OF THE “CONDITIONAL” CLASS ACTION

Rule 23 sets out the prerequisites which must be met in order for an action to proceed on behalf of a class,26 and also authorizes the court to allow class


24. See Kaplan, supra note 4, at 390. “The object is to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party. The new provision invites a close look at the case before it is accepted as a class action and even then requires that it be specially treated.” Id.


status on a "conditional" basis. Whether this contemplates a class certification without the requirements of 23(a) and (b) first having been satisfied is unclear and, therefore, the various approaches followed by the courts in this regard hardly have been consistent.

Some courts have rejected the idea that the class determination should be deferred pending discovery or an evidentiary hearing in order to develop an adequate factual foundation, indicating that the "findings" required by rule 23 may be sufficiently gathered from pleadings and affidavits. But the current leaning of the courts appears to be towards a more restrained approach in the utilization of the class action device. Although the rule itself calls for a class determination at the earliest practicable stage in the litigation, it is difficult to see how a bona fide class determination can be made without first having established the necessary factual foundation upon which to base the decision. Nevertheless, asserting their authority to allow class status conditionally and following the rule's directive that the class determination be made "as soon as practicable," courts have granted class status on a tentative basis before the plaintiff representative has demonstrated the necessary compliance with the criteria set out in the rule. In Seligson v. Plum Tree, Inc., for example, the court conditionally allowed class status pending discovery even though the plaintiff had not demonstrated the requisite predominance of common questions. Other courts have conditionally allowed the class action and postponed the issuance of the required notice to absent class members until the factual issues pertaining to the satisfaction of the requirements of rule 23 have been more fully developed through discovery.

32. See, e.g., Abercrombie v. Lum's, Inc., 345 F. Supp. 387, 388 (S.D. Fla. 1972); Wolfson v. Solomon, 54 F.R.D. 584, 591 (S.D.N.Y. 1972); Siegel v. Chicken Delight, Inc., 271 F. Supp. 722, 728 (N.D. Cal. 1967), modified sub nom. Chicken Delight, Inc., v. Harris, 412 F.2d 830 (9th Cir. 1969); Fischer v. Kletz, 41 F.R.D. 377, 386 (S.D.N.Y. 1966). But see Richland v. Cheatham, 272 F. Supp. 148, 155 (S.D.N.Y. 1967), where the court, discussing Fischer v. Kletz, criticized such a procedure, stating: "[w]ithout notice, the most essential element of the class action—that those absent be bound—is missing; what was in effect ordered was a consolidation and not a class treatment. We do not approve of the practice of declaring an action a class suit with all its attendant problems with a warning that
Unresolved in such cases where class status has been granted without a preliminary finding that each of the requirements of rule 23 has been satisfied is the question whether the language and concept of rule 23 actually allows for such a procedure. Does the authority to allow class status conditionally, coupled with the court's discretionary power under 23(d), permit the court to defer its findings as to the satisfaction of the prerequisites of 23(a) and 23(b) in initially determining whether a suit may proceed on a class basis? Arguably, rule 23(c)(1) renders all class determinations conditional by their very nature; the Advisory Committee pointed out that the determination "once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound." Thus, the court is provided with the necessary flexibility to establish subclasses, or otherwise to deal with the administrative and judicial complexities which the class suit generates, or even to revoke its original ruling if facts develop which indicate that the class device is not the most effective means of proceeding toward an adjudication of the plaintiffs' claims. But, particularly in the large, complex class actions, the designation of class status before sufficient factual information has been presented demonstrating satisfaction of the rule's requirements would seem both to contradict the language of the rule itself and to frustrate the economies it was designed to achieve. To allow a suit to proceed on a class basis, where a consideration of all the relevant facts might indicate that it is unwarranted, results in a substantial waste of time, effort and expense when information subsequently uncovered reveals the impropriety of the class suit. It also increases the possibility of disproportionate settlements since an affirmative class determination places the plaintiff in a significantly more advantageous bargaining it may not so continue. It is preferable to proceed by consolidation and intervention without prejudice to subsequent class action treatment if, upon further development of the litigation, it appears appropriate. Such a procedure is consistent with the direction of the rule that class treatment be directed as soon as practicable."

33. For other cases where class status was conditionally granted pending further discovery, see, e.g., Forbes v. Greater Minneapolis Area Bd. of Realtors, 61 F.R.D. 416, 418 (D. Minn. 1973); In re Career Academy Antitrust Litigation, 60 F.R.D. 378, 381 (E.D. Wis. 1973); In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 283-84 (S.D.N.Y. 1971); Cusick v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 317 F. Supp. 1022, 1026 (E.D. Pa. 1970); City of Philadelphia v. Embart Corp., 50 F.R.D. 232, 235-36 (E.D. Pa. 1970); Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42, 45 (S.D.N.Y. 1966); cf. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 570 (2d Cir. 1968) ("It may be that in some situations it is better at the outset to decide that the proceeding may be prosecuted as a class action and leave for later resolution some of the debatable matters, such as the sufficiency of the representation or the notice to be given, or the feasibility of meeting problems of judicial administration."). But see Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir.), cert. granted, 414 U.S. 908 (1973).

34. Advisory Committee Notes, supra note 3, at 104.

35. See Cannon v. Texas Gulf Sulphur Co., 53 F.R.D. 216, 220 (S.D.N.Y. 1971) ("Here plaintiffs have failed to satisfy the requirements of Rule 23(a), and class treatment, whether conditional or not, is inappropriate.").
III. THE QUANTUM OF PROOF NECESSARY TO SUPPORT THE CLASS ACTION DESIGNATION: THE QUESTION OF PROBABILITY OF SUCCESS ON THE MERITS

In order for an action to proceed on a class basis, the plaintiff must satisfy the court38 that the class is sufficiently numerous to render joinder impracticable; that common legal or factual questions exist among the class members; that his claims are typical of those of the class, and that he will adequately represent the class.39 Additionally, in order to qualify as a (b) (3) class action, the plaintiff must show that common questions predominate over those affecting only individual members, and that the class action device is superior to any other method of adjudication.40 While rule 23 expressly requires that the class representative satisfy these criteria, some courts have required that the plaintiff additionally demonstrate a reasonable probability of success on the merits as a condition to qualifying for class status.41 Although this requirement generally has

36. The Manual, supra note 17, points out the need for an expeditious class determination, and emphasizes that "in no event should there be a tentative determination of a class action request for the purposes of settlement." Id. § 1.40, at 25. "Before any settlement negotiations occur, there should be a class action determination." Id. § 1.46, at 54. In defense of its position, the Manual notes, inter alia, that until the court has made the findings required by rule 23 as to the satisfaction of the rule's criteria for class status there is no assurance that the absent class members will be represented adequately in the settlement negotiations. Furthermore, the "appropriate membership of the class and the identity of the members cannot be determined in the absence of an opportunity for hearing and judicial findings of fact and conclusions of law." Id. at 55.

