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Class Actions and the Uniform Class Actions Act: Function and Structure

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CLASS ACTIONS AND THE UNIFORM CLASS ACTIONS ACT: FUNCTION AND STRUCTURE

I. INTRODUCTION

A Uniform Class Actions Act[1] (UCAA) has been recently drafted and approved by the National Conference of Commissioners on Uniform State Laws.[2] The final version, adopted by the Conference by a vote of fifty to one, is the result of five tentative drafts and two years of work by a drafting committee composed of judges, law professors, and practicing lawyers.[3] Although the UCAA represents a compromise[4] and occupies the middle ground in a highly controversial area, if adopted it would facilitate the bringing of representative actions in state courts.

The class action was originally developed by courts of equity as an efficient judicial device designed to adjudicate common claims involving numerous parties.[5] It is generally recognized[6] that the first fully litigated decision sustaining a class action, *Brown v. Vermuden*,[7] arose in equity 300 years ago although the origin of the class action concept may be much older than that.[8] Some states still recognize a common law action[9] but class actions today are primarily based upon statute or rule. Prior to the drafting of the UCAA these statutes and rules could be divided into three types. The first type of statute is based upon the 1849 amendments to the New York Field Code which was the initial attempt to codify the

1. UNIFORM CLASS ACTIONS [ACT] [RULE] [hereinafter cited as UCAA]. A copy of the UCAA is appended to this comment.

2. National Conference of Commissioners on Uniform State Laws, 645 N. Michigan Ave., Chicago, Ill. 60611.

3. Vestal, *States Need Machinery for Handling Class Actions*, Uniform Law Memo 10 (Spring/Summer 1977). Professor Vestal was the chairman of the drafting committee for the UCAA.

4. *Id.*

5. Wheaton, *Representative Suits Involving Numerous Litigants*, 19 CORNELL L.Q. 399, 401 (1934).

6. J. POMEROY, EQUITY JURISPRUDENCE § 246, at 467-68 (5th ed. 1941); J. STORY, COMMENTARIES ON EQUITY PLEADINGS § 94 (1838).

7. 22 Eng. Rep. 796, 802 (Ch. 1676). Reverend Carrier, subsequently replaced as Vicar of Worselworth by Reverend Brown, sued both miners and owners of the lead mines of Derbyshire to establish a one-tenth interest in the mines because the miners were not paying their tithes.

8. Marcin, *Searching for the Origin of the Class Action*, 23 CATH. U.L. REV. 515, 516 (1974).

9. *See, e.g.*, People v..City of Chicago, 73 Ill. App. 2d 184, 219 N.E.2d 548 (1966); Evans v. Progressive Cas. Ins. Co., 300 So. 2d 149 (Miss. 1974).

pre-existing equity law on representative suits.[10] A second type of state statute follows the original version of the class actions rule, Federal Rule of Civil Procedure (FRCP) 23, adopted by the Supreme Court in 1938.[11] The third type mirrors the present version of FRCP 23, a 1966 revision of the original rule.[12]

The accessibility of federal courts as a forum for class actions has been limited[13] and two recent decisions by the United States Supreme Court, *Zahn v. International Paper Co.*[14] and *Eisen v. Carlisle & Jacquelin*,[15] have further severely reduced this accessibility. In *Zahn*, the Court held that each of the class members, not just the representative parties, in a diversity action under FRCP 23 must satisfy the $10,000.00 jurisdictional minimum amount or be excluded from the class.[16] In *Eisen*, the Court required that personal notice be given to all identifiable class members in a FRCP 23(b) type action with costs to be borne by the plaintiffs.[17] Because of the difficulties involved in bringing a state class suit under statutes based upon the Field Code and the original FRCP 23, in response to the *Zahn* and *Eisen* decisions, and in recognition of the growing number of multistate class actions, the Conference undertook to prepare the UCAA.[18]

A result of compromise, the UCAA has already been criticized from both conservative[19] and liberal[20] viewpoints. These critics appear to agree however, that the Act allows for excessive judicial discretion. Such criticism seems to be unfounded.[21] The UCAA may be considered as both an "act" and a "rule." It was designed for use by state court judges

10. *See, e.g.*, CAL. CIV. PROC. CODE § 382 (West 1967); CONN. GEN. STAT. § 52-105 (1958).

11. *See, e.g.*, IOWA CODE R. CIV. P. 42 (1975); MO. REV. STAT. § 507.070 (1969).

12. *See, e.g.*, ARIZ. REV. STAT. ANN. R. CIV. P. 23 (West 1973); DEL. CODE ANN. CH. CT. R. 23 (Mitchie 1975).

13. Snyder v. Harris, 394 U.S. 332, 338 (1969). The Supreme Court ruled that in a diversity suit brought as a class action, the claims of the individual class members could not be aggregated to satisfy the $10,000 jurisdictional requirement.

14. 414 U.S. 291 (1973).

15. 417 U.S. 156 (1974). There are eight reported *Eisen* opinions: 417 U.S. 156 (1974); 479 F.2d 1005 (2d Cir. 1973); 391 F.2d 555 (2d Cir. 1968); 370 F.2d 119 (2d Cir. 1966); 54 F.R.D. 565 (S.D.N.Y. 1972); 52 F.R.D. 253 (S.D.N.Y. 1971); 50 F.R.D. 471 (S.D.N.Y. 1970); 41 F.R.D. 147 (S.D.N.Y. 1966).

16. 414 U.S. at 301.

17. 417 U.S. at 176-77.

18. UCAA, Prefatory Note.

19. Scher, *Uniform Class Actions, A Critical View*, 63 A.B.A.J. 840 (1977).

20. Moore, *Uniform Class Actions, Does It Go Far Enough?*, 63 A.B.A.J. 842 (1977).

21. The UCAA has also been subject to attack for being inflexible and too specific in its provisions. Statement of the Section of Public Utility Law, American Bar Association on the Proposed Uniform Class Actions Act 6 (Nov. 9, 1976).

who have not handled many class suits and who need the specificity of the UCAA's provisions for guidance.[22] The twenty-two provisions of the UCAA are certainly more detailed than FRCP 23. FRCP 23 was itself recognized as a broad outline of general policies and directions[23] and was criticized for the amount of discretion left to the trial judge.[24] It will be shown that the specificity of the UCAA's provisions raises some obvious but unanswered questions.

Thus, the UCAA has already provoked disagreement concerning one of its fundamental aspects, that of specificity versus judicial discretion. The UCAA has been adopted in modified form by Pennsylvania.[25] As additional states consider the UCAA, debate over its form, purpose, and various provisions is likely to become more intense, since it contains some innovative and highly controversial sections.[26]

II. FUNCTION

Before examining six of the UCAA's more interesting provisions for some of the issues and questions which they raise, it is first necessary to review the underlying policy questions which a state legislature contemplating enactment of the UCAA should address. Since the structure of an effective act must be determined by the function it is intended to serve, careful consideration of the following questions will determine the form in which future class action statutes will be enacted.

A. What is the Primary Purpose of the Class Action?

In order to draft an effective class action act, a state legislature must first determine what it views as the primary purpose of the class action. This is the key question. One viewpoint is that the class action should serve the traditional purpose of litigation, which is recovery to each

22. Vestal, *States Need Machinery For Handling Class Actions*, Uniform Law Memo 8 (Spring/Summer 1977).

23. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 52 (1968). Judge Frankel viewed the discretionary aspects of FRCP 23 not as an invitation to exercise power but as a challenge to use labor and imagination to form a huge body of procedural common law. For a contrasting view by Justice Black, see note 24 *infra*.

24. I particularly think that every member of the Court should examine with great care the amendments relating to class suits. It seems to me that they 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."

Statement of Justice Black dissenting to Amendments to Rules of Civil Procedure, 383 U.S. 1029, 1035 (1966).

25. 1977 Pa. Legis. Serv. R. Civ. P. 1701-1716, at 261.

26. *See* Vestal, *Uniform Class Actions*, 63 A.B.A.J. 837 (1977).

individual plaintiff or class member.[27] It is under this class action concept that the strict requirements of case or controversy, personal jurisdiction, individual notice, individual measure and recovery of damages, and existing rules regarding solicitation and attorney's fees are rigidly followed. Under this view, the amount of prospective individual recoveries may be so insignificant as not to justify the time and expense of litigation.[28]

The contrary approach is that individual recovery is inherently difficult to achieve and thus the primary purpose of the class action should be the disgorgement of ill-gotten gains and the deterrence of socially undesirable conduct which results from the threat of litigation. Just as a wrongdoer should not be allowed to retain damages from a one million dollar injury to one person, he should not retain damages from a one dollar injury to a million people. The focus is on the wrongdoer and not upon the injured party as in the more traditional approach, although there may still be individual recovery.[29] Requirements such as individual notice to each class member are no longer as significant, and concepts such as fluid recovery[30] and attorneys' fee awards in successful injunction actions become significant.[31] The importance of the distinctions between the viewpoints is particularly apparent when dealing with factual situations involving a large number of class members, each with an individually small amount of potential recovery. In these situations claimants may be unaware of their injury or unwilling to incur the cost and inconvenience of pursuing their remedy.

B. Is Judicial Action the Preferable Procedure?

A legislature must also decide whether judicial action is the preferable procedure. The increasing workload of the courts, recognition that the judicial system may not be equipped to handle numerous parties with small individual claims, and the fact that class actions often force judges into the role of administrators in weighing social goals and distributing class relief, have called the very existence of the judicial class action into question. "The emergence of the class action inescapably forces consideration of the characteristics of the judicial and the administrative

27. Although UCAA § 3(a)(2) provides for either a plaintiff or defendant class, this comment will discuss the issues in the context of the more frequent plaintiff class situation.

28. *See, e.g.*, Hackett v. General Host Corp., 455 F.2d 618, 625-26 (3d Cir. 1972).

29. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1022 (2d Cir. 1973) (dissenting opinion).

30. *See* notes 195-203 *infra* and accompanying text.

31. H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973).

process because its features in many instances are derived from both."[32] This is particularly true where the deterrence and disgorgement functions are emphasized. Many of the same considerations also apply under the individual recovery theory, although the traditional procedural restrictions, while perhaps not allowing for maximum recovery, do tend to lessen many of the court's difficulties in administering class relief. At least one court has called for alternative procedures: "Another, better method of attaining the desired objectives should be sought—perhaps one to be administered by a public body in existence, federal or state administrative agencies, or by specifically constituted tribunals."[33]

Class actions often involve substantial legal issues on the question of liability. Parties must not be deprived of meaningful access to the judicial system. Also, the cost of establishing and administering an alternative mechanism and the problems of integrating it into our existing system must be weighed against the difficulties inherent in utilizing the present court procedures.

C. *Is Uniformity Necessary or Desirable?*

A final question which a legislature should consider is whether uniformity is necessary or desirable. The necessity for uniform state class action procedures has been questioned often. It has been argued that there is not a need, as in the case of the Uniform Commercial Code for instance, for broad national planning. When existing state procedural rules are incorporated into the UCAA, it will necessarily lead to diversity in its application. Furthermore, there is no more need to disturb the diversity and individuality of the states in the class action context than in other procedural areas such as appellate review, evidentiary rules, or the size of juries.[34]

On the other hand, many activities have an impact on large numbers of persons, often from several states. Supporters of the UCAA feel it will assist states in handling multistate class actions and will reduce the chance of multiplicity of litigation and inconsistent judgments.[35]

III. STRUCTURE

There are six key provisions of the UCAA which best indicate the intent of the drafting committee. The intent apparently is to facilitate the

32. La Mar v. H. & B. Novelty & Loan Co., 489 F.2d 461, 463 (9th Cir. 1973).

33. Schaffner v. Chemical Bank, 339 F. Supp. 329, 337 (S.D.N.Y. 1972).

34. Statement of the Section of Public Utility Law, American Bar Association on the Proposed Uniform Class Actions Act 3-5 (Nov. 9, 1976).

