Cleveland State Law Review

Volume 24 | Issue 3 Note

1975

Class Actions under Rule 23(b)(2): A Type of Class Action Which Does Not Require Eisen Notice

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CLASS ACTIONS UNDER RULE 23(b) (2): A TYPE OF CLASS ACTION WHICH DOES NOT REQUIRE *EISEN* NOTICE

I. INTRODUCTION

CLASS ACTION LITIGATION IN RECENT YEARS has often focused on whether absent members of the class must be notified of the pendency of the action at the outset of the suit. Since 1966, when Rule 23 of the Federal Rules of Civil Procedure was amended, the notice controversy has filled volumes of articles, commentaries and judicial opinions. This question of pretrial notice becomes most crucial in the disposition of the suit when the class is extremely large, or when the financial resources of the person responsible for notifying the class is limited. In either case, a strict rule which makes expensive notice mandatory may effectively dispose of the suit without ever having reached the merits of the complaint.

Such a strict mandatory notice rule now requires that individual noice be given to all absent class members in actions brought in the federal courts under Rule 23(b) (3). Most practitioners are aware of this rule as it was mandated in the recent Supreme Court decision of *Eisen v. Carlisle & Jacquelin*.[1] Many practitioners, however, are apparently unaware that such pretrial notice is not required in other types of class actions (*i.e.*, other than the (b) (3) type). Specifically, many are unaware that the majority of courts which have examined the notice requirements of class actions maintained under Rule 23(b) (2) seeking injunctive or declaratory relief have reached the conclusion that individual pretrial notice is *not* required.

This comment will address the subject of class actions under Federal Rule 23(b) (2) and will trace the development of notice requirements, taking note of the split of authority on the issue. The holding and the deceivingly broad language of the Supreme Court's decision in *Eisen* will also be examined in order to illustrate its lack of effect on the (b) (2) notice requirements that have developed in the lower courts.

A. *Class Actions Under the Amended Rule 23*

Under amended Rule 23, a suit may be maintained as a class action if, first, it meets the four prerequisites enumerated in Rule 23(a).[2] These prerequisites require that: (1) the class be numerous; (2) there be a commonality of issues; (3) the representatives be typical of the class; and, (4) "the representative parties will fairly and adequately protect the interests

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[1] 417 U.S. 156 (1974) (alternatively known as *Eisen* IV). For a complete case history of all the *Eisen* decisions see note 26 *infra*.

[2] FED. R. CIV. P. 23(a).

of the class."[3] Upon satisfying these prerequisites, a suit may be certified as a class action if, in addition, it qualifies under one of the three types of class actions listed in Rule 23(b) — *i.e.*, subdivision (b) (1), (b) (2), or (b) (3).[4]

It has generally been recognized when considering the three types of class actions defined in Rule 23(b) that only certain types of suits qualify under subdivisions (b) (1) and (b) (2), and thus the application of these two subdivisions is more restricted than that permitted under subdivision (b) (3).[5] For example, the subdivision (b) (1) class action is limited to cases in which there is a chance of inconsistent adjudication among the parties if the suit is not maintained as a class action, or to cases in which disposition of the suit as an individual action would prejudice the rights of absent class members if they were not made parties to the adjudication. Similarly, application of subdivision (b) (2) is limited to those suits in which a class action injunction or declaratory judgment is needed to enjoin the party opposing the class from continuing activities which are violative of the rights of the class as a whole. Thus, classes which may have maintained an action under either of these first two subdivisions have been described as being more cohesive than the amorphous class

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[3] FED. R. CIV. P. 23(a) (4).

[4] FED. R. CIV. P. 23(b) provides:

> (b) Class Actions Maintainable. 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 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.

[5] C. WRIGHT & A. MILLER, 7A FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1786 (1972) [hereinafter referred to as WRIGHT & MILLER]. One court has noted

> that virtually every class action that meets the requirements of 23(b) (1) or 23(b) (2) will also meet the less severe requirements of 23(b) (3). . . . The Advisory Committee recognized that Rule 23(b) (3) is designed for situations where class action treatment is not so clearly called for as in subdivisions (b) (1) and (b) (2) of Rule 23.

Van Gemert v. Boeing Co., 259 F. Supp. 125, 130-31 (S.D.N.Y. 1966).

that can maintain an action under Rule 23(b) (3).[6] The courts have generally recognized that the distinctive nature of the (b) (1) and (b) (2) class must be contrasted with the broad scope of the Rule 23(b) (3) class in which the only bond among the class members may be their aspiration "to remedy a common legal grievance."[7]

B. *Characteristics of (b) (2) Class Actions*

Rule 23(b) (2) is applicable to those cases in which final declaratory or injunctive relief with respect to the entire class is appropriate. A class action may be maintained under Rule 23(b) (2) when the party opposing the class has acted in such a way as to form a *pattern of activity* toward the members of the class,[8] or has established a *regulatory scheme* which is common to all members of the class.[9] The activity need only be "generally applicable" to the class as a whole.[10]