37. In City & County of Denver v. American Oil Co., 53 F.R.D. 620 (D. Colo. 1971), the court cautioned that "the prodigious number of class actions presently being filed in this and all other federal courts with their inevitable concomitant problems of judicial administration require that careful thought be given to the determination which must be made." Id. at 623.


been imposed where the court has been entertaining the class action question at a preliminary evidentiary hearing, most courts have rejected such a requirement both within the context of a preliminary hearing42 and without.43 The Second Circuit in Eisen v. Carlisle & Jacquelin (Eisen III)44 rejected the use of a preliminary “mini-hearing” on the merits to determine which party was to bear the cost of notice to the class after the class determination had been made. Implicit in its opinion is disapproval of a hearing on the merits for the purpose of deciding the class action issue itself.45 Pointing out that the class determination is not dependent on the existence of a cause of action,46 and wary of “pre-trying” the issues prior to the class determination,47 other courts have expressed reservation with regard to such an inquiry into the merits. In their opinion, such inquiry is more properly initiated through the summary judgment procedure or by motion to dismiss for failure to state a claim.48 Alternatively, many courts


45. 479 F.2d at 1015-16.

46. Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir.), cert. denied, 398 U.S. 950 (1970) ("A suit may be a proper class action, conforming to Rule 23, and still be dismissed for failure to state a cause of action.").


48. See, e.g., Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1015-16 (2d Cir.), cert. granted,
have required a minimal demonstration that plaintiff's class status claim is neither frivolous nor speculative.\(^4\)

Although the concern which has been expressed with regard to pre-trying the case or infringing on the summary judgment procedure is certainly valid, the apparently conflicting language of the various courts is more a semantic than a substantive difference with regard to the type of evidence to be produced. The gradational distinctions between the evidence necessary to demonstrate that the pertinent requirements of rule 23 have been satisfied, that the plaintiff's claim is not frivolous, and that there exists a reasonable likelihood of success on the merits are often difficult to discern.\(^5\) While the court would not be considering the evidence for the purpose of prematurely deciding the merits, the fact that some of the evidence pertaining to the merits would be before the court should not deter it from considering this information in determining whether the requirements of rule 23 have been met. An informed resolution of the class action issue usually necessitates an analysis of some of the issues and nature of proof to be raised at trial in order to determine questions relating to manageability, the commonality of questions, and whether such common questions predominate.\(^6\)

As was recently observed by the Court of Appeals for the Fifth Circuit:

"On the merits" is an elusive term at best, not wholly suitable as a guideline in this situation. In a sense much that a plaintiff alleges with respect to his individual claim goes to the "merits" of his claim. . . . It is inescapable that in some cases there will be


\(^6\) 50. See Blecher, Discovery and Trial, 41 Antitrust L.J. 240, 241 (1972).

overlap between the demands of 23(a) and (b) and the question of whether plaintiff can succeed on the merits.52

While the actual merits of plaintiff's claim would remain undecided for the purposes of such an inquiry, this "overlap"53 would appear almost inevitable in a complex class action where "an analysis of the issues and the nature of proof which will be required at trial is directly relevant to a determination of whether the matters in dispute are principally individual in nature or are susceptible of proof equally applicable to all class members."54 Such a procedure would not constitute a pre-judgment of the suit.55 The resulting class determination, however, would provide the parties with a firm basis for an evaluation of the relative strengths of their positions.56 Summary judgment or dismissal motions may then be appropriate; settlement negotiations may be initiated upon the basis of an informed estimate of the extent of the class and the potential exposure of the defendant, or further discovery may be allowed followed by a full trial on the merits. By following such a procedure, a judgment on the merits is not reached solely because proof pertaining to the major issues is presented. Since rule 23 expressly requires that the above-mentioned prerequisites of 23(a) and the additional requirements of 23(b) (3) be satisfied in order for a suit to proceed as a 23(b) (3) class action, a court should not be dissuaded from requiring proof on these issues for the reason that some of the same evidence may be necessary in deciding the substantive worth of the plaintiff's claim. Recognizing this distinction of purpose, the court will ensure compliance with rule 23 and thereby be in a position to establish firmly whether the action before it falls within the parameters of the rule.57

53. Such an overlap was evidenced by the court's language in Grad v. Memorex Corp., 61 F.R.D. 88 (N.D. Cal. 1973), where it allowed a rule 10b-5 suit to proceed as a class action, stating: "Although this court has not preceded the [class action] ruling today with a preliminary trial on the merits... it has determined, with the benefit of extensive briefing and the fruits of the parties' discovery, that plaintiffs' claims are not insubstantial, that indeed on their face they have substantial merit." Id. at 95.
55. But if every issue has been brought before the court at the preliminary hearing, the case would then be ripe for a motion for summary judgment. See Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968), rev'd, 438 F.2d 825 (2d Cir. 1970), on remand, 53 F.R.D. 664 (E.D.N.Y. 1971), aff'd, 464 F.2d 437 (2d Cir. 1972).
56. See Weinstein, supra note 16, at 304.
57. The use of a preliminary hearing on the merits, however, has generated support by the commentators. See National Institute for Consumer Justice, Redress of Consumer Grievances 31 (1973); Blecher, supra note 18, at 370; Katarincic & McClain, supra note 13, at 437, 439 et seq.; Leader, Threshold Prerequisites to Securities Fraud Class Actions, 48 Texas L. Rev. 417, 427 (1970); Weinstein, supra note 16, at 303-04; 40 U. Colo. L. Rev.
IV. GATHERING THE INFORMATION NECESSARY FOR THE CLASS ACTION DETERMINATION

A. Discovery Among the Parties

In addition to the issues relating to the timing of the class determination, and the quantum of evidence necessary to support a class designation, there remains the question of the means through which this information is to be ascertained.