35. UCAA, Prefatory Note.

bringing of representative actions in the state court systems by relaxing strict traditional procedural requirements, while simultaneously taking measures to insure that the interests of both the absent class members and the rights of the class opponent are adequately protected. These six provisions concern notice, personal jurisdiction, class certification appealability, discovery, solicitation and maintenance, and relief. These provisions will be compared with existing law and some of the issues which they raise and problems which may result from enactment of the UCAA will also be examined.

A. Notice

Before the significance of the unusual notice section in the UCAA[36] can be fully understood, a comparison of the FRCP 23 requirements for maintaining a class action and the UCAA requirements is necessary.

Prior to its amendment in 1966, FRCP 23 described three types of class actions known as "true," "hybrid," and "spurious."[37] A "true" class action involved a joint or common right, the adjudication of which determined the rights of all parties who would be bound by the judgment regardless of whether they joined in the action.[38]

A "hybrid" action, similar to an in rem or quasi in rem action, determined all the rights of absent parties, but only to specific property. The judgment on any other issues was only binding on the participating parties.[39]

The "spurious" action has been referred to as a type of permissive joinder in which the parties were required to "opt-in" to the action. Participation was allowed only if common questions of law or fact were involved.[40] The "spurious" action was criticized as lessening the social utility of the class action device since multiplicity of litigation was not avoided unless the individual class members took affirmative steps to intervene in the action.[41]

In 1966 FRCP 23 was amended to abolish these categories in order to obtain a more workable approach. To maintain a class action under the amended rule the requirements of subsection 23(a)[42] and either subsec-

36. UCAA § 7.

37. *See generally* Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 570-75 (1937).

38. *Id.* at 572-73.

39. *Id.* at 574.

40. *Id.* at 574-76.

41. Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 703-05 (1941).

42. FED. R. CIV. P. 23(a) provides:

tion 23(b)(1), 23(b)(2) or 23(b)(3)[43] must be met. FRCP 23(b)(3) is similar to the old "spurious" type action in requiring that common questions of law or fact be involved. Unlike the 1938 rule, FRCP 23 as amended will include absent parties in a judgment unless they specifically decide to "opt-out."[44] In order to inform the class members of their ability to "opt-out," FRCP 23(c)(2) requires "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[45] This notice requirement is necessary only in FRCP 23(b)(3) type actions.

Contrast FRCP 23 with the UCAA, which does not categorize class actions. Section 1 of the UCAA allows a representative action to be brought if the class is so numerous that joinder is impracticable[46] and there exists a common question of law or fact.[47] In addition, the class action should promote the fair and efficient adjudication of the controversy[48] and the representative parties must fairly and adequately protect the

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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.

43. *Id.* 23(b) provides:

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 question 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.

44. *Id.* 23(c)(3).

45. *Id.* 23(c)(2).

46. UCAA § 1(1).

47. *Id.* § 1(2).

48. *Id.* § 2(b)(2).

interests of the class.[49] Section 3 lists thirteen criteria[50] to be considered in determining whether the class action should be permitted for the fair and efficient adjudication of the controversy. UCAA subsections 3(a)(2) and (3) correspond to FRCP 23(b)(1), UCAA subsection 3(a)(4) corresponds to FRCP 23(b)(2), and UCAA subsections 3(a)(5), (8), (9), (10) and (11) correspond to FRCP 23(b)(3) type actions.

Section 7 of the UCAA provides for notice to absent class members[51] regardless of the nature of the action or the type of relief sought. A highly controversial subsection is 7(d) which requires personal or mailed notice only to persons whose potential recovery or liability is estimated to exceed $100 if their "identit[ies] and whereabouts can be ascertained by the exercise of reasonable diligence."[52] For those with less than $100 at stake, only notice "reasonably calculated to apprise the members of the class of the pendency of the action" is required.[53] This provision would promote the deterrence and disgorgement functions of a class action. In addition to the question of how and when this $100 limit is to be determined, the major issue is whether or not the notice requirement in the UCAA, which specifies personal notice only to those class members whose liability is estimated to exceed $100, if enacted, would violate constitutional due process.

The extent of the due process limitations on notice is indicated by the Supreme Court's interpretation of FRCP 23. While there is no notice requirement for FRCP 23(b)(1) or (2) type actions, FRCP 23(c)(2) does provide a notice requirement for actions brought under 23(b)(3). The leading case interpreting the FRCP 23(c)(2) notice requirement is *Eisen v. Carlisle & Jacquelin*.[54] In *Eisen*, the Supreme Court interpreted the "unmistakable" language of FRCP 23(c)(2) to require that individual notice be sent to each class member whose location could be ascertained through reasonable effort.[55] The *Eisen* Court, though recognizing the

49. *Id.* § 2(b)(3).
50. *Id.* § 3(a)(1)-(13).
51. *Id.* § 7.
52. *Id.* § 7(d).
53. *Id.* § 7(e).
54. 417 U.S. 156 (1974). Morton Eisen filed a class action suit in United States District Court alleging in his complaint that two odd-lot brokerage houses on the New York Stock Exchange were monopolizing odd-lot trading and charging excessive fees in violation of the Sherman Act. Eisen's individual trebled claim totaled seventy dollars, and the total claim for the class of some six million shareholders was estimated to be between twenty-two and sixty million dollars. *Id.* at 160; Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 265, (S.D.N.Y. 1971).
55. The Court stated: "[T]he express language and intent of rule 23(c)(2) leaves no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort." 417 U.S. at 175.

constitutional due process issue, rested its decision on the language of FRCP 23(c)(2),[56] which seems to clearly support the Supreme Court's ruling. FRCP 23(c)(2) was drafted with this requirement because, as the committee notes indicate, the committee felt such individual notice was required to comport with due process.[57]

The main case relied upon by the FRCP advisory committee, though not specifically involving a class action under FRCP 23, was *Mullane v. Central Hanover Bank & Trust Co.*[58] In considering the due process requirements necessary to ensure a judgment's res judicata effect on absent parties, the *Mullane* Court stated: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections."[59] The *Mullane* Court did state that it is not unreasonable for the state to dispense with more certain notice to absentees whose interests are either conjectural or future[60] and that a res judicata effect may foreclose the rights of persons "missing or unknown" even though an indirect means of notification is used. The Court appeared to authorize a balancing approach.[61] However, as the Court later stated in *Schroeder v. City of New York*:[62] "[N]otice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question."[63]

The purpose of giving notice to absent class members is to give them an opportunity to take an active role in the litigation in order to protect

56. A California case has interpreted the *Eisen* decision as constitutionally not requiring individual notice. "[I]f the United States Supreme Court had desired to hold that such notice was constitutionally required, it certainly could have phrased its holding in less Delphic language." Cartt v. Superior Court, 50 Cal. App. 3d 960, 968, 124 Cal. Rptr. 376, 381 (1975) (footnote omitted). *See also* Gant v. City of Lincoln, 193 Neb. 108, 225 N.W.2d 549 (1975).

57. The Advisory Committee's Note on the Amendments to Rules of Civil Procedure, 39 F.R.D. 98 *passim* (1966).

58. 339 U.S. 306 (1950).

59. *Id.* at 314 (citations omitted).

60. *Id.* at 317.

61. The Court in *Mullane* stated:

> The Court has not committed itself to any formula achieving a balance between [the] interests [of the state and the individual interests protected by the fourteenth amendment] in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensible . . . .

Id. at 314.

62. 371 U.S. 208 (1962).

63. *Id.* at 212-13.

their interests. Are the requirements of due process satisfied if the absent parties' interests are adequately represented, whether or not they have personal notice of the action? In *Hansberry v. Lee*,[64] the Supreme Court dealt with adequacy of representation. The Court referred to the judgment in a class or representative suit as a "recognized exception"[65] to the general rule that a judgment in personam is not binding on a person who is not a party to the litigation. The Court noted that due process is satisfied where there is adequate representation of an absentee's rights and interests by parties who are present.[66] Lower courts have also suggested that adequacy of representation without notice is enough.[67]

The Supreme Court has not yet squarely faced the issue of whether adequate representation without personal notice is sufficient to satisfy due process in a class action context. Neither *Schroeder* nor *Mullane* involved a FRCP 23 class action, which requires that the interests of the class be protected. *Mullane* suggests a practical approach to due process.[68] Persons with claims of less than $100 are unlikely to bring individual suits. It would seem more reasonable and beneficial to these persons to allow a representative action on their behalf even if they would not receive notice. Thus, by only requiring notice reasonably calculated to apprise those class members with claims of less than $100 of the pendency of the action, the UCAA adopts a practical approach which may satisfy constitutional due process standards.

There is one additional question: when both practical and due process considerations are taken into account, is a res judicata effect a necessity in a class action context?[69] The class opponent would seem to be the one most concerned with achieving finality in the litigation. However, persons not initially bound who have claims of less than $100 are unlikely to

64. 311 U.S. 32 (1940).

65. In *Hansberry* the Supreme Court stated:

> To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative" suit to which some members of the class are parties, may bind members of the class or those represented who are not made parties to it.

Id. at 41.

66. *Id.* at 42-43.

67. *See, e.g.*, Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 256 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); Woodward v. Rogers, 344 F. Supp. 974, 980 n.10 (D.D.C. 1972), *aff'd*, 486 F.2d 1317 (D.C. Cir. 1973).

68. 339 U.S. at 306, 314.

69. For the view that the defendant has no constitutional right to be subjected to only one law suit, see Cartt v. Superior Court, 50 Cal. App. 3d 960, 968, 124 Cal. Rptr. 376, 381 (1975). For the view that the defendant is entitled to a judgment that will be meaningful, see Home Sav. v. Superior Court, 42 Cal. App. 3d 1006, 1011-14, 117 Cal. Rptr. 485, 488-89 (1974).

initiate much additional litigation. Collateral estoppel and *stare decisis* may work against them, as well as the statute of limitations.[70] Successful individual claimants could be paid from those funds which either revert to the defendant or escheat to the state.[71] Class members who are not notified initially of the class certification may of course still be notified that they may directly participate in any recovery. Thus, as a practical matter, a res judicata effect as to those claimants with small potential recoveries is not necessary.

B. Personal Jurisdiction

One of the purposes of preparing the UCAA was to assist states in handling multistate class actions.[72] This can be achieved only if state courts have an effective means of binding nonresidents. The extent to which a state may exercise extraterritorial jurisdiction raises constitutional due process issues similar to those discussed in the previous section on notice. Unfortunately, the approach to the jurisdictional issue by the UCAA drafting committee will only lead to confusion and is an abrogation of their responsibility to face the issue directly.

Section 6 of the UCAA provides that a state court "may exercise jurisdiction over any person who is a member of the class suing or being sued if: [(1)] a basis for jurisdiction exists or would exist in a suit against the person under the law of this State . . . ."[73] This fundamental provision destroys the uniform national treatment of class actions which the UCAA is trying to achieve since states' jurisdictional requirements vary. This section also raises many unanswered questions. The drafting committee's comment to section 6 states that persons beyond the court's reach may be able to participate in a plaintiff class by intervention. Will notice be required to be sent to these persons to inform them of their opportunity to intervene? Is this a type of "opt-in" provision, the general concept of which was rejected by the drafting committee?[74] Without

70. The statute of limitations is tolled for all class members pending a determination of class status. American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974). However, there seems to be no reason to toll the statute for those persons choosing not to participate in the class recovery.

71. *See* notes 199-203 *infra* and accompanying text.

