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Ninth Circuit Review—Class Actions—Due Process and Notice in a Rule 23(b)(2) Class Action

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CLASS ACTIONS—DUE PROCESS AND NOTICE IN A RULE 23(b)(2) CLASS ACTION

I. INTRODUCTION

The Ninth Circuit has recently expressed its view on the requirement of notice in class actions maintained under rule 23 of the Federal Rules of Civil Procedure.[1] In two 1977 decisions, the circuit held that due process does not require notice to the absent members of a class certified under subsection 23(b)(2).[2] These decisions raise serious constitutional questions in light of the Supreme Court's holding in *Mullane v. Central Hanover Bank & Trust Co.*[3] that due process requires notice in all representative actions.[4]

Rule 23 governs the maintenance of class actions in the federal court system. It is necessary to meet the requirements of both 23(a)[5] and 23(b)[6]

1. FED. R. CIV. P. 23. For text of rule see notes 5-6, 14-15 *infra*.

2. Elliott v. Weinberger, 564 F.2d 1219, 1228 (9th Cir. 1977); Souza v. Scalone, 563 F.2d 385, 386 (9th Cir. 1977) (per curiam).

3. 339 U.S. 306 (1950).

4. *Id.* at 314. The notice must be reasonably calculated to reach the individual class members involved, but it need not actually reach the class members to satisfy due process requirements. *Id.* at 314-15. *See also* text accompanying notes 59-95 *infra*.

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

> 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.

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

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
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> (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
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> (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
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> (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
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> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of

to qualify for class action treatment under the rule. Once these requirements have been fulfilled, any judgment in the action will bind all members of the class with the same force and effect as if every class member had been before the court.[7] It is this broad res judicata effect that is the very purpose underlying the rule.[8]

Section 23(b) sets forth three alternative types of class actions which may be maintained.[9] One type is embodied in 23(b)(2) which permits class action treatment where "the party opposing the class has acted or refused to act on grounds generally applicable to the class," and where the class seeks predominantly injunctive or declaratory relief.[10] Monetary relief is permissible under this subsection so long as the declaratory or injunctive relief is predominant.[11]

An alternative to 23(b)(2) is found in the much broader provisions of 23(b)(3).[12] Subsection 23(b)(3) provides for use of the class action device where common questions of law or fact predominate, and where the trial court finds class action posture to be a superior means of disposition of the suit.[13]

Notice to members of a class, apprising them of the action, is governed by 23(d)(2)[14] and 23(c)(2).[15] Subsection 23(d)(2) is a discretionary provi-

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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 class in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

7. *Id.* 23(c)(3). *Cf.* Hansberry v. Lee, 311 U.S. 32, 45-46 (1940) (Court refused to bind member of class where representation in first suit was found to be inadequate).

8. American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 547 (1974); Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97, 116 [hereinafter referred to as Dam].

9. FED. R. CIV. P. 23(b); *see* note 6 *supra*.

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

11. *Id.* 23, Advisory Committee's Note, 39 F.R.D. 69, 102 (1966).

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

13. *Id.*

14. *Id.* 23(d)(2) provides:

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

15. *Id.* 23(c)(2) provides:

In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

sion giving the court the power to order notice to the members of any 23(b) class.[16] Notice to members of a (b)(3) class, however, is mandatory under subsection 23(c)(2), which requires the court to direct to the members of the class "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[17] Subsection 23(c)(2) is, by its own terms, only applicable to actions maintained under 23(b)(3), leaving any notice to (b)(2) class members within the discretion of the trial court under 23(d)(2).[18]

The fact that the mandatory notice provision of rule 23 does not apply to actions brought under (b)(2) does not close the question of whether notice is required in such actions.[19] Quite apart from what the rule requires, the due process clause of the fifth amendment[20] may impose constitutional requirements for notice.[21] Thus, it is necessary to examine the possible conflict between the Ninth Circuit view and the due process clause[22] in light of the constitutional sufficiency of alternative forms of notice.[23]

II. THE NINTH CIRCUIT VIEW

The Ninth Circuit has stated its view on the requirement of notice in 23(b)(2) class actions in two recent decisions: *Elliott v. Weinberger*[24] and *Souza v. Scalone*.[25] *Elliott v. Weinberger* was an appeal from a district court order requiring the Secretary of Health, Education and Welfare to provide a hearing and notice prior to the initiation of proceedings to recoup overpayments to old-age and disabled social security

16. *See* note 14 *supra*.

17. FED. R. CIV. P. 23(C)(2). *See* note 15 *supra*.

18. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 n.14 (1974).

19. *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564-65 (2d Cir. 1968); text accompanying note 55 *infra*. For a discussion of the rather complex procedural history of *Eisen*, see Comment, *Class Actions Under Rule 23(b)(2): A Type of Class Action Which Does Not Require Eisen Notice*, 24 CLEV. ST. L. REV. 504, 510-11 n.26 (1975).

20. U.S. CONST. amend. V.

21. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968).

22. *See* text accompanying notes 59-95 *infra*.

23. *See* text accompanying notes 96-113 *infra*.

24. 564 F.2d 1219 (9th Cir. 1977), *rev'g* Elliott v. Weinberger, 371 F. Supp. 960 (D. Hawaii 1974) and Buffington v. Weinberger, No. 734-73C2 (W.D. Wash. Oct. 22, 1974). *Elliott* and *Buffington* were consolidated for appeal. Both cases were concerned with the constitutionality of the recoupment procedure, but since the *Elliott* district court had ordered notice pursuant to its discretionary power under FED. R. CIV. P. 23(d)(2), only the *Buffington* facts gave rise to the issue of notice to absent (b)(2) class members. 564 F.2d at 1228.