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[6] *See* Comment, *Constitutional and Statutory Requirements of Notice under Rule* 23(c) (2), 10 B. C. IND. & COM. L. REV. 571 (1969). *See also* WRIGHT & MILLER, *supra* note 5, § 1786. As one noted authority has stated:

> [(b) (1) and (b) (2) classes] tend to be cohesive groups because the rule requires that the members have similar interests in the subject matter of the litigation or be seeking relief applicable to all of them (an injunction or declaratory judgment). Thus, members of a Rule 23(b) (1) or a Rule 23(b) (2) class usually are related in interest in the sense that they are seeking the same remedy or are asserting the same claims or defenses.

Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 315 (1973).

Under 23(b) (3), all types of suits are permitted to qualify as class actions upon a finding by the court that the issues which are common to the class *predominate over* the issues which affect only individual members, and that the class action procedure is *superior* to all other methods for adjudication of the controversy. Whether the use of the class action in a particular case would be "superior" to other available means of adjudication is apparently the determining factor considered by the courts. *See, e.g.*, Wilcox v. Commerce Bank of Kansas City, 474 F.2d 336 (10th Cir. 1973); Alpert v. United States Indus., Inc., 59 F.R.D. 491 (C.D. Cal. 1973); Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972).

[7] Bennett v. Gravelle, 323 F. Supp. 203, 218 (D. Md. 1971).

[8] A suit challenging a pattern of activity where the party opposing the class acts in a consistent manner toward the members of a class, can be brought as a class action under subdivision (b) (2). In this type of suit, one who is affected by the pattern of activity can seek a decision from the court that the challenged conduct violates the rights of the affected class and a court order to prevent the opposing party from continuing the activity. This is one type of suit for which Rule 23(b) (2) was intended. *See* Hicks v. Crown Zellerbach Corp., 49 F.R.D. 184, 187 (E.D. La. 1968) (where the court maintained a (b) (2) class action against an employer to enjoin allegedly "established discriminatory policy or policies" which if proven would have been in violation of equal employment opportunities). *See also* Russo v. Kirby, 335 F. Supp. 122 (E.D.N.Y. 1971) (enjoining administrators from continuing "practice" of denying food stamps to employees on strike).

[9] One who is affected by a regulatory scheme, which is common to all members of the class, can initiate a suit challenging the continued use of that scheme under subdivision (b) (2). *See, e.g.*, Karr v. Schmidt, 320 F. Supp. 728, 730 (W.D. Tex. 1970), *rev'd on on other grounds*, 460 F.2d 609 (5th Cir.), *cert. denied*, 409 U.S. 989 (1972) ((b) (2) class action proper to challenge dress code regulations promulgated by a high school as being violative of the Civil Rights Act); Cole v. Housing Authority of City of Newport, 312 F. Supp. 692, 694 n.2 (D.R.I. 1970) (challenge to regulation requiring two years of residency for admission to federally financed public housing is properly maintained under Rule 23(b) (2)).

[10] The fact that not all members of the class are aggrieved or adversely affected by the

Subdivision (b) (2) class actions have often been successfully implemented in civil rights cases,[11] including employment discrimination suits.[12] The class action under (b) (2) thus becomes a powerful vehicle to counter the awesome power of the corporate employer.

There are two important differences, however, between subdivision (b) (2) and subdivision (b) (3) class actions which must be perceived in order to understand the distinct notice requirements of each. First, there are provisions in Rule 23 which permit class members of a (b) (3) class action to "opt out," or exclude themselves from the adjudication upon notification to the court, and thus not be bound by any judgment rendered in the class action, either for or against the class.[13] There are no "opt out" provisions available in (b) (2) class actions, and it has been repeatedly held that (b) (2) class members have no such right to exclude themselves from the class action.[14] It is reasoned that because of the

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opposing party's actions does not change the propriety of maintaining the class under Rule 23(b) (2). Under the accepted interpretation as it is used in Rule 23(b) (2), the term "generally applicable" does not require the party opposing the class to act directly against each member of the class. "As long as his action would affect all persons similarly situated, his acts apply generally to the whole class." Comment, *Rule* 23 *Categories in Subsection* (b), 10 B.C. IND. & COM. L. REV. 539, 542 (1969). This interpretation is consistent with the intention of the drafters of the Rule, as evidenced by the Advisory Committee's Note to subdivision (b) (2) which states in part:

> Action or inaction is directed to a class within the meaning of [subdivision (b) (2)] even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Advisory Committee's Note to Rule 23, 39 F.R.D. 98, 102 (1966).

As an example of this interpretation of "generally applicable," it has been held that a number of persons who had been displaced by an urban renewal project could maintain a subdivision (b) (2) class action to challenge alleged discrimination in their relocation, even though a number of the members of the class were completely satisfied with their new dwellings. Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968). The court in *Norwalk CORE* stated that "[t]he fact that some members of the class were personally satisfied with the defendant's relocation efforts is irrelevant." *Id.* at 937.