72. UCAA, Prefatory Note.

73. UCAA § 6(a)(1). Section 6 also provides an extraterritorial state jurisdiction provision which would allow the exercise of jurisdiction in a sister state if that state has a reciprocal grant of power. Although subject to constitutional due process questions, there is some precedent for this type of provision. *See, e.g.*, UNIFORM CERTIFICATION OF QUESTIONS OF LAW [ACT] [RULE]; UNIFORM FOREIGN DEPOSITIONS ACT; UNIFORM MANDATORY DISPOSITION OF DETAINERS ACT.

74. Vestal, *Uniform Class Actions*, 63 A.B.A.J. 837, 838 (1977).

notice, the opportunity to intervene may be meaningless. If these persons do not intervene they may subject the class opponent to numerous individual suits. In such "minimum contact" states as California,[75] when and how will jurisdiction over each potential class member be determined? If an aggregate judgment is obtained in favor of the class will the amount of the judgment later be reduced proportionately to exclude parties over whom the court has no jurisdiction under state law?

All parties have an interest in securing a judgment which is certain in effect and binding upon every potential class member. The plaintiff wants a judgment as large as possible, the class opponent has a desire not to be subjected to numerous lawsuits and potentially conflicting judgments, and the courts have an interest in reducing litigation and promoting judicial efficiency. In *Mullane v. Central Hanover Bank & Trust Co.*,[76] the Court clearly stated that the issue of notice is quite different from the issue of the extent of a state's power.[77] The Court held that a New York court could settle all questions respecting the management of a common trust and the decision would be binding on nonresidents. What is the maximum jurisdictional effect which a judgment in a representative action can have consistent with due process? An examination of existing case law provides a clue to the answer.

Due process in the class action context may mean only that the interests of a person must be adequately represented if it is not possible for him or his personally selected representative to appear.[78] In the case of *Smith v. Swormstedt*,[79] the Supreme Court early recognized the practical problems involved in a lawsuit where the parties are numerous. The Court noted that rights and liabilities are subject to change by death or otherwise and that it is very inconvenient, often to the point of preventing prosecution, to make all interested persons parties. The Court then held that a portion of the parties in interest may represent the entire group and that the decree would bind all of them as if they were before the court.[80] In *Hartford Life Insurance Co. v. Ibs*[81] the Court, after quoting *Smith*, held that a Minnesota court was required to give full faith and credit to a class action judgment obtained in Connecticut.

The Supreme Court in *Hansberry v. Lee*[82] indicated that where the

75. *See* CAL. CIV. PROC. CODE § 410.10 (West Supp. 1977).
76. 339 U.S. 306 (1950).
77. *Id.* at 313.
78. RESTATEMENT OF JUDGMENTS § 86, Comment b (1942).
79. 57 U.S. (16 How.) 288 (1853).
80. *Id.* at 303.
81. 237 U.S. 662, 673 (1915).
82. 311 U.S. 32 (1940).

interests of the class representative are the same as those of persons who are not present and the procedures adopted fairly ensure the protection of the absent parties, the fourteenth amendment is satisfied and the judgment will bind those persons not within the jurisdiction of the court.[83] This suggests that the unique nature of a class action may constitutionally justify treatment different from that in the ordinary civil suit.

The recent Supreme Court case, *Shaffer v. Heitner*,[84] which requires that state court jurisdiction must be evaluated according to the standards set forth in *International Shoe*,[85] may provide a basis for exerting nationwide jurisdiction in a class action context. *International Shoe Co. v. Washington*[86] established the "minimum contacts" test[87] for determining whether a court can exercise personal jurisdiction. *Shaffer* indicates that where the property providing the contact is also the subject matter of the litigation, that may be sufficient to allow the exercise of jurisdiction for that action, but not for any other purpose.[88] If the nonresidents are adequately protected, an interest in the outcome of the litigation may itself be a sufficient minimum contact to satisfy the requirements of due process.

Many lower federal courts have held that personal jurisdictional concerns are satisfied if the representative parties are properly served and within the jurisdiction of the court.[89] State courts have reached a similar conclusion.[90] In order to ensure the effectiveness of a class action, states

83. Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction . . . . In such cases where the interests of those not joined are of the same class as the interests of those who are, where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree.

Id. at 41-42.

84. 97 S. Ct. 2569 (1977).

85. *Id.* at 2584-85.

86. 326 U.S. 310 (1945).

87. [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id. at 316.

88. 97 S. Ct. at 2582.

89. *See, e.g.*, Canuel v. Oskoian, 269 F.2d 311 (1st Cir. 1959); Griffin v. Illinois Cent. R.R. Co., 88 F. Supp. 552 (N.D. Ill. 1949); Salvant v. Louisville & N.R. Co., 83 F. Supp. 391 (W.D. Ky. 1949).

90. North Carolina has held that one of its residents was bound by a judgment in a California class action. Taylor v. Pacific Mut. Life Ins. Co., 214 N.C. 770, 200 S.E. 882 (1939). For similar holdings arising from the same California proceeding, see Larson v. Pacific Mut. Life Ins. Co., 373 Ill. 614, 27 N.E.2d 458, *cert. denied*, 311 U.S. 698 (1940);

considering enactment of a version of the UCAA should include a more specific jurisdictional provision in accordance with the adequate representation standard of *Hansberry* or the minimum contacts standard of *Shaffer*. Under appropriate circumstances, this could provide for nationwide jurisdiction.

C. *Class Certification Appealability*

A class action proceeds in two essential steps: (1) the certification stage, when there is a determination of the existence of a class; and (2) an adjudication of the substantive merits of the plaintiff's case. A serious problem can arise for both parties, though especially for a plaintiff class with small individual claims, where a trial court refuses to permit a plaintiff to maintain his lawsuit in the form of a class action (the determination of which should be made as soon as practicable after the commencement of the action)[91] but does allow him to proceed on his personal claim.[92] There is no special provision in FRCP 23 allowing or disallowing an interlocutory appeal either from a favorable or from an adverse class determination. Although not exactly clear as to timing, the obvious intent of UCAA section 4(c) is to provide for interlocutory appeal. Section 4(c) states that "[a]n order certifying or refusing to certify an action as a class action is appealable."[93]

There are competing considerations involved in deciding if interlocutory appeal of the class determination should be allowed. The court's desire to promote judicial efficiency by avoiding piecemeal litigation is an argument against interlocutory appeal. Contrast this with the parties' need for certainty as to potential risks and rewards, which favors an early class determination. However, in a class action context, this would also promote judicial efficiency. The courts seem to be divided; the majority of the state courts favor immediate appeal,[94] while the federal courts predominately take the contrary view.[95]

There is one alternative which has always been open to the plaintiffs.

Levy v. Pacific Mut. Life Ins. Co., 2 So. 2d 82 (La. App. 1941).

Although not addressing the issue of the binding effect of the judgment directly, the Supreme Court of North Dakota has held that "a class action may be utilized whether or not all members of the class can be found within the State . . . ." Horst v. Guy, 211 N.W.2d 723, 729 (N.D. 1973).

91. FED. R. CIV. P. 23(c)(1); UCAA § 2(a).

92. Though the class action is denied, the representative plaintiff may still proceed as an individual. *See, e.g.*, UCAA § 4(d).

93. *Id.* § 4(c).

94. Annot., 54 A.L.R.3d 595 (1973).

95. Annot., 17 A.L.R. FED. 933 (1973).

In *Oppenheimer v. F.J. Young Co.*,[96] the district court dismissed plaintiffs' class action complaint with leave to amend. Plaintiffs refused to amend and judgment was entered dismissing the complaint with prejudice. Plaintiffs then appealed the judgment and the class action determination. This is a rather risky procedure because the plaintiffs' individual claims would also have been finalized if the appellate court had upheld the district court on the class action issue. However, for a plaintiff with a small individual claim which would not be pursued without class status, the risk is irrelevant.

Finality seems to be the keyword for determining appealability. However, the definition of what is final and what constitutes sufficient finality varies from court to court. In some state courts, dismissal of the action as to all but the representative plaintiffs has been held to be a final disposition with respect to absent class members, and therefore appealable,[97] or has simply been held appealable as a final order.[98] Other state courts have held that such an order is not final and hence not appealable.[99]

This final decision concept is also important in federal court decisions.[100] However, there have been so many exceptions and qualifications created that the state of federal law is uncertain. The first type of exception is that which is statutorily created. Where injunctive relief is requested,[101] courts have allowed appeal where the denial of class status has narrowed the scope of injunctive relief.[102] Another statutory exception is the Interlocutory Appeals Act.[103] The Third Circuit has permitted a section 1292(b) appeal of a class action certification.[104] Even the "drastic

96. 144 F.2d 387 (2d Cir. 1944).

97. *See, e.g.*, Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967); Slakey Bros. Sacramento, Inc. v. Parker, 265 Cal. App. 2d 204, 71 Cal. Rptr. 269 (1968).

98. *See, e.g.*, Lee v. Child Care Serv. Del. County Inst. Dist., 461 Pa. 641, 337 A.2d 586, *appeal dismissed*, 423 U.S. 919 (1975).

99. *See, e.g.*, Taylor v. Major Fin. Co., 289 Ala. 458, 268 So. 2d 738 (1972).

100. "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts . . . ." 28 U.S.C. § 1291 (1970).

101. *Id.* § 1292(a)(1) provides in pertinent part: "The courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . . ."

102. *See, e.g.*, Price v. Lucky Stores, Inc., 501 F.2d 1177 (9th Cir. 1974) (per curiam).

103. 28 U.S.C. § 1292(b) (1970) provides that a district court is empowered to certify for appeal an order "not otherwise appealable" if in its opinion the order involves a "controlling question of law as to which there is substantial ground for difference of opinion and . . . [where] an immediate appeal . . . may materially advance the ultimate termination of the litigation . . . ."

104. Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974).

and extraordinary"[105] remedy of mandamus[106] has been used;[107] and FRCP 54(b) has also been urged as a method of appeal.[108]

Among the various judicially developed exceptions to the finality rule is the "collateral order" doctrine created in *Cohen v. Beneficial Industrial Loan Corp.*[109] The appealability of class action determinations would seem to fit squarely into the "collateral order" doctrine. The questions of common issues of law and fact and adequacy of representation are certainly important and are usually independent from any question of liability. Appeal has been allowed under this doctrine,[110] although the same circuit has also denied the right to make such appeals.[111]

Another exception is the "death knell" doctrine, announced by the Second Circuit in *Eisen v. Carlisle & Jacquelin*,[112] allowing appeal where the denial of class action certification would effectively end the action, particularly for numerous plaintiffs with small amounts of individual recovery. Other circuits have rejected the doctrine.[113]

Many of these cases seem to be applying or avoiding the finality rule without considering its purpose, which is to avoid piecemeal review and promote judicial efficiency.[114] If certification is denied, numerous individual suits could develop; if certification is granted, the increased potential liability of the defendant could be an unfair inducement for him to settle the claim. Uncertainty as to class status will necessarily affect the manner in which both sides treat the case. Thus, fairness and judicial efficiency are promoted not by postponement of appeal on class certification, but by appeal as early as possible in the litigation. The drafters of the UCAA have provided for what seems to be the preferable approach, that of interlocutory appeal. There has been some discussion as to whether the plaintiff and defendant should have the same right of ap-

105. *Ex parte* Fahey, 332 U.S. 258, 259 (1947).

106. 28 U.S.C. § 1651 (1970).

107. *See, e.g.*, McDonnell Douglas Corp. v. District Court, 523 F.2d 1083, 1087 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

108. Comment, *Appealability of Class Action Determinations*, 44 FORDHAM L. REV. 548 (1975).

109. 337 U.S. 541 (1949). The Court stated that there are decisions "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546.