25. 563 F.2d 385 (9th Cir. 1977) (per curiam).

beneficiaries.[26] The suit was certified as a class action under 23(b)(2) on behalf of the beneficiaries, and the parties sought injunctive relief as well as damages in the amount of the recouped overpayments.[27]

The Secretary in *Elliott* had challenged the validity of the class action order, arguing that notice had not been afforded the members of the beneficiary class. He contended that the failure to provide notice was a violation of due process of law, and that this failure reduced the effect of the judgment so as to bind only those individuals named as plaintiffs. The Ninth Circuit found that

> [a]lthough plaintiffs sought recovery of monies recouped from their monthly benefit checks, their primary purpose in bringing this action is to enjoin the Secretary from recouping such sums without providing social security beneficiaries a preceding hearing. In short, pecuniary recovery is purely incidental to this suit's principal purpose, and consequently this action is properly certifiable under 23(b)(2).[28]

The *Elliott* court held that "due process does not require notice in every (b)(2) class action,"[29] and that based on the trial court's determination that the class representation was adequate, "the class members . . . [had] received their functional equivalent to a day in court."[30] The absentees' claims in *Elliott* were potentially substantial in amount. For example, a Mrs. Biner, one of the participating class members, was assessed an overpayment in the amount of $2,216.20 for allegedly earning income in excess of her 11,680.00 limit in the year 1972.[31] Her benefits were then adjusted so that $50.00 per month would be withheld from her regular benefit payments.

The active class members who sought recovery in damages of the assessed over payments were denied monetary relief, and the *Elliott* court acknowledged that its determination "forecloses absent members from bringing individual suits thereafter."[32] The rule prescribed by the

26. 564 F.2d at 1222.
27. *Id.* at 1228.
28. *Id.*
29. *Id.*
30. *Id.* at 1229 (footnote omitted).
31. *Id.* at 1225 & n.7.
32. *Id.* at 1229 n.14. Of course, no court can make a final determination as to the res judicata effect of its judgment. *See, e.g.*, Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636 (D. Kan. 1968), *aff'd in part and rev'd in part on other grounds*, 441 F.2d 704 (10th Cir. 1971), *cert. denied*, 404 U.S. 951 (1972). *See also* FED. R. CIV. P. 23, Advisory Committee's Note, 39 F.R.D. 69, 106 (1966). The effect of a judgment is to be determined in a subsequent action. Zeilstra v. Tarr, 466 F.2d 111, 113 (6th Cir. 1972). The language of *Elliott* is illustrative of the Ninth Circuit's intent to consider the action res judicata as to absentees.

Ninth Circuit thus authorizes a procedure whereby an individual may be deprived of a claim for substantial monetary relief without ever being apprised of the existence of the action so long as the trial court determines that the class is adequately represented.

In *Souza v. Scalone*,[33] the plaintiff had filed a class action to contest the requirements of the Teamsters' Pension Plan, alleging that the Plan's age-at-break-in-service requirement was arbitrary and unreasonable.[34] The plaintiff sought an injunction preventing the imposition of the age requirement, a judgment declaring that the Plan, as administered, was not for the exclusive benefit of the employees, and damages in the amount of those retirement benefits denied due to the age requirement.[35] The court certified the class action as one properly maintainable under 23(b)(2), holding that despite the substantial nature of the damage claims, "[w]here the monetary relief sought is integrally related to and would directly flow from the injunctive or declaratory relief sought, 23(b)(2) status is appropriate."[36] The court further held that since the action was properly brought under 23(b)(2), neither the rule nor due process would require notice to absent class members where the representation of the class was deemed to be adequate.[37]

III. DUE PROCESS AND NOTICE

A. The Views Among the Circuits

1. That Due Process Never Requires Notice

Many circuits take the position that a class member's right to due process never requires notice in a 23(b)(2) class action.[38] In *Childs v.*

33. 563 F.2d 385 (9th Cir. 1977) (per curiam).

34. *Id.* at 385-86.

35. 64 F.R.D. 654, 658 (N.D. Cal. 1974), *vacated and remanded*, 563 F.2d 385 (9th Cir. 1977). The Ninth Circuit's discussion of the facts of *Souza* is very brief; therefore, it may be necessary to cite to the lower court opinion.

36. *Id.*

37. *Id.* at 659-60.

38. Childs v. United States Bd. of Parole, 511 F.2d 1270, 1276 (D.C. Cir. 1974); Katz v. Carte Blanche Corp., 496 F.2d 747, 756 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974); Hammond v. Powell, 462 F.2d 1053, 1055 (4th Cir. 1972); Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969); Lund v. Affleck, 388 F. Supp. 137, 140 (D.R.I. 1975); White v. Local 207, Laborers' Int'l Union, 387 F. Supp. 53, 54 (W.D. La. 1974); American Fin. Sys., Inc. v. Harlow, 65 F.R.D. 94, 110-11 (D. Md. 1974); Citizens Environmental Council v. Volpe, 364 F. Supp. 286, 288 (D. Kan.), *aff'd on other grounds*, 484 F.2d 870 (10th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Vaughns v. Board of Educ., 355 F. Supp. 1034, 1035 n.1 (D. Md.), *remanded on other grounds*, 468 F.2d 894 (4th Cir. 1972), *cert. denied*, 410 U.S. 910 (1973); Baxter v. Savannah Sugar Ref. Corp., 350 F. Supp. 139, 141 (S.D. Ga. 1972), *aff'd in part, rev'd in part and remanded on other grounds*, 495 F.2d 437 (5th Cir.), *cert.*

United States Board of Parole,[39] for example, the defendant Board objected to the district court's failure to require notice to all class members when the class was certified. The District of Columbia Circuit rejected the Board's challenge to the class certification, finding that the requirements of 23(b)(2) had been met. The court stated, "In this situation, the notice provision of Rule 23(c)(2) does not apply."[40] With this limited analysis, the court held that notice is not required in 23(b)(2) actions.