It is the plaintiff's burden to establish that the action meets the requirements of rule 23.\(^5\) The bare allegation that he has fulfilled these requirements should not be sufficient to establish class status.\(^6\) Since sufficient information necessary to satisfy the rule's requirements is generally not ascertainable from the pleadings and affidavits alone, it is fundamental that some form of discovery is necessary to provide the court with a basis for its judgment as to the efficacy of class status. What limitations, if any, should the court place on the scope of discoverable matter at this stage, and how closely supervised should the discovery process be? The court must strike a fine balance between effecting the broad purposes of rule 23 and protecting both parties—the defendant from attempts to stir up unwarranted litigation or efforts designed purely for client solicitation, and the plaintiff from the tactical abuses to which the discovery process is readily susceptible.

In *City of New York v. International Pipe & Ceramics Corp.*,\(^6\) the Second Circuit commented favorably on the use of extensive discovery by means of interrogatories which the trial court had directed so as to ascertain information relating to all the requirements of rule 23 in order to establish a reliable foundation for its class determination.\(^6\) Other courts have followed a similarly cautious approach.\(^6\) A policy of closely supervised discovery of this nature, where fairly

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\(^5\) See note 38 supra.


\(^6\) 410 F.2d 295 (2d Cir. 1969), aff'g 44 F.R.D. 584 (S.D.N.Y. 1968).

\(^6\) Id. at 297. The court of appeals pointed out that the trial judge's determination had been made "[a]fter having the nature and scope of the prospective trial thus unrolled before him, having had an opportunity to examine the interrogatories and answers thereto...and after having heard extensive oral argument on the class action issue..." Id.

and properly employed, can work both to maintain the courts as receptive to bona fide class claims and to eliminate at an early stage those which either do not fall within the contemplation of the rule or which can be adjudicated more appropriately in another fashion.

While the rule "contemplates that depositions or other proof may be utilized to establish the propriety of the class action,"63 few courts have addressed the question as to whether any limitations or restrictions should be imposed on the scope of discovery to which the parties may be subjected prior to the class determination. While discovery relating to the merits of the action would be inappropriate at this preliminary stage,64 discovery has been allowed with respect to the class status question itself, including "the nature and extent" of both the class and the transactions in order to establish the boundaries of the class, "so long as plaintiffs are [not] abusing the discovery rules so as to harass defendants ...."65 In Doyle v. Bresler's 33 Flavors, Inc.,66 the court directed that pre-class-determination discovery proceed on the issues of whether a class existed and, if so, the dimensions of the class and the adequacy of the plaintiffs as class representatives.67 It is at this preliminary stage that the court must determine whether and to what extent to allow discovery to proceed. In Branch v. Reynolds Metals Co.,68 defendants objected to plaintiffs' interrogatories on the ground that they related to the class allegation and, since the court had not yet approved class status, that they were irrelevant to the action at that point.69 The court found that if these objections were sustained, it would "place plaintiffs' counsel in the anomalous position of not being able to sustain its class contentions for

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64. The Manual, supra note 17, § 1.40, at 25, recommends that a separate schedule for discovery on the class action issue should be established if necessary for the class determination, but it stipulates that this usually should not proceed at the same time as merit discovery. See In re Ampicillin Antitrust Litigation, 55 F.R.D. 269, 272 (D.D.C. 1972).
67. More specifically, the court ordered that discovery be limited to: "1. [a]ll issues relevant to the particular claims of the named plaintiffs; 2. [t]he issue of whether there is a class of plaintiffs similarly situated to the named plaintiffs; 3. [t]he dimensions of such a purported class of plaintiffs; and 4. [t]he issue of whether the named plaintiffs can adequately represent such a purported class of plaintiffs.” Id. at 92,468. See also Margolin v. First Nat'l City Bank, Civil No. 72-1689 (S.D.N.Y. July 21, 1972), where the court granted defendant's motion to stay discovery "except for limited discovery relating directly to determination of the propriety of maintaining this action as a class action, and the adequacy of plaintiff as a class representative ....” Id.
69. Id.
lack of evidentiary support, yet unable to adduce such support by reason of its inability to prove class standing," and ordered the discovery to proceed. Many courts have implicitly reached a similar conclusion and allowed discovery of defendants' documents and records in order to ascertain the limits of their class.

Although a bona fide class claim should entitle the plaintiff representative to information relating to the class action issue, in order to avoid abuse such as client solicitation, the court should ensure that the plaintiff has presented at least "some evidence" supporting the maintainability of the class action before subjecting the defendant to the burden of producing large amounts of information. As has been pointed out by Judge Mansfield, "the purpose of the pre-trial discovery rules ... is to enable the parties to prepare for trial with respect to their own bona fide existing claims, not to determine whether third parties may have similar claims." Without a "minimal showing of substance" to the class action contention, the plaintiff should not be permitted to compel the defendant to assume the burden of producing such information or to open its books to someone who otherwise would be without right to inspect them. In order to avoid placing the class representative with a valid class claim in the anomalous position described in Branch, the court must make a careful examination of the plaintiff's class allegations at the earliest stage of the litigation. If warranted by a prima facie showing in the pleadings and affidavits, the court should then allow such discovery to proceed on the specific issues relating to satisfaction of the rule 23 requirements. Such a procedure would provide the plaintiff with the means of ascertaining the information necessary to substantiate the class action allegation and would protect the defendant from the abuses to which the rule may be susceptible.

This does not mean that the entire burden of discovery rests upon the defendant. The importance of uncovering sufficient information to determine the viability of proceeding on a class basis also requires that the plaintiff representative assume an equal responsibility of responding to requests for information.

During the course of the Plumbing Fixture Cases, the court dis-

70. Id. at 495. In order to permit such discovery to proceed the court tentatively allowed class status.


73. Id.

74. Rossin v. Southern Union Gas Co., 472 F.2d 707, 712 (10th Cir. 1973): "[Plaintiff] relied upon a theory that discovery and evidentiary hearing were hers as a matter of right, without even a minimal showing of substance as to her class action claims or any substantial need.

missed the plaintiffs' action for failure to respond to interrogatories which had requested such information as each plaintiff's name and address, the year his house was built, purchased, and/or renovated, whether the house contained particular plumbing fixtures, and the name of the manufacturer of such fixtures. The plaintiffs had claimed to represent a nationwide class of homeowners, and the court noted that the sanction of dismissal was "particularly appropriate in complex antitrust litigation ... where efficient and effective discovery procedures are essential to orderly adjudication." At this stage of the litigation, all relevant information within the reach of the class representative should be discoverable insofar as it goes to the issue of the maintainability of class status.