110. *See, e.g.*, Herbst v. International Tel. & Tel. Corp., 495 F.2d 1308, 1312-13 (2d Cir. 1974).

111. *See* General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974); Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974).

112. 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

113. *See, e.g.*, King v. Kansas City S. Indus., Inc., 479 F.2d 1259, 1260 (7th Cir. 1973) (per curiam); Hackett v. General Host Corp., 455 F.2d 618, 621-26 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972).

114. *See, e.g.*, Catlin v. United States, 324 U.S. 229, 233-34 (1945).

peal.[115] The UCAA makes no express distinction and there is no reason to imply one.[116] Judgment of dismissal as to the plaintiff, or certification and the resulting exposure of the defendant to increased liability are equally important considerations justifying an early class determination.

There is one serious problem with the UCAA in this area. The UCAA provides that an order certifying or refusing to certify an action as a class action[117] and an order amending the certification order are appealable.[118] It is possible for a plaintiff to request certification of a class many times larger than his cause of action justifies and then make gradual reductions in the proposed class size and appeal each subsequent adverse determination. Or perhaps, during trial, the defendant might continually request that the class size be reduced and then appeal each adverse decision which would repeatedly delay the trial. This has been an important factor in the rejection of these appeals by the courts.[119] Permitting an appeal each time a lower court issues a new certification order is clearly contrary to the purpose of the finality rule.[120] One solution to this problem would be to require that discovery related to class certification be completed prior to any determination of class maintainability. Once the appellate court has ruled on class certification, preferably before but possibly during the trial on the merits, the determination should be considered final at least until entry of judgment.

D. Discovery from Absentees

A major area of controversy under existing law is the determination of the status of the absent class members. In particular, to what extent may their participation be required, especially in the area of discovery. FRCP 23 includes no express provision requiring affirmative action by absent

115. Note, *Class Action Certification Orders: An Argument for the Defendant's Right to Appeal*, 42 GEO. WASH. L. REV. 621 (1974).

116. *See, e.g.*, Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974) (defendant); Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967) (plaintiff).

117. UCAA § 4(c).

118. *Id.* § 5(c).

119. *See, e.g., In re* Cessna Aircraft Distributorship Antitrust Litigation, 518 F.2d 213, 215-16 (8th Cir.), *cert. denied*, 423 U.S. 947 (1975); General Motors Corp. v. City of New York, 501 F.2d 639, 644-48 (2d Cir. 1974); Walsh v. City of Detroit, 412 F.2d 226, 227 (6th Cir. 1969).

120. The possibility of amendments to the class certification order has been used by at least one court for support of the proposition that the drafters of FRCP 23 did not intend immediate appealability. *See* Caceres v. International Air Transp. Ass'n, 422 F.2d 141, 143-44 (2d Cir. 1970). The UCAA allows both amendments and interlocutory appeal. UCAA §§ 4(c), 5(a), (d).

class members. The drafters of the UCAA have included an express provision concerning discovery against absent class members.[121]

Some existing federal cases have held that no discovery at all may be obtained from absent class members. The rationale has been based upon two similar theories. The first is that for FRCP 23 actions, absent class members are not considered parties and thus are not subject to FRCP 33 or 37.[122] This is an oversimplification since absent class members are considered parties for other purposes; *e.g.*, they have standing to appeal a settlement and are bound by any res judicata effect.[123] The other basis for denying discovery from absent class members is that FRCP 23 contemplates an adversary proceeding involving only the class representatives, while the other members of the class are permitted to await passively the outcome of the suit.[124]

Courts which have required discovery have based it upon the authority of FRCP 37[125] or 23(c) and (d).[126] Reliance upon FRCP 23 seems to be unfounded in light of the express wording of the statute. If, in fact, "the claims or defenses of the representative parties are typical of the claims or defenses of the class,"[127] discovery from absentees should not be necessary. However, the courts have recognized that discovery may under many circumstances be desirable or even necessary.[128] The drafters of the UCAA, realizing that a strict rule against nonrepresentative discovery was inappropriate, provided in section 10 for discovery (but only on court order) from a class member who has not appeared.[129]

There are at least three corollary questions which must be addressed. The drafters unfortunately provided guidance on only one. Once it is decided that absent party discovery will be allowed, it must be deter-

121. UCAA § 10(a) provides in part: "Discovery under [applicable discovery rules] may be used only on order of the court against a member of the class who is not a representative party or who has not appeared."

122. *See, e.g.*, Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972); Fischer v. Wolfinbarger, 55 F.R.D. 129, 132 (W.D. Ky. 1971).

123. *See, e.g.*, Certic v. Cuyahoga Lake Carpenters Dist. Council, 459 F.2d 579, 581 (6th Cir. 1972).

124. *See, e.g.*, Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 485, 489 (S.D.N.Y. 1973).

125. *See, e.g.*, Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1004 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972).

126. *See, e.g.*, Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 403-04 (S.D. Iowa 1968); Minnesota v. United States Steel Corp., 44 F.R.D. 559, 577 (D. Minn. 1968).

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

128. *See, e.g.*, Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1005 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 403-04 (S.D. Iowa 1968).

129. UCAA § 10(a).

mined: (1) under what circumstances the discovery will be allowed; (2) at what time and for what purpose information may be sought from the absent class members; and (3) what sanctions, if any, will be applied for failure to comply with the discovery request.

In considering the first question, a fine line must be drawn between the potential need of the defendants (assuming a plaintiff class) to know both the nature and especially the extent of their potential liability and the need to protect the class members from harassing and burdensome questionnaires. Discovery may be necessary for a fair adjudication of the controversy but could intimidate absentees who may not respond if their individual claims are small. This has been recognized by the courts. In *Brennan v. Midwestern United Life Insurance Co.*,[130] the court stated that before allowing 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."[131] The concept of court control over discovery, contrary to the usual theory of discovery,[132] was adopted by the drafters of the UCAA.[133] Additionally, the committee listed some factors to be considered by the trial court in deciding whether discovery should be allowed: the timing of the request; the subject matter covered; whether representatives of the class are seeking discovery on the subject to be covered; and whether discovery will result in annoyance, oppression, or undue burden or expense.[134]

The second question revolves around the two basic purposes for which discovery may be had in a class action. The first is to gather information necessary at an early stage of the action to ensure that the preliminary determination of the existence of a class has an adequate foundation.[135] The second purpose is to obtain information which is necessary to establish the defendant's defenses on the substantive issues of liability.[136]

130. 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972).

131. *Id.* at 1006.

132. FED. R. CIV. P. 26(a).

133. UCAA § 10(a).

134. *Id.*

135. For cases allowing discovery on this issue, see, *e.g.*, Unicorn Field, Inc. v. Cannon Group, Inc., 60 F.R.D. 217, 227-28 (S.D.N.Y. 1973); Goldstein v. Regal Crest, Inc., 59 F.R.D. 396, 399 (E.D. Pa. 1973); *In re* Antibiotic Antitrust Actions, 333 F. Supp. 267, 271-72 (S.D.N.Y.), *aff'd sub nom.* Pfizer, Inc. v. Lord, 449 F.2d 119 (2d Cir. 1971) (per curiam).

136. *See, e.g.*, Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1004-05 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972); Minnesota v. United States Steel Corp., 44 F.R.D. 559, 577-78 (D. Minn. 1968).

In addition to some earlier cases which have disallowed all discovery,[137] in 1974 the Supreme Court added another wrinkle which limits discovery. In *American Pipe & Construction Co. v. Utah*[138] the Court stated: "Not 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."[139] Thus, under the FRCP discovery cannot be required until the initial class certification has taken place. The concern is to avoid stirring up unnecessary litigation.[140] Although the UCAA speaks in terms of discovery "against a member of the class,"[141] it is not clear whether the committee meant to limit discovery to the period subsequent to certification, as did the Supreme Court in *American Pipe*, or to allow much broader discovery with the consent of the court. Pre-certification discovery regulated by the court would provide a mechanism for reasonably evaluating whether the action should proceed as a class action. This is consistent with the tone of the UCAA.

The third issue relates to the sanctions to be applied for noncompliance with discovery requests by absent class members. A parenthetical phrase in the UCAA states that discovery should take place under "applicable discovery rules."[142] This provision will necessarily cause diversity among the states, contrary to the UCAA's purpose of establishing uniformity. Also, a class action is distinctly different from the usual civil action. It would clearly be unreasonable, for instance, to expect each class member to hire an attorney to answer any inquiries. While the drafters of the UCAA are to be commended for establishing a provision allowing for class discovery, their failure to provide guidance for the consequences of noncompliance was a serious omission.

The consequences of noncompliance chosen by a particular court depend to some extent upon the view which the court takes as to the primary purpose of a class action. One alternative would allow discovery from absent class members without a penalty for nonresponse, although they may be required to file a claim to participate in any recovery. This approach has been taken by a few courts.[143] If the primary purpose of the

137. *See* notes 122-24 *supra* and accompanying text.

138. 414 U.S. 538 (1974).

139. *Id.* at 552.

140. *See, e.g.*, Pan Am. World Airways, Inc. v. District Court, 523 F.2d 1073, 1078-79 (9th Cir. 1975), *noted in* 44 FORDHAM L. REV. 421 (1975).

141. UCAA § 10(a).

142. *Id.*

143. *See, e.g.*, Arey v. Providence Hosp., 55 F.R.D. 62, 71-72 (D.D.C. 1972); Korn v.

class action is viewed as preventing unjust enrichment to the defendant rather than seeking recovery for the absent class plaintiffs, then this seems the preferable approach, especially if there is a large number of class members with individually small amounts of recovery.

Even though not subject to sanctions, passive absentees would not necessarily be immune from discovery. They could still be examined through the use of non-party depositions and subpoenas to which any person with relevant information may be subjected.[144] The discovery practice of using a sampling technique has been approved by some courts,[145] and can be used effectively, especially if the court sufficiently narrows the common issues and divides the class into appropriate subclasses.[146]

A second alternative would permit discovery backed by the sanction of excluding nonresponding class members from the action, but without prejudice to their individual claims. Under this approach the balance is shifted toward individual recovery rather than punishment of the defendant. The use of discovery here must be subjected to the type of close scrutiny which the drafters of the UCAA have provided in order to prevent the device from being used by the defendant simply as a mechanism for reducing class size. This is similar to a proof of claim form used by some courts[147] to obtain information relevant to the class certification question. However, the use of a claim device before liability of a group of drug manufacturers to a class of retail drug purchasers was established has been rejected.[148] The problem with applying the sanction of exclusion is that it is very similar to a requirement that the class members take affirmative action, essentially requiring them to "opt-in" to the class, a requirement which was specifically rejected in both the 1966 revision of the FRCP[149] and the UCAA.[150] Applying the sanction of exclusion would

Franchard Corp., 50 F.R.D. 57, 59-60 (S.D.N.Y. 1970) (for subsequent history see 456 F.2d 1206 (2d Cir. 1972)); Knight v. Board of Educ., 48 F.R.D. 108, 113 (E.D.N.Y. 1969).

144. *See, e.g.*, Southern Cal. Edison Co. v. Superior Court, 7 Cal. 3d 832, 500 P.2d 621, 103 Cal. Rptr. 709 (1972).

145. *See, e.g.*, Robertson v. National Basketball Ass'n, 67 F.R.D. 691 (S.D.N.Y. 1975); *In re* Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y.), *aff'd sub nom.* Pfizer, Inc. v. Lord, 449 F.2d 119 (2d Cir. 1971) (per curiam); Southern Cal. Edison Co. v. Superior Court, 7 Cal. 3d 832, 500 P.2d 621, 103 Cal. Rptr. 709 (1972).

146. UCAA § 2(c).

147. *See, e.g.*, Minnesota v. United States Steel Corp., 44 F.R.D. 559, 577 (D. Minn. 1968).