At least one court, sharing the view expressed in *Childs*, has suggested that the presence of an opportunity to exclude oneself from the (b)(3) class, and the absence of such an opportunity in (b)(2) actions, justifies the lack of any notice requirement in 23(b)(2) actions.[41] The notion is that absent an opportunity to "opt-out," there is no action to be taken by the absentee, and therefore there is no purpose to be served by providing notice. Most courts adopting this position simply treat the rule as presumptively valid, thus leaving notice in (b)(2) actions within the sole discretion of the court under 23(d)(2).[42]

2. That Due Process May Require Notice

Another view among the circuits is that due process may require notice in 23(b)(2) actions, but that notice in such actions is not always constitutionally required.[43] The justification which is usually advanced for this

denied, 419 U.S. 1033 (1974); Baham v. Southern Bell Tel. & Tel. Co., 55 F.R.D. 478, 481 (W.D. La. 1972); Wilczynski v. Harder, 323 F. Supp. 509, 512 n.3 (D. Conn. 1971); Mungin v. Florida E. Coast Ry. Co., 318 F. Supp. 720, 732 (M.D. Fla. 1970), *aff'd on other grounds*, 441 F.2d 728 (5th Cir.), *cert. denied*, 404 U.S. 987 (1971); Johnson v. City of Baton Rouge, 50 F.R.D. 295, 301 (E.D. La. 1970); Solman v. Shapiro, 300 F. Supp. 409, 411-12 n.1 (D. Conn.), *aff'd on other grounds*, 396 U.S. 5 (1969); Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636 (D. Kan. 1968), *aff'd in part and rev'd in part on other grounds*, 441 F.2d 704 (10th Cir. 1971), *cert. denied*, 404 U.S. 951 (1972).

39. 511 F.2d 1270 (D.C. Cir. 1974).

40. *Id.* at 1276.

41. Mungin v. Florida E. Coast Ry. Co., 318 F. Supp. 720, 732 (M.D. Fla. 1970), *aff'd on other grounds*, 441 F.2d 728 (5th Cir.), *cert. denied*, 404 U.S. 987 (1971).

42. *E.g.*, Childs v. United States Bd. of Parole, 511 F.2d at 1276.

43. Elliott v. Weinberger, 564 F.2d 1219, 1228-29 (9th Cir. 1977); Souza v. Scalone, 563 F.2d 385, 386 (9th Cir. 1977) (per curiam); Larionoff v. United States, 533 F.2d 1167, 1184-86 (D.C. Cir. 1976), *aff'd on other grounds*, 97 S. Ct. 2150 (1977); Ives v. W.T. Grant Co., 522 F.2d 749, 764-65 (2d Cir. 1975); Mattern v. Weinberger, 519 F.2d 150, 157-58 (3d Cir. 1975), *vacated and remanded on other grounds*, 425 U.S. 987 (1976); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 878-79 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 257 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); Lewis v. Philip Morris, Inc., 419 F. Supp. 345, 352 (E.D. Va. 1976); Redhail v. Zablocki, 418 F. Supp. 1061, 1066-68 (E.D. Wis. 1976), *aff'd on other grounds*, 98 S. Ct. 673 (1978); Sweet v. General Tire & Rubber Co., 74 F.R.D. 333, 336-37 (N.D. Ohio 1976); Watson v. Branch County Bank, 380 F. Supp. 945, 960 (W.D. Mich. 1974),

position is that "[t]he touchstone of due process is that each party has his or her positions fairly and adequately represented in court . . . . As long as there is adequate representation, notice is not required in 23(b)(2) actions."[44] The absence of an "opt-out" provision in (b)(2) actions provides further justification. "In Rule 23(b)(2) action[s] notice would serve no purpose at this time, as class members cannot opt out as they can in 23(b)(3) actions."[45]

Some of the courts which subscribe to this view suggest particular circumstances under which notice would be required,[46] but most courts avoid specific enumeration of such circumstances, merely acknowledging that they may exist.[47] The Ninth Circuit decisions in *Elliott* and *Souza* are representative of this view.[48]

3. That Due Process Always Requires Notice

The third view on the issue of notice in 23(b)(2) actions is that due process always requires some form of notice in any representative suit.[49]

rev'd mem., 516 F.2d 902 (6th Cir. 1975); Fertig v. Blue Cross of Iowa, 68 F.R.D. 53, 59 (N.D. Iowa 1974); Lynch v. Household Fin. Corp., 360 F. Supp. 720, 722 n.3 (D. Conn. 1973); Woodward v. Rogers, 344 F. Supp. 974, 980 n.10 (D.D.C. 1972), *aff'd mem.*, 486 F.2d 1317 (D.C. Cir. 1973); Francis v. Davidson, 340 F. Supp. 351, 361 (D. Md.), *aff'd mem.*, 409 U.S. 904 (1972); King v. Kansas City S. Indus., Inc., 56 F.R.D. 96, 100 (N.D. Ill. 1972), *appeal dismissed per curiam*, 479 F.2d 1259 (7th Cir. 1973), *aff'd on other grounds*, 519 F.2d 20 (7th Cir. 1975). *See also* 3B MOORE'S FEDERAL PRACTICE ¶ 23.55, at 1152-53 (2d ed. 1977).

44. Sweet v. General Tire & Rubber Co., 74 F.R.D. 333, 336-37 (N.D. Ohio 1976) (footnotes omitted).

45. *Id.* at 337 n.11.

46. *E.g.*, Elliott v. Weinberger, 564 F.2d at 1229:

> Only when necessary to provide class members an opportunity to signify whether representation by named plaintiffs is fair and adequate or to intervene to present additional claims or to otherwise come into the action to, for example, submit views as *amici curiae*, does due process require the direction of some sort of notice to absent members of a (b)(2) class.