Notwithstanding the foregoing conclusions, yet another question remains: to what extent is the class representative responsible for gathering information from those members of the class who have not actively intervened in the suit? If the plaintiff's claim is validly a class action, the identity of at least some of the class members should be within his reach or he would not have been able initially to assert that there were "others similarly situated." With the representative's own factual data relating to the class motion and that which he is able to ascertain from a sampling of the purported class members, he should be able to produce some evidence supporting the maintainability of class status before the defendant is compelled to produce information. If the plaintiff intends to be a true representative of his class, this places no extra or unexpected burden on him. Moreover, it removes the possibilities of his bringing a frivolous class claim, turning the class action into a device for client solicitation or placing an unjust and ultimately unnecessary discovery burden on the defendant.

B. The Role of the Absent Class Member

While the above procedures employed with respect to the representative parties and their party-opponents may oftentimes provide the court with sufficient factual data upon which to base a class action determination, the additional problem remains as to the status of the absent class members, or potential class members and to what extent, if any, their participation may be required in the course of the litigation. Although it invests the trial court with broad discretion-

76. Id. at 16.
77. Id. at 19. "[P]laintiffs' answers to Defendants' Interrogatories are totally inadequate and fail to provide essential information critical to the determination of which, if any, of the many plaintiffs in the present litigation are entitled to recover damages." Id. at 15. In Stavrides v. Mellon Nat'l Bank & Trust Co., 17 Fed. Rules Serv. 2d 1126 (W.D. Pa., Oct. 17, 1973), the court granted defendant's motion to compel answers to questions posed to the class representatives respecting possible unethical conduct on the part of plaintiffs' counsel as relevant to the issue of whether a class action should be allowed.
78. In Dennis v. Norwich Pharmacal Co., 17 Fed. Rules Serv. 2d 126 (D.S.C. 1973), on deposition plaintiff could name only three other individuals who would be members of the class. "A bare allegation of numerosity such as this does not meet the requirements of Rule 23(a)(1), as such is mere unsupported speculation on plaintiff's part." Id. at 128. Cf. Demarco v. Edens, 390 F.2d 836, 845 (2d Cir. 1968).
ary power in the development and control of the litigation, 79 rule 23 includes no express provision requiring affirmative action on the part of absent class members. 80 It was the apparent intention of the 1966 revision to ensure absentees membership in the class unless they exercised their option to exclude themselves. 81 However, in the absence of an express mandate to the contrary, courts have permitted various forms of inquiry to be submitted to absentees. Such courts have grounded their authority on rules 23(d) and 23(c)(3), and authorized such a procedure under two basic circumstances: (1) where the court deemed such information or data necessary in order to ensure that the foundation upon which the initial class action determination was made is adequate. 82

and, (2) where such information is shown to be necessary to the defendant's defense on the issue of liability.83

The major question to be considered in determining the desirability of the employment of such a procedure is whether the potential benefit to be derived from its use is outweighed by the possible deleterious effects on the class action concept. On the one hand, the accumulation of such information relating to the class determination may be of assistance in revealing the scope of the litigation, in reducing the trouble and expense of subsequent notices which might be required, in providing the parties with a knowledgeable basis upon which settlement negotiations may be initiated, and in providing the court with a basis for an informed re-appraisal of the class action issue or the possible desirability of establishing subclasses.84 On the other hand, there exists the risk of discouraging persons with otherwise meritorious claims from remaining in the class through the intimidation generated in a layman by a confusing legal document, or by burdening them with the responsibility of obtaining assistance through counsel—a result which rule 23 was specifically designed to obviate. Additionally, where the sanctions of dismissal or exclusion from the class are imposed against non-responding members, the defendant may be able to employ the procedure as a tactical device to reduce the size of the class.

The proof of claim form that is mailed to the class member with the notice of the class action, or the "dual notice" device (whereby the claim form is sent separately following the notice), have been the vehicles most commonly adopted by the courts in obtaining information from absent class members. The proof of claim form's predominant use has been in antitrust actions brought by governmental entities on behalf of other such entities and sub-agencies.85 While the utilization of the claim form in these cases generally has been restricted to obtaining information pertinent to the class status question,86 the propriety of its application has been justified on the grounds that the class members were readily identifiable; that their respective claims were substantial enough to


86. See, e.g., Minnesota v. United States Steel Corp., 44 F.R.D. 559, 577 (D. Minn. 1968), where the court directed that the requested information include the name of the claimant, the amount of purchases and dates thereof for which claim was made, the firm through which the steel was bought, and the end use made of the product.
justify the expense of filing the claims; that they were less likely to be confused
or intimidated by the claim form, and that their records of the relevant trans-
actions were readily ascertainable.87

The propriety of the proof of claim device, however, becomes more dubious
when dealing with classes of consumers and other individual purchasers lacking
the resources and sophistication of the more substantial governmental agencies.88
In the Drug Cases, for example, the proof of claim form had been employed with
respect to the governmental entity class,89 but rejected in dealing with the class
of retail drug purchasers, "none of whom may have a claim large enough to
justify the expense of preparing a proof of claim form until they are assured of a
recovery."90 It is in this area that the risks of deterring claimants from remaining
in the class are most apparent and the proof of claim device is most sus-
ceptible to abuse. The two possible sanctions which may be imposed against a
non-responding member—dismissal of his claim with prejudice and exclusion
from the class—may be criticized as unnecessarily harsh or inconsistent with rule
23.91 However, if applied, they serve to magnify the need to balance the necessity
of such information against the adverse effect the procedure may have on the
purpose of rule 23. Dismissal with prejudice has the double effect of "locking a
member into a class but closing the door to any benefits he might derive there-
from."92 Exclusion from the class, although an apparent reversion to the old
rule's opt-in requirement, bars the claimant's participation in the class but does
not preclude his initiation of an independent action.93

Pa. 1968), however, only required that the members of the governmental entity class file a
statement of intent to prove their individual damages in order to recover, stating: "I see
no reason why those class-members who do not elect exclusion from the class may not be
required to take some kind of minimal affirmative action as a condition of ultimate recovery.
"Id. at 459. See Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 403 (S.D. Iowa
1968), aff'd, 409 F.2d 1239 (8th Cir. 1969).