148. *See In re* Antibiotic Antitrust Actions, 333 F. Supp. 267 (S.D.N.Y.), *aff'd sub nom.* Pfizer, Inc. v. Lord, 449 F.2d 119 (2d Cir. 1971) (per curiam).

149. *See* 3B MOORE'S FEDERAL PRACTICE §§ 23.02-1, 23.10 (2d ed. 1977).

150. *See* Vestal, *Uniform Class Actions*, 63 A.B.A.J. 837 (1977).

mean that absent class members must take action either to be excluded from the class or included in the judgment. Inaction would mean the class member would be bound by res judicata and also barred from any recovery.

A third and perhaps unnecessarily harsh sanction would be exclusion of the class member from the class combined with a dismissal with prejudice of his individual claim. This procedure has also been used on occasion.[151]

A careful limitation of the common questions and division of the class into appropriate subclasses would greatly lessen the need for class discovery. Discovery may be necessary under some circumstances but its scope should be carefully supervised by the court. Sanctions against individual class members should be avoided.

E. Solicitation and Maintenance

Section 17(b) of the UCAA contains a unique provision which is bound to stir considerable controversy among members of the bar. The relevant portion of the UCAA provides that "the court by order may authorize and control the solicitation and expenditure of voluntary contributions for [meeting the costs and litigation expenses of the action] from members of the class, advances by the attorneys or others, or both, subject to reimbursement from any recovery obtained for the class."[152] Thus, the drafters have provided for both solicitation and maintenance.

The recent Supreme Court decision in *Bates v. State Bar of Arizona*[153] allows a certain amount of attorney advertising. Solicitation, which involves personal contact of clients, remains a violation of the *ABA Code of Professional Responsibility*.[154] Prohibiting solicitation may be a valid form of restraint on the time, place, or manner of advertising.

There are two basic types of solicitation in regard to class actions. The first of these is solicitation of parties by an attorney in order to file suit. This includes solicitation of the first named plaintiff, of additional named plaintiffs for a class action which has already been filed, and solicitation of unnamed existing class members to provide them with direct representation. This last type of solicitation is not allowed under the UCAA. Although there are persuasive arguments for allowing solicitation of

151. *See, e.g.*, Harris v. Jones, 41 F.R.D. 70, 74-75 (D. Utah 1966).

152. UCAA § 17(b).

153. 97 S. Ct. 2691 (1977).

154. "Obviously, a lawyer should not contact a non-client, directly or indirectly, for the purpose of being retained to represent him for compensation." ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 2-3 (1975).

clients in a class action context,[155] courts have allowed discovery from named plaintiffs concerning whether or not class attorneys solicited their participation,[156] and solicitation of class representatives has been used as justification for refusal to certify a class.[157]

The second type of solicitation in class actions is that provided for in the UCAA. Class action litigation contemplates an adversary proceeding where only the representative plaintiffs take an active role. However, costs of conducting such an action can be extremely high, especially if notice is required to be sent to each class member.[158] The drafters of the UCAA have provided for solicitation of voluntary contributions if authorized by court order.[159]

Traditionally in class actions the attorney-client relationship is analyzed in terms of the named plaintiff and the attorney.[160] District courts have instituted gag orders restricting communications with absent class members.[161] This is the reverse of the general rule that the client should be informed of all relevant information.[162] The practice of restricting communications is in accordance with the *Manual for Complex and Multidistrict Litigation*,[163] which specifically forbids solicitation of fees and expenses.[164] The apparent fear is that the attorney will mislead the members of the class.[165]

There seems to be no valid reason to prohibit solicitation of voluntary contributions from class members with the careful supervision of the

155. *See* Schoor, *Class Actions: The Right to Solicit*, 16 SANTA CLARA L. REV. 215 (1975).

156. *See, e.g.*, Stavrides v. Mellon Nat'l Bank & Trust Co., 60 F.R.D. 634 (W.D. Pa. 1973); Carlisle v. LTV Electrosystems, Inc., 54 F.R.D. 237 (N.D. Tex. 1972); Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 16 Fed. Rules Serv. 2d 1021 (N.D. Tex. 1972).

157. *See, e.g.*, Carlisle v. LTV Electrosystems, Inc., 54 F.R.D. 237 (N.D. Tex. 1972).

158. In Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 167 (1974), the cost of postage alone was estimated to be $225,000.

159. UCAA § 17(b).

160. *See, e.g.*, Magida v. Continental Can Co., 12 F.R.D. 74 (S.D.N.Y. 1951).

161. *See, e.g.*, American Fin. Sys., Inc. v. Pickrel, 18 Fed. Rules Serv. 2d 292 (D. Md. 1974); Vance v. Fashion Two Twenty, Inc., 16 Fed. Rules Serv. 2d 1513 (N.D. Ohio 1973).

162. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 7-8 (1975).

163. 49 F.R.D. 217 (1970).

164. *Id.* at 219.

More recently the ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 1326 (1975) has stated that it is ethically proper for an attorney to solicit funds to be used for expenses in connection with preparation for litigation of a class suit, or the expense of mailing notice, but that it is not proper for an attorney to solicit funds from class members for his own compensation.

165. *See, e.g.*, Kronenberg v. Hotel Governor Clinton, Inc., 281 F. Supp. 622, 625-26 (S.D.N.Y. 1968).

court as provided for in the UCAA. If an injury has been done to a large group, there is little reason to prevent recovery simply because one party does not have the resources to conduct the litigation.[166] If this were the rule the defendant would benefit by causing injury to the greatest number of people possible, since generally the larger the class the greater the expense of litigation.

There are additional reasons for allowing class solicitation—the constitutional provisions of free speech and due process of the first[167] and fourteenth[168] amendments.[169] The Supreme Court has held that some kinds of solicitation are protected by the first amendment.[170] Although each of the main cases[171] dealt with by the Court involved a group previously organized for a purpose other than litigation, the Court's reasoning may also be applicable in a class action situation. As was stated:

> [C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation.[172]

The Court could find no compelling state interest to support anti-solicitation regulations. In addition, the control of communications to a class may be an unconstitutional prior restraint under the first amendment.[173]

The UCAA clause which provides that attorneys for the class may advance the costs of the suit[174] is directly contrary to the *ABA Code of Professional Responsibility* which does not allow attorneys to advance or guarantee the costs of litigation unless the client remains ultimately liable

166. "The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel." ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 2-1 (1975) (footnotes omitted).

167. U.S. CONST. amend. I.

168. *Id.* amend. XIV.

169. *See, e.g.*, Rodgers v. United States Steel Corp., 508 F.2d 152 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975), *noted in* 88 HARV. L. REV. 1911 (1975).

170. *See* NAACP v. Button, 371 U.S. 415 (1963).

171. United Transp. Union v. State Bar, 401 U.S. 576 (1971); District 12, UMW v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).

172. United Transp. Union v. State Bar, 401 U.S. 576, 585-86 (1971).

173. *See, e.g.*, Rodgers v. United States Steel Corp., 508 F.2d 152 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975), *noted in* 88 HARV. L. REV. 1911 (1975).

174. UCAA § 17(b).

for such expenses.[175] Such an act constitutes maintenance. Ordinarily, the class members are not ultimately liable as the expense incurred in bringing suit is usually deducted from any recovery.[176] This is of course contingent upon the plaintiff class prevailing.[177]

Courts suspecting maintenance have allowed class opponents to discover who has assumed responsibility for litigation costs.[178] The primary argument against allowing the attorney to advance costs of litigation is that most class actions are brought to collect a large fee or coerce a settlement for the attorney's benefit.[179] There would seem to be little concern for recovery if the class members do not desire to advance the costs of litigation.

On the other hand, the courts have supervisory powers over the action and have disapproved dismissals even when both parties have stipulated to a settlement.[180] An attorney is unlikely to bring a frivolous suit, as his recovery of costs incurred depends upon a successful suit and the court has supervisory power over the amount of the fee that will be collected.[181] The named plaintiffs may be unable to advance the costs of litigation. Disgorging ill-gotten gains and preventing future undesirable conduct are legitimate concerns favoring maintenance.

F. Relief

The problem of how to fashion relief for large classes where a monetary judgment has been awarded has been the subject of much discussion and has resulted in varying suggestions.[182] The desirability of the alternatives depends to a large extent upon one's viewpoint of the purpose of the action.

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175. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 5-103(B) (1975).

176. *See, e.g.*, Oppenlander v. Standard Oil Co., 64 F.R.D. 597 (D. Colo. 1974).

177. Attorney's fees are also awarded out of any recovery as a judicially created outgrowth of the equity powers of the federal courts. *See, e.g.*, City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974).

178. *See, e.g.*, Sayre v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 65 F.R.D. 379, 386 (E.D. Pa. 1974).

179. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 571 (2d Cir. 1968) (Lumbard, C.J., dissenting).

180. *See, e.g.*, Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324 (E.D. Pa. 1967).

181. *See, e.g.* City of Detroit v. Grinnell Corp., 495 F.2d 448, 472 (2d Cir. 1974) (setting aside a fee at the rate of $635 per attorney-hour and remanding to the district court for an evidentiary hearing as to the propriety of the amount of the fee).

182. *See* Comment, *Manageability of Notice and Damage Calculations in Consumer Class Actions*, 70 MICH. L. REV. 338, 360-73 (1971).

One viewpoint finds the goal of precise compensation to individual class members for their personal injuries of primary importance. Under an extreme approach, each class member is required to come forth individually and prove in a full evidentiary hearing his right to a portion of the recovery.[183] It has been argued that this procedure is a requirement of due process,[184] though some authors feel it is not.[185] A less drastic approach, but nonetheless one with precise compensation as the fundamental premise, is requiring the use of individual proof of claim forms from each absent class member in order to establish a personal right of recovery.[186] The problem with this approach is that many persons will not file proof of claim forms, particularly where individual recovery is small, and the defendant will thereby escape a large portion of his liability. For instance, in *Market Street Railway Co. v. Railroad Commission*[187] a railroad company had collected $700,000 in excess trolley fares, yet individual claims amounted to only $12,000 with the average claim being $2.00.[188]

If deterrence of undesirable conduct and prevention of unjust enrichment to the defendant constitute the rationale for the class action, then different forms of relief are available. Rather than calculating damages individually, the aggregate amount of damages suffered by the class is calculated.[189] The adoption of this procedure raises some difficult questions. Must each class member be given the opportunity to establish his claim to a portion of the recovery? As to those funds which are not claimed by the absent class members, several alternatives exist: the funds could be distributed generally to the individual class members, returned to the defendant, escheat to the state, or could be used under court supervision for some purpose generally beneficial to the class as a whole though not necessarily to its individuals. The focus here is not upon whether the defendant has the right to require each individual class member to prove his damages, but whether there is a right in each class member to assert a claim to a portion of the damage recovery. Examples

183. *See, e.g.*, Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969).

184. *See* City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 61 (D.N.J. 1971).

185. *See, e.g.*, Comment, *Due Process and Fluid Class Recovery*, 53 ORE. L. REV. 225 (1974).

186. *See, e.g.*, Harris v. Jones, 41 F.R.D. 70, 74 (D. Utah 1966).

187. 28 Cal. 2d 363, 171 P.2d 875 (1946).

188. *Id.* at 366, 171 P.2d at 877.