The *Elliott* court found that it was not necessary "to provide class members an opportunity to signify whether representation . . . [was] fair and adequate" because the trial court record reflected that plaintiffs were represented by "skilled and experienced counsel." *Id.*

47. *E.g.*, Sweet v. General Tire & Rubber Co., 74 F.R.D. 333, 336-37 (N.D. Ohio 1976).

48. *See* text accompanying notes 59-95 *infra*.

49. Schrader v. Selective Serv. Sys. Local Bd. No. 76, 470 F.2d 73, 75 (7th Cir.), *cert. denied*, 409 U.S. 1085 (1972); Zeilstra v. Tarr, 466 F.2d 111, 113 (6th Cir. 1972); Sandler v. Tarr, 463 F.2d 1096, 1096 (4th Cir.) (per curiam), *cert. denied*, 409 U.S. 990 (1972); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564-65 (2d Cir. 1968); Richmond Black Police Officers Ass'n v. City of Richmond, 386 F. Supp. 151, 158 (E.D. Va. 1974); Alexander v. Avco Corp., 380 F. Supp. 1282, 1286 (M.D. Tenn. 1974); Brandt v. Owens-Illinois, Inc., 62 F.R.D. 160, 171 (S.D.N.Y. 1973); Kristiansen v. John Mullins & Sons, Inc., 59 F.R.D. 99, 109 n.13 (E.D.N.Y. 1973); United States *ex rel.* Walker v. Mancusi, 338 F. Supp. 311, 316 n.4 (W.D.N.Y. 1971), *aff'd on other grounds*, 467 F.2d 51 (2d Cir. 1972); Lopez v. Wyman, 329 F. Supp. 483, 486 (W.D.N.Y. 1971), *aff'd mem.*, 404 U.S. 1055 (1972);

In *Eisen v. Carlisle & Jacquelin*,[50] for example, the plaintiff had instituted a class action seeking damages and injunctive relief on behalf of himself and all other purchasers and sellers of "odd-lots" on the New York Stock Exchange. He alleged that the defendant brokerage firms and the defendant stock exchange had violated the antitrust and securities laws respectively.[51] The class was determined to have over six million members, over two million of whom were ascertainable.[52]

Faced with the prohibitive cost of notifying over two million class members individually,[53] Eisen vigorously argued that the action was properly maintainable under 23(b)(1) or 23(b)(2), and that if so maintained, individual notice was not required.[54] The court responded:

> We must also note that plaintiff's effort to qualify the action under 23(b)(1) and 23(b)(2) was induced by his erroneous theory that notice is not "mandatory" under these sections. This theory is based on the assumption that 23(c)(2) provides the only "mandatory" notice required by the new rule . . . . Nevertheless, we hold that notice is required as a matter of due process in all representative actions, and 23(c)(2) merely requires a particularized form of notice in 23(b)(3) actions.[55]

The court cited *Mullane v. Central Hanover Bank & Trust Co.*[56] as requiring this result,[57] and, as will be seen,[58] the *Eisen* view is probably the only view among the circuits that does comport with the *Mullane* decision.

Zachary v. Chase Manhattan Bank, 52 F.R.D. 532, 535 (S.D.N.Y. 1971); McCarthy v. Director of Selective Serv. Sys., 322 F. Supp. 1032, 1034 (E.D. Wis. 1970), *aff'd per curiam on other grounds*, 460 F.2d 1089 (7th Cir. 1972); Cancel v. Wyman, 321 F. Supp. 528, 533 (S.D.N.Y. 1970), *appeal dismissed*, 441 F.2d 553 (2d Cir. 1971); Pasquier v. Tarr, 318 F. Supp. 1350, 1353 (E.D. La. 1970), *aff'd per curiam on other grounds*, 444 F.2d 116 (5th Cir. 1971); Fowles v. American Export Lines, Inc., 300 F. Supp. 1293, 1295 n.1 (S.D.N.Y. 1969), *aff'd per curiam on other grounds*, 449 F.2d 1269 (2d Cir. 1971); Clark v. American Marine Corp., 297 F. Supp. 1305, 1306 (E.D. La. 1969); Shulman v. Ritzenberg, 47 F.R.D. 202, 205-06 n.10 (D.D.C. 1969).

50. 391 F.2d 555 (2d Cir. 1968). The Second Circuit may no longer follow *Eisen*. *See* Ives v. W.T. Grant Co., 522 F.2d 749, 764-65 (2d Cir. 1975); Frost v. Weinberger, 515 F.2d 57, 65 (2d Cir. 1975), *cert. denied*, 424 U.S. 958 (1976). Therefore, *Eisen* is used merely to illustrate this third view on the notice requirement.

51. 391 F.2d at 559.

52. Dam, *supra* note 8, at 101-02.

53. The cost of notifying 2,250,000 known class members individually would have been approximately $225,000. *Id.*

54. 391 F.2d at 564.

55. *Id.* at 564-65 (footnotes omitted).

56. 339 U.S. 306 (1950).

57. 391 F.2d at 565.

58. *See* text accompanying notes 59-95 *infra*.