88. But see Harris v. Jones, 41 F.R.D. 70, 74-75 (D. Utah 1966), where the court al-
lowed proofs of claim to be submitted to individual purchasers of securities with the sanction
of dismissal for failure to respond.


Pfizer, Inc. v. Lord, 449 F.2d 119 (2d Cir. 1971) (per curiam). However, the court did express
its willingness to conduct a "sampling" of the claims of class members within a repre-
sentative state or subdivision. Id. at 288.

91. See Blecher, supra note 18, at 372. The Manual characterizes the use of the man-
datory proof of claim as a "clear abuse of discretion." Manual, supra note 17, § 1.45, at 47.
See also 7A C. Wright & A. Miller, Federal Practice and Procedure § 1787, at 159 (1972);
Patrick & Cherner, Rule 23 and the Class Action for Damages: A Reply to the Report of
the American College of Trial Lawyers, 28 Bus. Law. 1097, 1105 (1973). However, "[b]ecause
the proof-of-claim statement may serve an important function, the best approach is to con-
sider the desirability of its use on the basis of the facts in each case." 7A C. Wright & A.
Miller, supra (footnote omitted).

92. Newberg, supra note 3, at 590.

93. Although the excluded class member would retain standing to bring a subsequent
As a third, and certainly less severe approach, the court in *Korn v. Franchard Corp.* adopted an "optional" proof of claim procedure, whereby no penalty was imposed on those non-responding members. Recognizing the advantage which the claim form provides in determining the size of the class and the adequacy of representation, Judge Mansfield nevertheless concluded that "[u]nless and until liability to the class is established or seems reasonably certain . . . members should not be barred for failure to track down this information, even though such a requirement might later be a reasonable condition to their participation in any recovery, assuming liability is established." Wary of reversion to the disadvantages of the old rule, the court was reluctant to impose the requirement of mandatory response as a condition to eligibility for class membership. The court implicitly found the value of the requested information substantially outweighed by the potential harm to the class action concept, and ruled that the absent members would be unaffected by a failure to respond.

There has been commentary supporting the use of the proof of claim device. Pollock, supra note 16, at 750-51; Ward & Elliott, The Contents and Mechanics of Rule 23 Notice, 10 B.C. Ind. & Com. L. Rev. 557, 567-68 (1969) ("A procedure as helpful as that requiring the class members to state their claims prior to a specific date certainly should not be condemned until some class member demonstrates that this procedure has indeed prejudiced his rights." Id. at 568.). But see Committee on Federal Courts, Class Actions—Recommendations Regarding Absent Class Members and Proposed Opt-In Requirements, 28 Record of N.Y.C.B.A. 897, 904-07 (1973). Compare id. at 907-09 (minority report). It seems plausible to assume that this area of the law will be affected by the recent Supreme Court decision in *Zahn v. International Paper Co.*, 94 S. Ct. 505 (1973), wherein the Court held that all members of the class in a suit based on diversity must meet the jurisdictional amount in controversy requirement. Presumably, a court will be compelled to make inquiry of absent class members when jurisdiction is based on diversity in order to determine which of the absent members in fact are subject to its jurisdiction.


95. Id. at 60. Here, the court grounded its authority to use the proof of claim device on rule 23(c)(2) requiring the court ultimately to determine who the class members are.

96. Id. Judge Mansfield noted a "fundamental inconsistency in providing, on the one hand, that a member who fails to request exclusion shall be included in the class and, on the other hand, that a member who fails to file a proof of claim shall be excluded from any recovery." Id. (emphasis omitted). However, once liability has been established or a settlement approved, the proof of claim form has been employed as a condition to monetary recovery. See, e.g., Ziems v. LaMorte, 459 F.2d 628 (2d Cir. 1972); Manual, supra note 17, § 1.45, at 48.

97. It is interesting to note the results of the court's procedure: claim forms were sent to over 1,000 purchasers—one-third were returned undelivered, 233 responses were received.
Once the class determination has been made, a similar analysis is appropriate with regard to whether absent class members may be required to submit to interrogatories relating to the defendant’s defense on the issue of liability.\textsuperscript{98} While courts have rejected the use of such interrogatories under the circumstances of the cases then at bar,\textsuperscript{99} they have concurrently recognized, either expressly or impliedly, their discretionary power to allow the submission of reasonable interrogatories to class members at appropriate times and for essential purposes\textsuperscript{100}—presumably situations in which the requested information is of which 77 (representing 111 persons) requested exclusion, and, of those who did not request exclusion, 80 to 90 percent did not fill out the forms adequately. 456 F.2d at 1207-08. On appeal, the Second Circuit attributed the results to the fact that the class members were laymen and confused by the language of the form. Id. at 1210-11.

A similar approach was followed in Arey v. Providence Hosp., 55 F.R.D. 62 (D.D.C. 1972). Although a 23(b)(2) class action based on alleged discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. (1970), the court employed the proof of claim device to provide necessary information as to the scope of the class and the alleged discrimination, but followed Korn in declining to impose a bar to recovery for failure to respond. The court recognized the need for such information to allow it “to rule more intelligently in future determinations regarding the boundaries of the class, the need for sub-classes, or even a re-evaluation of the class status designation itself.” 55 F.R.D. at 71. More recent cases utilizing the proof of claim device have followed Korn in declining to make response mandatory. DeMilla v. Cybernetics Int'l Corp., [Current Binder] CCH Fed. Sec. L. Rep. ¶ 94,364 (S.D.N.Y. Jan. 16, 1974); Unicorn Field, Inc. v. Cannon Group, Inc., 60 F.R.D. 217, 227-28 (S.D.N.Y. 1973); cf. Abulan v. R.W. Pressprich & Co., 51 F.R.D. 496, 497 (S.D.N.Y. 1971). But see Forbes v. Greater Minneapolis Area Bd. of Realtors, 61 F.R.D. 416 (D. Minn. 1973). Having conditionally allowed class status, the court recognized the necessity of factual development in order for it to pass upon “proposed refinements and revisions of the class definition,” (id. at 418), and noted that the large, unspecified class presented “an aspect of uncertainty which should be promptly resolved.” Id. Stating that “fairness, economy and efficiency in the administration of this action” would be served by the use of the dual notice device, the court indicated that those class members who do not opt out should take some affirmative action as a condition of ultimate recovery. Id.