189. *E.g.*, Bebchick v. Public Utils. Comm'n, 318 F.2d 187, 203-04 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963). *See* Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

of cases in which there was no opportunity at all for individual class members to claim a portion of the recovery are rare.[190]

The UCAA implies that individual notice to each class member of a recovery right is not required. Only those parties whose identities can be determined without expending a disproportionate share of the recovery need be notified,[191] and the court shall supervise the distribution of funds to the members of the class as their interests warrant.[192] If, for instance, the cost of notice is greater than the estimated amount of individual recovery, it seems that the court may fashion whatever relief it deems appropriate. However, section 15(c)(5) of the UCAA implies that damages should be given to each class member who claims a portion of the money.[193]

Usually the problem arises when all the individual claims have been satisfied and there are funds, determined to be owed to the class in the aggregate, which are undistributed. These funds may be returned to the defendant or escheat to the state, as a provision of the UCAA allows.[194] The other alternative is to use the funds to benefit the class as a whole.

The term "fluid recovery" is generally used to describe the methods by which the unclaimed funds may be used to benefit the class as a whole. It has been both approved[195] and rejected[196] by the courts. The primary criticism of a "fluid" approach is that the recovery may benefit persons who were not injured by the defendant's conduct.[197]

Fluid recovery can take three forms. The first form is a direct distribution for the benefit of the class. Although such a provision was contained in earlier drafts of the proposed UCAA,[198] it was eliminated from the final version.

190. For two examples, both cases being terminated as a result of a court approved settlement, see Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967) and Kurman v. Purex Corp., an unreported Los Angeles Superior Court case, No. 995 518 (1971), *cited in* Grossman, *Class Actions: Manageability and the Fluid Recovery Doctrine*, 47 L.A.B. BULL. 415, 420 (1972).

191. UCAA § 15(c)(1)-(2).

192. *Id.* § 15(c)(4).

193. *Id.* § 15(c)(5).

194. *Id.*

195. *See, e.g.*, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 262-63 (5th Cir. 1974); Bebchick v. Public Utils. Comm'n, 318 F.2d 187, 203-04 (D.C. Cir.) (supplemental opinion), *cert. denied*, 373 U.S. 913 (1963).

196. *See, e.g.*, City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971). In Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1018 (2d Cir. 1973), *vacated & remanded on other grounds*, 417 U.S. 156 (1974), the United States Court of Appeals for the Second Circuit held that fluid recovery violates due process but did not explain its reasoning.

197. *See* Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448, 461-62 (1972).

198. *See* The Special Committee on Uniform Class Actions Act National Conference of Commissioners of Uniform State Laws, Fourth Tentative Draft of the Proposed Uniform

The second form of fluid recovery is to return the funds to the defendant but impose conditions upon the use of the funds which require him to remedy or alleviate any harm done.[199] The comment to section 15 of the UCAA gives as an example an "affirmative" use of the funds by requiring a defendant who is sued because of the discharge of pollutants to spend any unclaimed funds to install pollution-control devices.[200] The UCAA would thus apparently authorize a type of fluid recovery. There is uncertainty as to whether or not the UCAA would allow a "negative" use of the funds such as a reduction in the market price of an item or service, a frequently employed device.[201] Is price reduction considered a direct distribution for the benefit of the class or is it considered a return of the funds to the defendant so that the harm may be alleviated? The better view and the one consistent with a policy of deterrence is to allow a reduction in prices as a type of fluid recovery. While promoting the deterrence function, this concept comes closest to compensating class members.

The third method of fluid recovery is payment of any unclaimed funds to the state, which is authorized by the UCAA.[202] This is the extreme view of deterrence and disgorgement and is an alternative to conditioned payment to the defendant. This method has rarely been followed although there is precedent for this type of recovery.[203]

How is the trial court to decide which alternative to use in distributing the unclaimed damages? The class action is a procedural device, not a substantive cause of action and courts must be flexible in its use. In recognition that the nature and seriousness of the substantive violation must be considered in fashioning relief, the drafters of the UCAA in section 15(c)(6) established criteria which the trial court should follow.[204]

IV. CONCLUSION

The class action device was originally designed to promote judicial efficiency by deciding common issues of law and fact in one representa-

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Class Actions Act, *reprinted in The Proposed Uniform Class Action Act-II*, 4 CLASS ACT. REP. 492, 496 (1975).

199. *See* UCAA § 15(c)(7).

200. *Id.* § 15, Comment.

201. *See, e.g.*, Alaska Steamship Co. v. Federal Maritime Comm'n, 344 F.2d 810 (9th Cir. 1965); Illinois Bell Tel. Co. v. Scattery, 102 F.2d 58 (7th Cir. 1939).

202. UCAA § 15(c)(5).

203. *See, e.g.*, West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

204. UCAA § 15(c)(6).

tive action where there existed the possibility of numerous individual claimants coming before the court. The nature and purpose of the modern day representative suit must be carefully considered by any legislature considering class action legislation. The structure of class action statutes must reflect what is determined to be the function of the class action.

There are two basic purposes of the modern class action: first, to provide recovery for individual class members, and second, to deter undesirable social conduct and to force the defendant to disgorge any unjustly acquired gains. The UCAA's provisions indicate the drafters' intent to compromise between these two functions. By attempting to compromise, the UCAA has drawn criticism from both liberal and conservative viewpoints.

The UCAA favors the use of state class actions and eliminates many of the obstacles to representative suits as indicated by the notice and solicitation provisions. The drafters of the UCAA have recognized, in the escheat provision for instance, that disgorgement is as important as recovery.

The UCAA also provides needed flexibility by allowing, for example, interlocutory appeal of the class maintainability determination. The provision allowing discovery from absent class members indicates a concern for the rights of the party opposing the class. To prevent possible abuse from either side, the UCAA indicates that the trial court is to take an active role in order to protect the interests of absent class members and guarantee their constitutional due process rights.

The UCAA, unlike FRCP 23 and existing state provisions, is to be commended for providing considerable guidance in its provisions and attempting to make state courts more accessible to representative suits. With the costs of litigation continuing to increase, the class action may be the only effective method of obtaining recovery for large numbers of claimants with small individual claims. In areas such as antitrust, without the class action most members of the public would have little idea that they were subjected to illegal practices.

There are some criticisms which can be directed at the UCAA. The discovery and jurisdiction sections tend to oppose the desired goal of uniformity. In attempting to provide specificity there are, ironically, many vague issues and some unanswered questions. The failure to provide lengthy comments indicating the drafters' intent as to the meaning and purpose of the various sections was a serious omission.

States should adopt the theme of the UCAA, which is to encourage class actions. Its provisions alleviate many of the present difficulties in

bringing representative suits. When individual recovery is not practical, deterrence and disgorgement should not be abandoned. Legislatures should avoid compromise and should be certain to make their intent clear and provide sufficient guidance and clarity to the courts.

Dana Sherman

APPENDIX

UNIFORM CLASS ACTIONS [ACT] [RULE]

Drafted by the NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT IN ALL THE STATES

---

at its

ANNUAL CONFERENCE
MEETING IN ITS EIGHTY-FIFTH YEAR
AT ATLANTA, GEORGIA
JULY 31-AUGUST 6, 1976

WITH PREFATORY NOTE AND COMMENTS

The Committee which acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Class Actions [Act] [Rule]

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UNIFORM CLASS ACTIONS [ACT] [RULE]

Prefatory Note

A class action is an equitable concept which originated as an exception to the general rule in equity that all persons (however numerous) materially interested in the subject matter of a suit were to be made parties to it. The class suit was an invention of equity to allow a suit to proceed when the parties interested in the subject were so numerous that it would have been impracticable to join them without long delays and inconveniences which would obstruct the purposes of justice. Under these conditions representatives of a class conduct litigation on behalf of themselves and all others similarly situated and the judgment binds all members.

The first state statute on class suits was the 1849 Amendment to the Field Code of New York which attempted to codify the pre-existing equity law on representative suits. Two types of representative suits which could be maintained under the rules of equity were specially adopted as allowable under the Field Code. The first type of suit involved actions where the question was one of a common or general interest and one or more class members sued for the benefit of the entire class. The second type involved cases in which the parties were very numerous and it was impracticable to bring them all before the court. A common interest or right was present among the members and the representatives sought to establish or enforce this right in order to benefit all the members of the class in common and injure none. Other states have adopted statutes modeled on these concepts.

In 1938 the Supreme Court adopted the Federal Rules of Civil Procedure including Rule 23 which governed class actions for federal courts. Many states have adopted a version of this rule. The 1938 Rule 23 created three separate categories of class actions based on the substantive character of the right asserted by the class and the *res judicata* effect of the class action judgments on nonappearing members. The first category, the "true" class suit, requires a common or joint cause of action that exists for all parties and the issues determined in the suit are preclusive to all class members. The second type is the "hybrid" suit requiring each member to have an interest in a specific fund or property which is in controversy and the judgment binds the rights of the class with respect to the property involved. The third type, "spurious," requires that a common question of law or fact affect the several rights involved and a common relief must be sought. The decree in such actions had no binding effect on nonappearing members. Class actions of the latter sort were merely invitations to join.

In 1966 Federal Rule 23 was amended. The new Rule 23 is divided into five subsections dealing with different procedural requirements for bringing a class suit. After satisfying the four prerequisites of subsection (a), a class suit must fit in one of the three categories of subsection (b) which describe appropriate occasions for maintaining a class action: 23(b)(1) where difficulties would be likely to arise if separate actions were brought by class members; 23(b)(2) where the party opposing the class has improperly acted on grounds generally applicable to the class so as to create a need for injunctive relief; or 23(b)(3) where common questions predominate over any questions affecting only individual class members and a class action is superior to other adjudicatory methods. A judgment under the amended rule binds all those whom the court finds to be members of the class. Several states have a version of this rule for their class action statute.

Presently three types of class action statutes predominate in the United States; (1) the Field Code provision, (2) state statutes modeled on Rule 23 of the Federal Rules of Civil Procedure as it existed prior to July, 1966, and (3) statutes modeled on the new Federal Rule 23. Some states still do not have a class action statute. State rules based on the Field Code and the earlier Federal Rule pose distinct problems and disadvantages in maintaining class suits. Recent Supreme Court decisions have severely limited the availability of the present Rule 23 as a group remedy. In Zahn v. International Paper Co., 414 U.S. 291 (1973) the Court held that each of the class members in a diversity action under Rule 23 must satisfy the jurisdictional amount of more than $10,000 and any members who do not must be dismissed from the case. In Eisen v. Carlisle & Jacquelin, 417 U.S. 136 [*sic*] (1974) the Supreme Court interpreted Rule 23(b)(3) and (c)(2) to require personal notice of the action to all identifiable class members with service costs to be borne by the plaintiffs.

More classes with claims will be seeking redress in state courts because the federal courts have severely restricted th [*sic*] availability of class actions in their forum. Presently state statutes vary in their treatment of class actions. A strong need exists for states to adopt a uniform class action act. Many activities have impact on large numbers of persons often from several states. Adoption of a uniform act will assist states in handling multistate class actions, thereby reducing multiplicity of litigation and the chance of inconsistent judgments. The Act provides supervision of the adequacy of representation by the representative parties to insure that the interests of the class will be protected. Subsections to cover special problems of the class action are provided: notice techniques, discovery of the members of the class, effect of the judgment on the members of the class, methods of fashioning relief, and liability for costs and expenses.

This Act applies whenever an action involving a class is commenced. When a final order refusing to certify a class action is entered, the application of this Act will terminate. The scope of this Act is similar to that of F.R.C.P. 23 and does not cover derivative actions by shareholders or suits by unincorporated associations.

Within the limits of practicality, due process requires that all individuals be afforded a meaningful opportunity to be heard, Boddie v. Connecticut, 401 U.S. 371 (1971). A class action is a procedure by which people with small claims or limited means can exercise their rights and thereby make our system of justice more responsive to their needs.

UNIFORM CLASS ACTIONS [ACT] [RULE]

Sec.

Section 1. [Commencement of a Class Action]

One or more members of a class may sue or be sued as representative parties on behalf of all in a class action if:

(1) the class is so numerous or so constituted that joinder of all members, whether or not otherwise required or permitted, is impracticable; and

(2) there is a question of law or fact common to the class.