B. *The Supreme Court's Rule:* Mullane

In 1950, the Supreme Court set forth the requirements of due process regarding notice in representative actions in *Mullane v. Central Hanover Bank & Trust Co.*[59] *Mullane* was an action to establish the interests of beneficiaries in a common trust fund.[60] The petition was filed pursuant to a New York statute[61] which authorized notice by publication as a satisfactory means of informing the beneficiaries of the action. The purpose of the action was twofold: to determine the interests of the beneficiaries,[62] and, due to the res judicata effect of the determination, to protect the trustee from later claims of mismanagement of the trust.[63] The Court held that the New York statute violated the due process rights of the absent beneficiaries,[64] and set forth the standard for notice: " 'The fundamental requisite of due process of law is the opportunity to be heard.' This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."[65] The Court construed the due process clause as requiring some form of notice whenever "the proceeding is one in which [absentees] may be deprived of property rights,"[66] and the Court held that, in this particular case, notice by publication alone was insufficient.[67]

In *Mullane*, the Court recognized two property interests that were subject to potential deprivation, and therefore subject to the due process notice requirement. One such interest was the potential diminution of the corpus of the trust by the allowance of fees and expenses to contesting

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59. 339 U.S. 306 (1950).

60. *Id.* at 309.

61. N.Y. BANKING LAW § 100-c(12) (McKinney 1944) (amended), as quoted by the *Mullane* Court:

> After filing such petition [for judicial settlement of its account] the petitioner shall cause to be issued by the court in which the petition is filed and shall publish not less than once in each week for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund and in such estates, trusts or funds mentioned in the petition, all of which may be described in the notice or citiation only in the manner set forth in said petition and without setting forth the residence of any such decedent or donor of any such estate, trust or fund.

339 U.S. at 309-10.

62. *Id.* at 309.

63. *Id.* at 311.

64. *Id.* at 320.

65. *Id.* at 314 (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).

66. 399 U.S. at 313.

67. *Id.* at 320.

parties. The other interest threatened was the right of each beneficiary to bring a subsequent action against the trustee for negligent impairment of the trust account.[68] The *Souza* class members faced potential deprivation of interests similar to the diminution of the trust account in *Mullane*,[69] and absentee class members in both *Elliott* and *Souza* were deprived of their interests in bringing subsequent actions.[70] These interests are clearly types which the *Mullane* holding seeks to protect by requiring notice to absentees.

Neither the *Elliott* court nor the *Souza* court attempts to deal expressly with the terms of *Mullane*. Both courts do, however, address the question of due process as it relates to notice.[71] The Ninth Circuit has taken the position that no right to "opt-out" exists in an action of the (b)(2) type.[72] The rule expressly provides (b)(3) class members the opportunity to exclude themselves from the action; it does not, however, provide that opportunity to members of a (b)(2) class.[73] The absence of any right to

68. *Id.* at 313. The Supreme Court observed:

> In two ways this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairments of their interests. Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest.

69. In *Mullane*, class members had invested in a common fund. The Court in that case was concerned that absentees might be deprived of their property interests in the fund without notice and an opportunity to be heard. 339 U.S. at 307-09, 313. Similarly, in Souza v. Scalone, 563 F.2d at 386, absentee class members had invested in a pension fund in which the class members faced potential deprivation of their interests.

70. *Mullane* was concerned with an absentee having his or her right to sue "cut off." This right was also threatened in *Elliott* and *Souza*. In *Elliott*, 564 F.2d at 1228, it was determined that class members were not entitled to damages in the amount of the recouped overpayments. Under the doctrine of res judicata, the absentees had their right to bring an independent action extinguished by the finality of the *Elliott* judgment. Similarly, the claims of absentees may have been cut off by the res judicata effect of the *Souza* judgment. 563 F.2d at 386. For a discussion of whether the type of relief sought should affect the notice requirement, see note 83 *infra*.

Although the Ninth Circuit in *Elliott* and *Souza* claimed that res judicata would prevent absentee class members from pursuing subsequent independent actions on their claims, no court can decide the final effect to be given to its judgment in a subsequent action. *See* note 32 *supra*.

71. Elliott v. Weinberger, 564 F.2d at 1228-29; Souza v. Scalone, 563 F.2d at 386.

72. Elliott v. Weinberger, 564 F.2d at 1229 n.14. *But cf.* Bauman v. United States Dist. Court, 557 F.2d 650, 659-60 (9th Cir. 1977) (court refused to issue writ of mandamus directing district court to delete from class order provision permitting members of 23(b)(2) class to "opt-out" based on fact that class order was not "clearly erroneous," noting that "[n]either the Supreme Court nor our court has yet decided whether members of a Rule 23(b)(2) class may exclude themselves from the class.").

For the view that a right to "opt-out" does exist in a 23(b)(2) action, see Walker v. Styrex Indus., 21 Fed. R. Serv. 2d 355, 358 (M.D.N.C. 1976); Ostapowicz v. Johnson Bronze Co., 54 F.R.D. 465, 466 (W.D. Pa. 1972).

73. FED. R. CIV. P. 23(c)(2); *see* note 15 *supra*.

withdraw from the action is viewed as negating, in part, the purpose to be served by requiring notice to absentees.[74] In *Mullane*, however, there was no right in the beneficiaries to exclude themselves from the effect of the judgment;[75] therefore, the "opt-out" rationale for the absence of a notice requirement may fail to satisfy the due process requirement of *Mullane*.

Another justification advanced by the Ninth Circuit for the absence of a notice requirement is that

> it is less likely that there will be special defenses or issues relating to individual members of a . . . Rule 23(b)(2) class, than in the case of a Rule 23(b)(3) class. This means there is less reason to be concerned about each member of the class having an opportunity to be present.[76]

This rationale is unpersuasive for several reasons. First, *Mullane* recognizes a right in class members to participate in the action, to some degree, if they so desire.[77] It is this right that *Mullane* seeks to ensure by requiring notice.[78] The similarity of each member's claim has no bearing on whether the absentees should be notified of the action to enable them to exercise that right. Secondly, the *Mullane* Court viewed the class of beneficiaries as being extremely cohesive. "The individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries."[79] Furthermore, it is questionable whether the (b)(2) class is necessarily cohesive at all. Rejecting cohesiveness as a basis for

74. Elliott v. Weinberger, 564 F.2d at 1229 n.14; Souza v. Scalone, 563 F.2d at 386 (expressly adopting reasoning of *Elliott*, and vacating and remanding order "to allow the district court . . . to consider the contentions of Scalone in light of the general criteria set out in *Elliott*.").