\textsuperscript{98} Since many courts have adopted the use of the bifurcated trial, separating the issues of liability and individual damages, questions as to damages may be postponed until liability has been established and thus would not be relevant in determining the class action question. See, e.g., Green v. Wolf Corp., 406 F.2d 291, 301 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969); Gardner v. Awards Marketing Corp., 55 F.R.D. 460, 462 (D. Utah 1972); City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 67 (D.N.J. 1971). Separate trials for damages and liability are recommended by the Manual, supra note 17, § 4.12, at 136-38. However, due process questions have been raised as to such a procedure. See Simon, supra note 11, at 386.


\textsuperscript{100} In Gardner v. Awards Marketing Corp., 55 F.R.D. 460 (D. Utah 1972), the proposed interrogatories, relating primarily to the question of damages and the relevant product
critical to the issue of liability and is unavailable from any other source. The principal objection is that treating absent class members as if they were parties conflicts with the design of rule 23, and would necessarily emasculate the rule. In *Brennan v. Midwestern United Life Insurance Co.*, the Seventh Circuit addressed this conflict between the competing interests of the absent class members in remaining passive and the defendant in having the ability to ascertain necessary information for its defense. The court held that under certain circumstances, absent class members may be required to submit to discovery under rules 33 and 34, and that the sanctions of rule 37 may be imposed to compel compliance with such discovery orders. In so ruling, however, the court stipulated that "[b]efore ordering such discovery, a trial court must be assured that the requested information is actually needed in preparation for trial and that discovery devices are not used to take unfair advantage of 'absent' class members." Although a fair treatment of the apparent needs of the defendant may call for the response of absent members to certain court-approved inquiries, imposing the sanction of dismissal with prejudice against non-responding class members seems unduly harsh. Some of the absent class members actually may never have received the form; others, although in receipt of it, may have misconstrued it or have been so confused by it that they declined to take any action whatsoever, unaware of the resulting penalty. Exclusion from the class would effectively accomplish the desired result without imposing upon the absentee

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102. 450 F.2d 999 (7th Cir. 1971), cert. denied, 405 U.S. 921 (1972) (affirming the district court's dismissal with prejudice of the claims of absent class members for failure to respond to discovery under Rules 33 and 34), noted in 40 Fordham L. Rev. 969 (1972); 40 U. Cin. L. Rev. 842 (1971).

103. 450 F.2d at 1004-05. The court found, in rule 23(d), discretionary power in the trial court to enter such orders where the discovery is "necessary or helpful to the proper presentation and correct adjudication" of the action, as long as "adequate precautionary measures are taken to insure that the absent member is not mislead or confused." Id. at 1005. Cf. Minnesota v. United States Steel Corp., 44 F.R.D. 539, 532 (D. Minn. 1968), where the court allowed defendants to pose "transaction" interrogatories to absent class members after the proofs of claim had been filed.

104. 450 F.2d at 1006.
double burden of dismissal with prejudice.\textsuperscript{106} Whatever device a court may adopt in gathering information from the absent members of a class, a specific rule of general applicability is difficult to formulate. In each case the court must balance the necessity of obtaining such information either for its own use or for the defense to liability, against the potential prejudice to the absentees and to the class action concept itself.\textsuperscript{106}

Traditionally, the courts have grounded their authority to submit the various inquiries to class members on their discretionary powers under rule 23(d);\textsuperscript{107} the sanctions of rule 37 for failure to respond to discovery are limited to parties to the action.\textsuperscript{108} Although whether the court may impose any sanction on class members for failure to respond may turn on the answer to the corollary question of whether such persons are parties to the action, a dispositive resolution of their status is not to be derived from the language of rule 23 itself. The courts have displayed no consistency in the application of party or non-party status to the absentees.\textsuperscript{109} Although it may be argued that the issue is one of academic significance only, and that questions as to the propriety of requiring some form of action on the part of the absentees should be decided on the basis of the facts in each case, a general perspective may be of assistance in providing appropriate guidelines for consideration in dealing with specific problems.

The absent class member is bound by the res judicata effect of the judgment and has standing to appeal a settlement\textsuperscript{110} or to attack the judgment collaterally on the basis of inadequacy of representation.\textsuperscript{111} While his citizenship is not relevant in a (b)(3) diversity action,\textsuperscript{112} each class member is required to satisfy the jurisdictional amount requirement.\textsuperscript{113} Counterclaims are assertable against

\begin{enumerate}
\item The Seventh Circuit, in Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), cert. denied, 405 U.S. 921 (1972), referred to the absent class members as “absent parties.” Id. at 1005. The Supreme Court in Hansberry v. Lee, 311 U.S. 32 (1940), in dealing with the question of the adequacy of representation of the class referred to the absent members as “not formal parties,” id. at 42; “absent parties,” id. at 42, 44, 45; and “parties who are represented, though absent.” Id. at 43.
\item Sertic v. Cuyahoga Lake Carpenters Dist. Council, 459 F.2d 579 (6th Cir. 1972).
\item Hansberry v. Lee, 311 U.S. 32 (1940).
\item Collins v. Bolton, 287 F. Supp. 393, 399-400 (N.D. Ill. 1968).
\item Zahn v. International Paper Co., 94 S. Ct. 505 (1973), aff’d 469 F.2d 1033 (2d Cir. 1972) (“Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount....” Id. at 512.).
\end{enumerate}
absent class members, although courts have recognized the problems regarding when they may be asserted and whether mention of the counterclaim should be included in the required notice to the class regarding the class action suit. It has been held that absent class members would not be liable for costs even though they would be bound by the judgment and the courts have approached questions concerning various forms of communication with absent or potential class members in diverse fashions. While some of these courts have referred to the absent class members as "parties" or "non-parties," the terms appear to have been used more for the purposes of resolving collateral issues than before the court than for a conclusive resolution of the absentees' status.