Comment

This section sets forth the requirements that must be satisfied if a class action is to be brought. Section 2 authorizes the certification of a class action.

Section 2. [Certification of Class Action]

(a) Unless deferred by the court, as soon as practicable after the commencement of a class action the court shall hold a hearing and determine whether or not the action is to be maintained as a class action and by order certify or refuse to certify it as a class action.

(b) The court may certify an action as a class action, if it finds that (1) the requirements of Section 1 have been satisfied, (2) a class action should be permitted for the fair and efficient adjudication of the controversy, and (3) the representative parties fairly and adequately will protect the interests of the class.

(c) If appropriate, the court may (1) certify an action as a class action with respect to a particular claim or issue, (2) certify an action as a class action to obtain one or more forms of relief, equitable, declaratory, or monetary, or (3) divide a class into subclasses and treat each subclass as a class.

Comment

The standard established under 2(b)(2) is elaborated in Section 3(a) and that established under 2(b)(3) is elaborated in Section 3(b).

Section 3. [Criteria Considered]

(a) In determining whether the class action should be permitted for the fair and efficient adjudication of the controversy, as appropriately limited under Section 2(c), the court shall consider, and give appropriate weight to, the following and other relevant factors:

(1) whether a joint or common interest exists among members of the class;

(2) whether the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for a party opposing the class;

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

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

(5) whether common questions of law or fact predominate over any questions affecting only individual members;

(6) whether other means of adjudicating the claims and defenses are impracticable or inefficient;

(7) whether a class action offers the most appropriate means of adjudicating the claims and defenses;

(8) whether members not representative parties have a substantial interest in individually controlling the prosecution or defense of separate actions;

(9) whether the class action involves a claim that is or has been the subject of a class action, a government action, or other proceeding;

(10) whether it is desirable to bring the class action in another forum;

(11) whether management of the class action poses unusual difficulties;

(12) whether any conflict of laws issues involved pose unusual difficulties; and

(13) whether the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class.

(b) In determining under Section 2(b) that the representative parties fairly and adequately will protect the interests of the class, the court must find that:

(1) the attorney for the representative parties will adequately represent the interests of the class;

(2) the representative parties do not have a conflict of interest in the maintenance of the class action; and

(3) the representative parties have or can acquire adequate financial resources, considering Section 17, to assure that the interests of the class will not be harmed.

Comment

The factors listed in Section 3(a)(1) to (13), possibly along with other factors, are to be considered by the court in determining whether to certify the action as a class action. The factors may be given different weight by the court.

After an action has been brought as a class action, if the court determines that there is pending in another court an action which encompasses the action pending both as to general class and claim, it may refuse under Subsection 3(a)(9) and (10) to certify the action against or on behalf of the class if it concludes that this forum is not the most appropriate one. The court in making this decision should consider the sequence of the suits, the residence of the members of the class, where the transaction or occurrence involved took place, where the relevant evidence is available, and other pertinent facts.

Section 4. [Order on Certification]

(a) The order of certification shall describe the class and state: (1) the relief sought, (2) whether the action is maintained with respect to particular claims or issues, and (3) whether subclasses have been created.

(b) The order certifying or refusing to certify a class action shall state the reasons for the court's ruling and its findings on the facts listed in Section 3(a).

(c) An order certifying or refusing to certify an action as a class action is appealable.

(d) Refusal of certification does not terminate the action, but does preclude it from being maintained as a class action.

Comment

If class certification is denied, subsection (d) presupposes the existence of rules of civil procedure which will allow the action to continue with the representative parties as properly joined parties.

Denial of certification and the allowance of a personal action under subsection (d) does not affect any possible intervention or joinder of class members who are not representative parties under the applicable state laws.

Section 5. [Amendment of Certification Order]

(a) The court may amend the certification order at any time before entry of judgment on the merits. The amendment may (1) establish subclasses, (2) eliminate from the class

any class member who was included in the class as certified, (3) provide for an adjudication limited to certain claims or issues, (4) change the relief sought, or (5) make any other appropriate change in the order.

(b) If notice of certification has been given pursuant to Section 7, the court may order notice of the amendment of the certification order to be given in terms and to any members of the class the court directs.

(c) The reasons for the court's ruling shall be set forth in the amendment of the certification order.

(d) An order amending the certification order is appealable. An order denying the motion of a member of a defendant class, not a representative party, to amend the certification order is appealable if the court certifies it for immediate appeal.

Comment

An order amending an order of certification is an appealable order as is an order certifying or refusing to certify an action as a class action.

A member of a defendant class can attempt to get out of a class action by seeking an amendment of the order of certification. If a member of a defendant class seeks an amendment which would delete him or her from the class and the court refused to make such an order, an appeal can be taken if the court certifies it for appeal.

Under Section 5(b) the court may order notice given of an amendment if it deems it desirable in light of the nature of the amendment and the notice previously given.

Section 6. [Jurisdiction over Multi-State Classes]

[(a)] A court of this State may exercise jurisdiction over any person who is a member of the class suing or being sued if:

[(1)] a basis for jurisdiction exists or would exist in a suit against the person under the law of this State[;][or]

[(2) the state of residence of the class member, by class action law similar to subsection (b), has made its residents subject to the jurisdiction of the courts of this State.]

[(b) A resident of this State who is a member of a class suing or being sued in another state is subject to the jurisdiction of that state if by similar class action law it extends reciprocal jurisdiction to this State.]

Comment

The reach of the court under this Act is restricted by both constitutional and statutory or rule limitations. Persons beyond the court's reach may be able to participate in a plaintiff class action by intervention under provisions similar to Federal Rule 24 which exist in most states.

The court in deciding whether to certify the action as a class action is to consider the conflict of laws problems which may be involved. (See Section 3(12).) Those problems may exist because of the possibility of bringing the action in a jurisdiction other than that in which the operative facts occurred and because of the reach of the court under this section beyond the state in which the court is sitting.

The bracketed subsections of Section 6 incorporate reciprocal provisions which would allow a state to exercise jurisdiction in a sister state if that state has a reciprocal grant of power. There is some precedent for this sort of provision. (See, for example, the Uniform Certification of Questions of Law [Act] [Rule], the Uniform Foreign Depositions Act, and the Uniform Mandatory Disposition of Detainers Act.)

Section 7. [Notice of Action]

(a) Following certification, the court by order, after hearing, shall direct the giving of notice to the class.

(b) The notice, based on the certification order and any amendment of the order, shall include:

(1) a general description of the action, including the relief sought, and the names and addresses of the representative parties;

(2) a statement of the right of a member of the class under Section 8 to be excluded from the action by filing an election to be excluded, in the manner specified, by a certain date;

(3) a description of possible financial consequences on the class;

(4) a general description of any counterclaim being asserted by or against the class, including the relief sought;

(5) a statement that the judgment, whether favorable or not, will bind all members of the class who are not excluded from the action;

(6) a statement that any member of the class may enter an appearance either personally or through counsel;

(7) an address to which inquiries may be directed; and

(8) other information the court deems appropriate.

(c) The order shall prescribe the manner of notification to be used and specify the members of the class to be notified. In determining the manner and form of the notice to be given, the court shall consider the interests of the class, the relief requested, the cost of notifying the members of the class, and the possible prejudice to members who do not receive notice.

(d) Each member of the class, not a representative party, whose potential monetary recovery or liability is estimated to exceed $100 shall be given personal or mailed notice if his identity and whereabouts can be ascertained by the exercise of reasonable diligence.

(e) For members of the class not given personal or mailed notice under subsection (d), the court shall provide, as a minimum, a means of notice reasonably calculated to apprise the members of the class of the pendency of the action. Techniques calculated to assure effective communication of information concerning commencement of the action shall be used. The techniques may include personal or mailed notice, notification by means of newspaper, television, radio, posting in public or other places, and distribution through trade, union, public interest, or other appropriate groups.

(f) The plaintiff shall advance the expense of notice under this section if there is no counterclaim asserted. If a counterclaim is asserted the expense of notice shall be allocated as the court orders in the interest of justice.

(g) The court may order that steps be taken to minimize the expense of notice.

Comment

The hearing required by subsection (a) can be combined with the hearing required by Section 2(a).

Personal mailed notice to all members of the class is not required by this Act. For consideration of the notice required by the U. S. Constitution, see Gant v. City of Lincoln, 225 N.W.2d 549 (Neb. 1975), and Cartt v. Superior Court in and for County of Los Angeles, 50 Cal. App. 3d 960, 124 Cal. Rptr. 376 (Ct. App. 1975).

The notice to be given may vary as to the persons to be notified and the form of notice and, to some extent, the content. Subsection (c) indicates that the court must consider a number of factors in deciding what type of notice to give.

Subsection (g) allows the court to order a defendant who has a mailing list of class members to co-operate with the representative parties in notifying the class members. Use of a computer or enclosing notice in a regular mailing would be possibilities.

Section 8. [Exclusion]

(a) A member of a plaintiff class may elect to be excluded from the action unless (1) he is a representative party, (2) the certification order contains an affirmative finding under paragraph (1), (2), or (3) of Section 3(a), or (3) a counterclaim under Section 11 is pending against the member or his class or subclass.

(b) Any member of a plaintiff class entitled to be excluded under subsection (a) who files an election to be excluded, in the manner and in the time specified in the notice, is excluded from and not bound by the judgment in the class action.

(c) The elections shall be [docketed] [made a part of the record] in the action.

(d) A member of a defendant class may not elect to be excluded.

Comment

Under some circumstances members of a plaintiff class cannot elect to be excluded because they are indispensable parties. This would be determined by the court in ruling on certification considering the criteria of Section 3(a). Such situations might arise in actions comparable to those under Federal Rule 23(b)(1); see 3B, Moore's Federal Practice, ¶ 23.35. In most situations members of a plaintiff class will be permitted to elect to be excluded.

A class member aggrieved by an affirmative finding under Section 3(a)(1), (2), or (3) might seek relief through one of the extraordinary writs or through an interlocutory appeal if authorized by the state practice.

Section 9. [Conduct of Action]

(a) The court on motion of a party or its own motion may make or amend any appropriate order dealing with the conduct of the action including, but not limited to, the following: (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 as the court directs, of (i) any step in the action, (ii) the proposed extent of the judgment, or (iii) the opportunity of members to signify whether they consider the representation fair and adequate, to enter an appearance and present claims or defenses, or otherwise participate in the action; (3) imposing conditions on the representative parties or on intervenors; (4) inviting the attorney general to participate with respect to the question of adequacy of class representation; (5) making any other order to assure that the class action proceeds only with adequate class representation; and (6) making any order to assure that the class action proceeds only with competent representation by the attorney for the class.

(b) A class member not a representative party may appear and be represented by separate counsel.

Comment

The rules governing civil procedure in the courts of the state normally will govern procedures in class actions. Section 9 covers certain matters which deserve special consideration. Section 9(a)(4) does not limit the power of the attorney general to participate in litigation under other applicable provisions.

Section 10. [Discovery by or against Class Members]

(a) Discovery under [applicable discovery rules] may be used only on order of the court against a member of the class who is not a representative party or who has not appeared. In deciding whether discovery should be allowed the court shall consider, among other relevant factors, the timing of the request, the subject matter to be covered, whether representatives of the class are seeking discovery on the subject to be covered, and whether the discovery will result in annoyance, oppression, or undue burden or expense for the member of the class.

(b) Discovery by or against representative parties or those appearing is governed by the rules dealing with discovery by or against a party to a civil action.

Comment

Under Section 10 members of the class not representative parties and not appearing are not treated as parties to the litigation for discovery purposes. Discovery can be obtained of these members only on order of court.