75. 339 U.S. at 309, 311. The Court explained, "The decree in each such judicial settlement of accounts is made binding and conclusive as to any matter set forth in the account upon everyone having any interest in the common fund or in any particular estate, trust or fund." *Id.* at 309. The Court continued,

> We understand that every right which beneficiaries would otherwise have against the trust company, either as trustee of the common fund or as trustee of any individual trust, for improper management of the common trust fund during the period covered by the accounting is sealed and wholly terminated by the decree.

Id. at 311.

76. 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1786, at 143 (1972), *quoted in* Elliott v. Weinberger, Nos. 74-1611, 74-3118, slip op. at 13 (9th Cir. Oct. 1, 1975), *vacated and remanded on other grounds*, 425 U.S. 987 (1976). *But cf.* Elliott v. Weinberger, 564 F.2d 1219 (9th Cir. 1977) (reference to cohesiveness of (b)(2) class as basis for court's decision not included in 1977 opinion).

77. *See* notes 90-94 *infra* and accompanying text.

78. *Id.*

79. 339 U.S. at 319.

eschewing a (b)(2) notice requirement, one court stated, "most racial and/or sexual discrimination cases simply do not fit this stereotype. They are large and often encompass a varied set of subclasses . . . ."[80] Add to this the liberal standard of the Ninth Circuit for permitting unique[81] damage claims to be joined with claims for injunctive relief,[82] and the (b)(2) class gains the potential of being very diverse.[83]

The *Elliott* and *Souza* opinions stated that adequacy of representation is the touchstone of due process, and that if the court determined that representation of the class was adequate, the need for notice would cease to exist.[84] There are two problems with this justification. In the first

80. Lewis v. Philip Morris, Inc., 419 F. Supp. 345, 352 (E.D. Va. 1976). *See also* Dam, *supra* note 8, at 115-16.

81. Consider the diverse nature of the potential claims of the *Elliott* absentees. Each member had been assessed an overpayment on the basis of his or her particular situation. For example, Mrs. Biner's overpayment assessment was due to her allegedly earning income in excess of the statutory limit for 1972. 564 F.2d at 1224-25.

82. *See* text accompanying notes 31-32, 35-36 *supra*.

83. Some courts have implied that the nature of the relief sought should determine whether or not due process would require notice in a (b)(2) class action. *E.g.*, Ives v. W.T. Grant Co., 522 F.2d 749, 765 (2d Cir. 1975) (holding notice not required in (b)(2) action where relief sought is purely injunctive, but suggesting that inclusion of money damages in prayer may give rise to due process requirement of notice). This distinction fails for two reasons. First, the "property right" to file a claim which was recognized in *Mullane* is not limited to claims for monetary relief, but rather it is phrased in very broad terms. 339 U.S. at 313. Secondly, there is no rational justification for affording more protection to monetary claims than to constitutional or civil rights claims; the latter are certainly no less significant.

Note also that when *Elliott* was appealed to the Ninth Circuit for the first time, the court suggested that the presence of claims for monetary relief might have given rise to a due process requirement of notice. "When as here, absent members' interests are adequately assured of being represented because there are no money damages involved, . . . notice to the class serves no apparent purpose." Nos. 74-1611, 74-3118, slip op. at 14 (W.D. Wash. Oct. 1, 1975), *vacated and remanded on other grounds*, 425 U.S. 987 (1976). This is curious due to the fact that earlier in the opinion the court discusses the money damages involved. "Although plaintiffs seek recovery of monies recouped from their monthly benefit checks, their primary purpose in bringing this action is to enjoin the Secretary from recouping sums without providing social security beneficiaries a preceding hearing." *Id.* at 10. The court's reference to money damages as a justification for the absence of a notice requirement does not appear in the opinion of *Elliott*'s subsequent Ninth Circuit appeal.

If such a distinction should be made, it should not be based on the presence of money damages in the prayer, but on the possibility that such claims exist among absentees. It is these claims that notice serves to protect; claims that have been joined are being litigated, and therefore need no such protection. Furthermore, if the focus were not on the potential claims of absentees, a notice requirement in (b)(2) actions could be avoided by the class representatives simply forgoing their monetary claims.

84. Elliott v. Weinberger, 564 F.2d at 1229; Souza v. Scalone, 563 F.2d at 386.

Some courts which have held that due process only requires adequate representation have based their positions on Hansberry v. Lee, 311 U.S. 32 (1940). *E.g.*, Larionoff v.

instance, although *Mullane* does express concern for the adequacy of representation, the Court did not treat adequate representation as an alternative to the notice requirement.[85] On the contrary, the *Mullane* Court required notice for the purpose of ensuring adequate representation, observing that "notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all."[86] The Court recognized that although the representation by some beneficiaries may very well serve to protect the interests of absentees, that alone would not satisfy the requirements of due process.[87] Another court,[88] relying on *Mullane*, rejected the argument that where representation is adequate, notice is not constitutionally required, reasoning that the "argument assumes that the district judge can foresee *all* the potential claims that *may* be raised by class members in contesting the adequacy of the class representatives and resolve them, perhaps without specifically pointed argument, in a favorable manner."[89]

United States, 533 F.2d 1167, 1186-87 n.4 (D.C. Cir. 1976), *aff'd on other grounds*, 431 U.S. 864 (1977); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 256-57 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). *See also* Dam, *supra* note 8, at 111-12.