In the recent case of *American Pipe & Construction Co. v. Utah*, the Supreme Court held that, where class action status had been denied for failure to satisfy the 23(a)(1) numerosity requirement, "the commencement of the original class suit tolls the running of the statute [of limitations] for all purported members of the class who make timely motions to intervene" after the class action


115. Welt v. Continental Ill. Nat'l Bank & Trust Co., 60 F.R.D. 5 (N.D. Ill. 1973) (expressing view that "class members who file claims become 'parties' (for the purpose of Rule 13(a)) and that compulsory counterclaims must then be filed against them or be barred." Id. at 8.); Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 485, 489 (S.D.N.Y. 1973) (counterclaims not assertable against individual class members until they enter to prove damages after liability has been established).


117. Lamb v. United Sec. Life Co., 59 F.R.D. 44, 48 (S.D. Iowa 1973) (holding that absent class members were not parties and would not be liable for costs even though otherwise bound by the judgment). But see Deutscher v. Illustrated World Encyclopedia, Inc., Civil No. 72-4086 (S.D.N.Y. Jan. 18, 1974) (including provision in notice that class members may be liable to share proportionately the costs of the action if unsuccessful).

118. See, e.g., Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc., 435 F.2d 770, 773 (2d Cir. 1972) (permitting defendant to negotiate settlements with potential class members prior to the class determination); Bottino v. McDonald's Corp., 1973-2 Trade Cas. ¶ 74,810, at 95,619 (S.D. Fla. 1973) (authorizing both sides to communicate with potential class members to ascertain factual information relative to the class action issue); cf. Berley v. Dreyfus & Co., 43 F.R.D. 397 (S.D.N.Y. 1967). But see Vance v. Fashion Two Twenty, Inc., 16 Fed. Rules Serv. 2d 1513 (N.D. Ohio 1973); Merit Motors, Inc. v. Chrysler Corp., 1973-1 Trade Cas. ¶ 74,288 (D.D.C. 1972); In re Int'l House of Pancakes Franchise Litigation, 1972 Trade Cas. ¶ 73,854, at 91,627-28 (W.D. Mo. 1972) ("The Court does not believe that the defendant should be permitted to negotiate, in any way, individual settlements, such as release or covenant not to sue, or any other device, with the individual members of the existing class of plaintiffs.").

had been disallowed. Although the Court did not directly address the question of the absentees' status for the purpose of general application, it pointed out that once the class action is allowed and the notice is sent, "they are either non-parties to the suit and ineligible to participate in a recovery or be bound by a judgment, or else they are full members who must abide by the final judgment...."

In the case at bar, the Court stated that "the claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue." Although the language used by the Court may be limited to the facts of the case, at least inferentially there was a recognition of the direct relationship which the institution of the class action has on the purported class member. Remarking that pending the class determination the absentees were "mere passive beneficiaries" of the action, the Court noted that "[n]ot until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case." What responsibilities the class member might be required to undertake as a condition to ultimate recovery in the event that liability were established was not discussed in the opinion; however, at that stage, he would no longer be the passive beneficiary of the proposed class action. The implication is that the role of the absent class member is left to the trial court. The application of such an interpretation merely serves to re-emphasize the need for a circumspect approach in the exercise of the trial court's discretion with regard to obtaining necessary information from absent class members. Although within its discretionary power to order such discovery, the court must carefully analyze the need for such information either for its class determination or for the defendant's defense on the issue of liability. The court must consider whether the information is otherwise ascertainable from the class representative, defendant or other source, and whether the employment of such a procedure may be inappropriate in light of the potential adverse effects on the absent class members and the class action concept itself.

V. THE PRELIMINARY HEARING

In order to effectuate compliance with rule 23(c)(1)'s directive that the class determination be made "as soon as practicable" upon the institution of the class suit, it is incumbent upon the trial court to devise the most expeditious methods for reaching its decision on the class action issue. However, the court concurrently must ensure that an adequate factual basis has been established indicating that the class action requirements have or have not been fully satisfied. While the Advisory Committee pointed out that this determination rests "on

120. Id. at 766.
121. Id. at 764.
122. Id. at 765 (emphasis added).
123. Id.
satisfaction of the terms of [23](a) and the relevant provision of... (b),¹²² the rule itself provides no guidelines for a procedure by which to make the decision.

As one method of ascertaining whether a particular action is suited for class treatment, some commentators¹²⁶ and courts¹²⁷ have endorsed the preliminary evidentiary hearing, recognizing it as a useful tool for bringing before the court the necessary information upon which to base its class determination. Although, in a few cases the class determination has been made solely on the basis of the pleadings and without the benefit of discovery,¹²₈ some form of discovery has been allowed by most courts.¹²⁹ The preliminary hearing is not designed as an alternative to, or a substitute for, the appropriate party discovery procedures; rather it is a complementary device at the disposal of the courts which can provide the means for more ready resolution of the class action issue. At the pre-

¹²⁵ Advisory Committee Notes, supra note 3, at 104. The burden is on the party seeking to make use of the class action device to establish satisfaction of these prerequisites. See note 38 supra.

¹²⁶ See, e.g., Manual, supra note 17, § 1.40, at 22-26, suggesting that at the evidentiary hearing, the opposing party should be afforded the opportunity to refute the findings; Blecher, supra note 18, at 368; Kaplan, supra note 4, at 390; Weinstein, supra note 16, at 303-04. The Manual also notes that “[i]n some cases, where the issues are simple, or are otherwise fully developed in stipulations or full factual briefings, it is conceivable that the class action determination can be made without a hearing. But in most class action applications, the factual issues respecting whether the requirements of Rule 23 are met will be sufficiently complex to require a hearing.” Manual § 1.40, at 24-25 n.22 (citation omitted). See also note 57 supra.