Discovery against representative parties may include the representative parties' fee arrangement with counsel. Disclosure of this arrangement is required under Section 17.

Section 11. [Counterclaims]

(a) A defendant in an action brought by a class may plead as a counterclaim any claim the court certifies as a class action against the plaintiff class. On leave of court, the defendant may plead as a counterclaim a claim against a member of the class or a claim the court certifies as a class action against a subclass.

(b) Any counterclaim in an action brought by a plaintiff class must be asserted before notice is given under Section 7.

(c) If a judgment for money is recovered against a party on behalf of a class, the court rendering judgment may stay distribution of any award or execution of any portion of a judgment allocated to a member of the class against whom the losing party has pending an action in or out of state for a judgment for money, and continue the stay so long as the losing party in the class action pursues the pending action with reasonable diligence.

(d) A defendant class may plead as a counterclaim any claim on behalf of the class that the court certifies as a class action against the plaintiff. The court may certify as a class action a counterclaim against the plaintiff on behalf of a subclass or permit a counterclaim by a member of the class. The court shall order that notice of the counterclaim by the class, subclass, or member of the class be given to the members of the class as the court directs, in the interest of justice.

(e) A member of a class or subclass asserting a counterclaim shall be treated as a member of a plaintiff class for the purpose of exclusion under Section 8.

(f) The court's refusal to allow, or the defendant's failure to plead, a claim as a counterclaim in a class action does not bar the defendant from asserting the claim in a subsequent action.

Comment

Nothing in this Act precludes a party opposing the class from bringing an action against a member of the class concurrently with the class action or in the future. Subsection (f) makes the ordinary rules concerning compulsory counterclaims inapplicable in a class action under this Act.

The expense of notification of actions involving counterclaims is to be determined as provided in Section 7(f).

Section 12. [Dismissal or Compromise]

(a) Unless certification has been refused under Section 2, a class action without the approval of the court after hearing, may not be (1) dismissed voluntarily, (2) dismissed involuntarily without an adjudication on the merits, or (3) compromised.

(b) If the court has certified the action under Section 2, notice of hearing on the proposed dismissal or compromise shall be given to all members of the class in a manner the court directs. If the court has not ruled on certification, notice of hearing on the proposed dismissal or compromise may be ordered by the court which shall specify the persons to be notified and the manner in which notice is to be given.

(c) Notice given under subsection (b) shall include a full disclosure of the reasons for the dismissal or compromise including, but not limited to, (1) any payments made or to be

made in connection with the dismissal or compromise, (2) the anticipated effect of the dismissal or compromise on the class members, (3) any agreement made in connection with the dismissal or compromise, (4) a description and evaluation of alternatives considered by the representative parties and (5) an explanation of any other circumstances giving rise to the proposal. The notice also shall include a description of the procedure available for modification of the dismissal or compromise.

(d) On the hearing of the dismissal or compromise, the court may:

(1) as to the representative parties or a class certified under Section 2, permit dismissal with or without prejudice or approve the compromise;

(2) as to a class not certified, permit dismissal without prejudice;

(3) deny the dismissal;

(4) disapprove the compromise; or

(5) take other appropriate action for the protection of the class and in the interest of justice.

(e) The cost of notice given under subsection (b) shall be paid by the party seeking dismissal, or as agreed in case of a compromise, unless the court after hearing orders otherwise.

Comment

This section covers class actions brought under Section 1 until certification has been refused under Section 2, as well as class actions certified under Section 2.

Section 13. [Effect of Judgment on Class]

In a class action certified under Section 2 in which notice has been given under Section 7 or 12, a judgment as to the claim or particular claim or issue certified is binding, according to its terms, on any member of the class who has not filed an election of exclusion under Section 8. The judgment shall name or describe the members of the class who are bound by its terms.

Comment

Section 13 deals with the application of a class action judgment to the members of the class. This Act does not deal with the preclusive effect of a class action upon a member of the class who has requested exclusion. This is a matter which is governed by the normal rules of res judicata/preclusion.

Section 14. [Costs]

(a) Only the representative parties and those members of the class who have appeared individually are liable for costs assessed against a plaintiff class.

(b) The court shall apportion the liability for costs assessed against a defendant class.

(c) Expenses of notice advanced under Section 7 are taxable as costs in favor of the prevailing party.

Comment

Section 14 specifies the liability of class members when costs are assessed against the class and provides for assessment of the expense of notification under Section 7. The nature of other costs and assessments against parties in a class action is left to the law generally applicable in the state.

Section 15. [Relief Afforded]

(a) The court may award any form of relief consistent with the certification order to which the party in whose favor it is rendered is entitled including equitable, declaratory, monetary, or other relief to individual members of the class or the class in a lump sum or installments.

(b) Damages fixed by a minimum measure of recovery provided by any statute may not be recovered in a class action.

(c) If a class is awarded a judgment for money, the distribution shall be determined as follows:

(1) The parties shall list as expeditiously as possible all members of the class whose identity can be determined without expending a disproportionate share of the recovery.

(2) The reasonable expense of identification and distribution shall be paid, with the court's approval, from the funds to be distributed.

(3) The court may order steps taken to minimize the expense of identification.

(4) The court shall supervise, and may grant or stay the whole or any portion of, the execution of the judgment and the collection and distribution of funds to the members of the class as their interests warrant.

(5) The court shall determine what amount of the funds available for the payment of the judgment cannot be distributed to members of the class individually because they could not be identified or located or because they did not claim or prove the right to money apportioned to them. The court after hearing shall distribute that amount, in whole or in part, to one or more states as unclaimed property or to the defendant.

(6) In determining the amount, if any, to be distributed to a state or to the defendant, the court shall consider the following criteria: (i) any unjust enrichment of the defendant; (ii) the willfulness or lack of willfulness on the part of the defendant; (iii) the impact on the defendant of the relief granted; (iv) the pendency of other claims against the defendant; (v) any criminal sanction imposed on the defendant; and (vi) the loss suffered by the plaintiff class.

(7) The court, in order to remedy or alleviate any harm done, may impose conditions on the defendant respecting the use of the money distributed to him.

(8) Any amount to be distributed to a state shall be distributed as unclaimed property to any state in which are located the last known addresses of the members of the class to whom distribution could not be made. If the last known addresses cannot be ascertained with reasonable diligence, the court may determine by other means what portion of the unidentified or unlocated members of the class were residents of a state. A state shall receive that portion of the distribution that its residents would have received had they been identified and located. Before entering an order distributing any part of the amount to a state, the court shall given [*sic*] written notice of its intention to make distribution to the attorney general of the state of the residence of any person given notice under Section 7 or 12 and shall afford the attorney general an opportunity to move for an order requiring payment to the state.

Comment

Subsection (c)(3) is similar to subsection 7(g) in its purpose and scope and should be construed similarly.

Subsection 15(c)(5) provides for the possibility of escheat of funds available for the payment of the judgment if the court, applying the relevant criteria, so orders. The escheat provision is similar to that found in the Model Escheat of Postal Savings System Accounts Act.

If the court decides that undistributed funds available for the payment of the judgment should be distributed to the defendant, the court under subsection 15(c)(7), "in order to remedy or alleviate any harm done, may impose conditions on the defendant respecting the use of the money distributed to him." For example, if the plaintiff class sued for damage done because of the discharge of pollutants by the defendant and the class won a money judgment, the court might distribute to the defendant funds undistributed to the plaintiff class on condition that the defendant use the funds to install pollution-control devices.

Section 16. [Attorney's Fees]

(a) Attorney's fees for representing a class are subject to control of the court.

(b) If under an applicable provision of law a defendant or defendant class is entitled to attorney's fees from a plaintiff class, only representative parties and those members of the class who have appeared individually are liable for those fees. If a plaintiff is entitled to attorney's fees from a defendant class, the court may apportion the fees among the members of the class.

(c) If a prevailing class recovers a judgment for money or other award that can be divided for the purpose, the court may order reasonable attorney's fees and litigation expenses of the class to be paid from the recovery.

(d) If the prevailing class is entitled to declaratory or equitable relief, the court may order the adverse party to pay to the class its reasonable attorney's fees and litigation expenses if permitted by law in similar cases not involving a class or the court finds that the judgment has vindicated an important public interest. However, if any monetary award is also recovered, the court may allow reasonable attorney's fees and litigation expenses only to the extent that a reasonable proportion of that award is insufficient to defray the fees and expenses.

(e) In determining the amount of attorney's fees for a prevailing class the court shall consider the following factors:

(1) the time and effort expended by the attorney in the litigation, including the nature, extent, and quality of the services rendered;

(2) results achieved and benefits conferred upon the class;

(3) the magnitude, complexity, and uniqueness of the litigation;

(4) the contingent nature of success;

(5) in cases awarding attorney's fees and litigation expenses under subsection (d) because of the vindication of an important public interest, the economic impact on the party against whom the award is made; and

(6) appropriate criteria in the [state's Code of Professional Responsibility].

Comment

Most of the factors listed in subsection (e) are taken from Lindy Bros. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973).

Section 17. [Arrangements for Attorney's Fees and Expenses]

(a) Before a hearing under Section 2(a) or at any other time the court directs, the representative parties and the attorney for the representative parties shall file with the court, jointly or separately: (1) a statement showing any amount paid or promised them by any person for the services rendered or to be rendered in connection with the action or for the costs and expenses of the litigation and source of all of the amounts; (2) a copy of any written agreement, or a summary of any oral agreement, between the representative parties and their attorney concerning financial arrangments or fees and (3) a copy of any written agreement, or a summary of any oral agreement, by the representative parties or the attorney to share these amounts with any person other than a member, regular associate, or an attorney regularly of counsel with his law firm. This statement shall be supplemented promptly if additional arrangements are made.

(b) Upon a determination that the costs and litigation expenses of the action cannot reasonably and fairly be defrayed by the representative parties or by other available sources, the court by order may authorize and control the solicitation and expenditure of voluntary contributions for this purpose from members of the class, advances by the attorneys or others, or both, subject to reimbursement from any recovery obtained for the class. The court may order any available funds so contributed or advanced to be applied to the payment of any costs taxed in favor of a party opposing the class.

Comment

Section 17 requires this information to be disclosed in order to assist the court in making determinations concerning (1) adequacy of representation by the representative parties and by the attorney for the class, (2) any possible collusion between the representative parties and the attorney for the class, and (3) any possible conflict of interests among the representative parties and the class members.

This section is grounded on the idea that representative parties are fiduciaries for the class and that class actions are unique and require treatment different from ordinary actions.

If the information available under this section shows that an action has been improvidently brought, action can then be taken under Section 9(a)(5) or (6).

Section 18. [Statute of Limitations]

The statute of limitations is tolled for all class members upon the commencement of an action asserting a class action. The statute of limitations resumes running against a member of a class:

(1) upon his filing an election of exclusion;

(2) upon entry of an order of certification, or of an amendment thereof, eliminating him from the class;

(3) except as to representative parties, upon entry of an order under Section 2 refusing to certify the action as a class action; and

(4) upon dismissal of the action without an adjudication on the merits.

Comment

Section 18 adopts the principles of American Pipe and Construction Co. v. Utah, 415 U.S. 952, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), which held that the commencement of a class action under Federal Rule 23 suspends the applicable statute of limitation to all members of the class pending a determination of class action status.

Section 19. [Uniformity of Application and Construction]

This [Act] [Rule] shall be construed and applied to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] [Rule] among states enacting it.

Section 20. [Short Title]

This [Act] [Rule] may be cited as the "Uniform Class Actions [Act] [Rule]."

Section 21. [Repeal]

The following acts and parts of acts are repealed:

Section 22. [Time of Taking Effect]

This [Act] [Rule] shall take effect