In *Hansberry*, the Supreme Court refused to hold the defendant bound by a stipulated judgment entered in a prior suit in which the defendant was an absentee class member. The Court held that where the interests of the absentee are not adequately represented, res judicata will not apply in a subsequent suit, and found that the defendant's interests had not been represented adequately. 311 U.S. at 44-45.

The courts which claim that *Hansberry* requires only adequate representation point to the following language: "[T]his Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it." *E.g.*, Wetzel v. Liberty Mut. Ins. Co., 508 F.2d at 257 (quoting Hansberry v. Lee, 311 U.S. at 42). However, this language should be read in light of the following: "We decide only that the procedure and the course of litigation sustained here by the plea of *res judicata* do not satisfy [the requirements of due process]." 311 U.S. at 44. The latter excerpt suggests that *Hansberry* did not set forth *the* standard for due process in representative suits, but rather a minimum standard. Therefore, notice may be an additional requirement of due process of law.

Another problem with using *Hansberry* to justify the absence of a notice requirement is that *Hansberry* predated *Mullane* by ten years. Therefore, if *Hansberry* does stand for the proposition that due process does not require notice, *Mullane* would seem to have overruled *Hansberry*, sub silentio. *But see* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d at 257 ("We do not believe that *Mullane* overruled *sub silentio* the case of Hansberry v. Lee . . . ."). At least one court has suggested that *Hansberry* only sets forth a minimum requirement, and that notice is necessary to ensure that one is adequately represented. Lewis v. Philip Morris, Inc., 419 F. Supp. 345, 352 (E.D. Va. 1976).

85. 339 U.S. at 319.

86. *Id.*

87. *Id.* at 319-20.

88. Lewis v. Philip Morris, Inc., 419 F. Supp. 345 (E.D. Va. 1976).

89. *Id.* at 352.

A second problem with using adequacy of representation as a justification for not requiring notice in (b)(2) actions is that *Mullane* suggests that the absent class member is entitled to more than just adequate representation, and that notice serves to protect those entitlements. The *Mullane* Court states that notice to the absentee serves to protect his or her opportunity to "choose for himself whether to appear or default, acquiesce or contest."[90] This language has been construed by other courts[91] to guarantee the opportunity of absentees "to assess, for themselves, the adequacy of their purported representatives."[92]

The *Mullane* Court's language also suggests other rights of absentees: pursuing one's own arguments, employing a particular strategy, choosing the attorney one thinks will best represent him or her, and controlling the overall shape and vigor one wishes to apply to the litigation.[93] These rights are meaningless without notification to absent class members that a suit is pending which would give rise to these rights.[94] The rights of absentee class members, as recognized by the Supreme Court, are rights of which the *Elliott* and *Souza* class members may have been deprived by the Ninth Circuit's refusal to require notice in 23(b)(2) actions. This deprivation, in conjunction with the res judicata bar of any subsequent claims of absentees, may well be a violation of the absentee class members' rights to due process of law as defined by *Mullane*.[95]

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90. 339 U.S. at 314. "Quite different from the question of a state's power to discharge trustees is that of *the opportunity it must give beneficiaries to contest.*" *Id.* at 313 (emphasis added). It was recognized that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action *and afford them an opportunity to present their objections.*" *Id.* at 314 (emphasis added).

91. *E.g.*, Lewis v. Philip Morris, Inc., 419 F. Supp. 345 (E.D. Va. 1976).

92. *Id.* at 352.

93. Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485, 1496 (1974). *See* Walker v. Styrex Indus., 21 Fed. R. Serv. 2d 355, 358 (M.D.N.C. 1976) ("These men and women deserve the right to know that a suit is underway, to choose to withdraw from it if they wish so to do, or to be represented by counsel of their own choosing."), *quoted with approval in* Bauman v. United States Dist. Court, 557 F.2d 650, 659 n.13 (9th Cir. 1977); 3B MOORE'S FEDERAL PRACTICE ¶ 24.09-1[4], at 316 (2d ed. 1977) ("[I]t can be argued that the applicant should be the best judge of the adequacy of the representation of his own interests."); *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1414 (1976) ("[E]ach individual is the best judge of his own interests, even on matters such as the litigation strategy to be employed in the suit.").

94. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 314 ("[T]his right has little reality or worth unless one is informed that the matter is pending . . . .").

95. It should be noted that the refusal to require notice would probably not give rise to a due process violation if class action judgments did not bar the subsequent claims of the absentees. It is the res judicata effect of the judgment that gives rise to the *Mullane* Court's concern for the protection of the interests of the absentee. *Id.*

IV. TYPE OF NOTICE REQUIRED

The purposes of the class action device are to provide a vehicle for redressing numerous small claims that would otherwise go unasserted and to achieve the broad res judicata effect of a class action judgment.[96] If these claims are disposed of before reaching their merits, due to the cost of individual notice, the purpose of the class action device will be defeated. In *Eisen v. Carlisle & Jacquelin*,[97] for example, the class representatives were ordered to provide individual notice to over 2,250,000 23(b)(3) class members at a cost which would have exceeded $315,000.[98] This prohibitive cost prevented Mr. Eisen's $70.00 claim from every reaching a trial on the merits.[99] Results of this kind have caused class representatives to assert that their actions should qualify under 23(b)(2) rather than 23(b)(3).[100] Differences in notice provisions may have caused courts to certify actions as maintainable under (b)(2) when those actions were probably more appropriately (b)(3) actions.[101]

Alternatives to costly individual notice may, however, be quite acceptable under the terms of *Mullane*. Subsection 23(c)(2) requires that the members of a (b)(3) class be given "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[102] As noted previously,[103] this

96. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 560 (2d Cir. 1968).

97. 417 U.S. 156 (1974).

98. *Id.* at 166-67 & n.7.