¹²⁸ See note 25 supra and accompanying text.

liminary hearing, the parties argue the class action question before the court on
the basis of the previously discovered information and submitted affidavits. Such
a procedure gives the court the opportunity to resolve the class action issue
within an adversary context, and to reach an expeditious resolution of the issue.
Nevertheless, a few courts, even while allowing party discovery to proceed, have
specifically disapproved of the preliminary hearing prior to the class determi-
nation. Such decisions have been based on the objections that the preliminary
hearing is unnecessarily duplicative of trial, deprives the plaintiff of a jury
trial in cases where he has a right to one, and imposes an additional burden on
both the court and the parties. However, because of the special problems
facing both the court and the parties in a class action, the critical importance of
either a certification or a denial of class status warrants the scrutiny with which
the court must approach the class action issue through a closely supervised
schedule of discovery together with the more direct means of the preliminary
hearing. The possible injustice to the potential class member by the disallowance
of the class action without a proper consideration of all the facts, or to the
defendant by the allowance of a class action on the same basis, contravenes both
the equitable design of the rule itself and the economies it was intended to
achieve. Although critics have described the process of discovery in connection
with a preliminary hearing as violative of the rule's mandate that the class
determination be made "as soon as practicable," the actual practicability of

130. See, e.g., Miller v. Mackey Int'l, Inc., 452 F.2d 424, 427 n.4 (5th Cir. 1971); Guar-
1972); Sunrise Toyota, Ltd. v. Toyota Motor Co., 55 F.R.D. 519, 534 (S.D.N.Y. 1972);
Lamb v. United Sec. Life Co., 59 F.R.D. 25, 40 (S.D. Iowa 1972); Wolfson v. Solomon,
54 F.R.D. 584, 589-90 (S.D.N.Y. 1972); Weiss v. Tenney Corp., 47 F.R.D. 283, 289 n.2


133. See Wolfson v. Solomon, 54 F.R.D. 584, 589 (S.D.N.Y. 1972); Berland v. Mack,

134. The denial of class status may often leave the small claimant without a forum in
which to present his claim. "There is, in fact, no other available method; no other suits
are pending and this one will die if class suit status is now denied." Korn v. Franchard
Corp., 456 F.2d 1206, 1214 (2d Cir. 1972). Whether denial of the class action motion is an
unappealable interlocutory order which may sound the "death knell" of the action has been
a controversial subject itself. Compare Eisen v. Carlisle & Jacquelin (Eisen I), 370 F.2d
119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967) with Hackett v. General Host
Corp., 455 F.2d 618 (3d Cir.), cert. denied, 407 U.S. 925 (1972) and King v. Kansas City
S. Indus., Inc., 479 F.2d 1259 (7th Cir. 1973) (per curiam). See also Note, Managing the
Large Class Action: Eisen v. Carlisle & Jacquelin, 87 Harv. L. Rev. 426, 428-29 n.17
(1973).

135. Class actions are a creation of equity. See Kaplan, supra note 4, at 376 et seq.

136. Courts have rejected preliminary evidentiary hearings on this basis. See, e.g., Eisen
v. Carlisle & Jacquelin (Eisen III), 479 F.2d 1005, 1016 (2d Cir.), cert. granted, 414 U.S.
908 (1973); cf. Berland v. Mack, 48 F.R.D. 121, 126 (S.D.N.Y. 1969); Fogel v. Wolfgang,
rendering the decision without a comprehensive consideration of the class action contention is questionable. A court cannot decide whether a class will be manageable unless and until it has some idea of the limits of the purported class, the nature of the evidence to be presented at trial, the major issues and whether such issues predominate over individual questions. The utilization of the preliminary hearing in conjunction with the discovery process ensures the foundation for a sound class determination upon which the parties may confidently rely in subsequent negotiations, thereby disposing of the issue as efficiently and conclusively as possible.

VI. CONCLUSION

Although a rule of procedure as flexibly written as the current rule 23 is susceptible to the various forms of abuse which have aroused the criticism of both courts and commentators, this Comment has attempted to deal with some of the procedures which can be utilized for the proper application of the rule with due regard for obviating such potential abuses. While it is ultimately in the hands of the trial judge as to whether the rule, as it is presently written, can fairly and efficiently accomplish its objectives, it is worthwhile to repeat the observation of Judge Frankel:

[T]he time when a hard [class] determination is "practicable" as to the propriety of a class action will obviously vary from case to case. In some cases, discovery may be necessary in order to ground a judgment as to the extent and nature of an alleged class; inquiries of one kind or another may be appropriate in order to appraise the adequacy of representation, the availability of procedures different from and better than a class action, the extent of other litigation on the same subject, and other pertinent considerations. In such situations, it may not be possible to decide even tentatively near the outset of the case whether it should continue as a class action. It may be possible only to formulate a program of discovery and study under as stringent a timetable as the circumstances will allow, and then to reschedule the subject for determination under (c)(1).

It is with this flexibility in mind that the above discussed pre-trial procedures can be employed most effectively by the trial court in reaching a sound class determination. A suggested schedule for this pre-trial procedure would include:

1. Evidentiary Hearing. The preliminary hearing should be held by the court in conjunction with the limited discovery of (2). While refraining from reaching a determination as to the merits of the plaintiff's claim, the court should ensure that a sufficient factual basis is established upon which to base the class determination.

2. Controlled Discovery. Once plaintiff has come forward with a minimal showing of substance to his class action contention, a schedule of limited discovery should be established in order to provide plaintiff with reasonable discovery to substantiate the class action requirements, to provide the defendant a like

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138. Frankel, supra note 5, at 41-42.
opportunity to rebut, and to provide the plaintiff with the ability to ascertain essential information from the defendant in order to respond properly to defendant's inquiries relating to the class action issue.

3. Absent Class Members. Due to the burden they place on the absentee and the questionable value in most cases, inquiries posed to the absent class members should be allowed only upon a showing of special necessity where such essential information is not forthcoming from the parties. Its fairest use probably would be on a "sampling" basis, and the harsh sanction of dismissal with prejudice for failure to respond should be avoided except under the most unusual of circumstances.

Ultimately, such a circumspect approach would serve to better effect the administration of justice, the conservation of both judicial time and expense, and the design of rule 23.139

John J. Madden and Denise G. Paully

APPENDIX

FEDERAL RULES 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

139. Judge Mansfield has suggested recently an approach which would permit limited discovery to proceed under court strictures; he advocated a cautious approach coupled with a searching threshold inquiry and analysis, while insuring that the class determination not be based on the merits. He also suggested the discriminating use of the proof of claim device. Remarks of Judge Mansfield at the Ass'n of the Bar of the City of N.Y., Nov. 13, 1973.
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 finding 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; Judgement; 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 judgement, 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 judgement, 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.