99. Dam, *supra* note 8, at 101.

100. *See* notes 53-55 *supra* and accompanying text.

101. In *Eisen*, the Second Circuit found the class to be of the (b)(3) type. 391 F.2d at 565. The Supreme Court affirmed this determination. 417 U.S. at 163-64. The *Eisen* complaint contained three counts. Two of the counts were against odd-lot firms alleging violations of the Sherman Act. The third count was against the New York Stock Exchange alleging failure to regulate the odd-lot firms, a violation of the Securities Exchange Act of 1934. *Id.* at 160. The *Eisen* plaintiffs sought injunction of defendants from future violations as well as damages. The damage claims against the NYSE were unspecified as to their amounts. The damage claims against the odd-lot firms were in the amount of treble damages on 12½¢ to 25¢ per share traded. Although this amount could have been a substantial loss to the defendant, it would not have yielded a substantial gain to the class members. *Id.* at 160-61.

In *Elliott*, the plaintiff sought to enjoin the Secretary from recouping overpayments without providing notice and a preceding hearing. 564 F.2d at 1228. The complaint also prayed for damages in the amount of the recouped overpayments. *Id.* The plaintiffs' claims were quite substantial. *See* text accompanying note 31 *supra*.

Using the *Eisen* facts to illustrate the posture of a proper (b)(3) action, it would seem that *Elliott* should have been maintained under (b)(3) rather than (b)(2). The classes appear to have been equally cohesive. Furthermore, both classes sought damages and injunctive relief, and in *Elliott* the damages were considerably greater than in *Eisen*.

102. FED. R. CIV. P. 23(c)(2); *see* note 15 *supra*.

103. *See* text accompanying note 18 *supra*.

subdivision is limited in its application to (b)(3) actions. Therefore, the type of notice required in (b)(2) actions depends upon what due process requires in a given situation. It is doubtful that *Mullane* establishes as inflexible an approach as 23(c)(2).[104] *Mullane* ordered individual notice to all beneficiaries whose names and addresses were "at hand."[105] The Court found notice by publication to be sufficient as to those beneficiaries whose interests or addresses were unknown to the trustee.[106] In arriving at its decision, the *Mullane* Court adopted a balancing approach whereby the interests of the state in settling issues as to its fiduciaries were weighed against the interests of absentees in being apprised of the action:[107]

> The Court has not committed itself to any formula achieving a balance between these interests 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 indispensable to the process due residents, and it has more often been held unnecessary as to nonresidents. We disturb none of the established rules on these subjects.[108]

The *Mullane* Court also noted that the Supreme Court "has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning."[109] Under *Mullane*, "practical difficulties and costs" may be considered in determining whether individual notice is required by due process in a given situation.[110]

It would follow that in the case of (b)(2) actions where individual damages are de minimus or where the cost of individual notice would generally not be justified in light of the particular circumstances, the interests of the state in providing a remedy and in ensuring a binding judgment through the class action device would outweigh the need for individual notice, and notice by publication would be sufficient.[111] In

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104. Branham v. General Elec. Co., 63 F.R.D. 667, 670-71 (M.D. Tenn. 1974); Comment, *Consumer Class Actions in California: A Practical Approach to the Problems of Notice*, 7 PAC. L.J. 811, 821-22 (1976) [hereinafter referred to as *Consumer Class Actions*].

105. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 318.

106. *Id.*

107. *Id.* at 313-14.

108. *Id.* at 314.

109. *Id.* at 317. The other "class of cases" referred to by the *Mullane* Court were those involving "persons missing or unknown." *See, e.g.*, Cunnius v. Reading School Dist., 198 U.S. 458, 476-77 (1905).

110. 339 U.S. at 317.

111. *Consumer Class Actions, supra* note 104, at 821-22.

Elliott and *Souza*, however, individual notice should have been required; the potential class claims were substantial in amount[112] and individual notice in either case would not have imposed a significant burden. *Mullane* gave considerable weight to the fact that correspondence had occurred between a party to the suit and the absentees,[113] a factor presumably existing in both *Eliott* and *Souza*. In either case, notification of the pending suits could have been included with other communications between the defendants and the absentee class members imposing little in the way of cost or burden.

V. CONCLUSION

One interpretation of the *Elliott* and *Souza* opinions is that they represent an effort on the part of the Ninth Circuit to preserve the utility of the 23(b)(2) class action device as a means of enforcing individual rights. This utility may be defeated by a requirement that costly notice be provided to absentees. On the other hand, failure to impose such a requirement poses a substantial risk to the due process rights of the absentees. There is an unresolved conflict between the individual's interest in litigating claims and the individual's right to due process of law.

The Ninth Circuit notice requirement in (b)(2) class actions must be examined against the standards for individual due process rights as expressed by the Supreme Court in the *Mullane* decision. This examination may suggest that the Ninth Circuit view is inconsistent with the Court's concerns in *Mullane*. Furthermore, since it is clear that alternatives to costly individual notice may satisfy the due process requirement in many (b)(2) actions without inhibiting the utility of the class action device, no great hardship would result should (b)(2) actions be required to provide the kinds of notice envisioned in *Mullane*. Care must be taken to preserve those interests which the Supreme Court has viewed as fundamental to our system of justice.

Gregg S. Homer

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112. *See* text accompanying notes 31-37 *supra*.

113. 339 U.S. at 318-19. "The trustee periodically remits [the beneficiaries'] income to them, and we think that they might reasonably expect that with or apart from their remittances word might come to them personally that steps were being taken affecting their interests." *Id.* at 318. "[T]he fact that the trust company has been able to give mailed notice to known beneficiaries at the time the common trust fund was established is persuasive that postal notification at the time of accounting would not seriously burden the plan." *Id.* at 319.