[11] The drafters of Rule 23 recognized that subdivision (b) (2) is well suited for use in civil rights litigation. *See* Advisory Committee's Note to Rule 23, 39 F.R.D. 98, 102 (1966). The Note also indicates that use of Rule 23(b) (2) class actions is not limited to civil rights suits. *Id.*

[12] *See, e.g.*, Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); Baxter v. Savannah Sugar Refining Corp., 350 F. Supp. 139 (S.D. Ga. 1972), *modified*, 495 F.2d 437 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974).

[13] The term "opt out" has been coined to describe the option which members of a subdivision (b) (3) class have to exclude themselves from the litigation. FED. R. CIV. P. 23 (c) (2) provides that

> (2) *In any class action maintained under subdivision (b) (3)*, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. *The notice shall advise each member that (A) the court will exclude him from the class if he so requests* by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel. (Emphasis added.)

One of the main reasons of requiring notice to all members of a subdivision (b) (3) class is to notify the class members of their opportunity to "opt out" of the class.

[14] Air Line Stewards & Stewardesses Ass'n, Local 550 v. American Air Lines Inc., 490 F.2d

cohesive nature of the (b) (2) class action, absent class members cannot be permitted to opt out of the class, for to do so would jeopardize the effect of this type of class action.[15]

The second difference between (b) (2) and (b) (3) actions is that suits cannot be certified under the (b) (2) classification if "the appropriate final relief relates exclusively or predominantly to money damages."[16] This restriction on the (b) (2) action often limits its use to cases which do not relate to any type of property interest of the absent class members,[17] with the consequence that strict due process safeguards are not required in all cases. The more rigid due process safeguards are almost always necessary in the (b) (3) type of class action since, there, the adjudication of property interests of the absent class members is the norm.

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636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974); Beckerman v. Sands, 364 F. Supp. 1197 (S.D.N.Y. 1973).

[15] Air Line Stewards & Stewardesses Ass'n, Local 550 v. American Air Lines Inc., 490 F.2d 636 (7th Cir. 1973).

[16] Advisory Committee's Note to Rule 23, 39 F.R.D. 98, 102 (1966).

[17] There seems to be little doubt that monetary relief may be awarded in addition to an injunctive decree in a (b) (2) class action under appropriate circumstances. *Cf.* King v. Georgia Power Co., 295 F. Supp. 943, 948 (N.D. Ga. 1968). Courts often award back pay in employment discrimination cases maintained under subdivision (b) (2). *See, e.g.*, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Rush v. Lone Star Steel Co., 373 F. Supp. 526 (E.D. Tex. 1974); Baxter v. Savannah Sugar Refining Corp., 350 F. Supp. 139 (S.D. Ga. 1972), *modified*, 495 F.2d 437 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974); Local 186 v. Minnesota Mining & Mfg. Co., 304 F. Supp. 1284 (N.D. Ind. 1969). As a result of the expressed limitation in the Advisory Committee Notes, many courts have held that where it appears clear that a monetary award is a substantial and essential element of the plaintiff's claim, certification under 23(b) (2) would be considered inappropriate. Unfortunately, many courts have used a finding of predominant monetary awards to deny class certification under (b) (2) without articulating any standards or tests with respect to what constitutes predominant monetary damages. *See* Graybeal v. American Sav. & Loan Ass'n, 59 F.R.D. 7, 15 (D.D.C. 1973). No guidelines are suggested in the Rule or Advisory Notes for determining whether monetary relief is the predominant final remedy sought. Consequently many otherwise meritorious (b) (2) classes have been dismissed on an unarticulated finding that money awards are predominant. Because of the need to deal with the substantive issues and merits of many cases to determine if there are rights which are being violated by activities which should be enjoined, class actions should not be summarily dismissed on an unarticulated finding of predominant money damages. Disputes in this area should be settled in favor of class certification, with procedural safeguards applied to protect absent class members' interests if necessary. As one noted commentator has stated:

> Disputes over whether the action is primarily for injunctive or declaratory relief rather than a monetary award neither promote the disposition of the case on the merits nor represent a useful expenditure of energy. Therefore, they should be avoided. If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b) (2). Those aspects of the case not falling within Rule 23(b) (2) should be treated as incidental.

WRIGHT & MILLER, *supra* note 5, at § 1775. Finally, these findings of predominant money damages based on unarticulated standards are particularly unfortunate since a decision denying class certification is reviewable only with respect to whether the trial court abused its discretion in making the class determination. *See, e.g.*, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Manning v. International Union, 466 F.2d 812 (6th Cir. 1972); Kansas City v. Williams, 205 F.2d 47 (8th Cir.), *cert. denied*, 346 U.S. 826 (1953).

II. Notice for (b) (2) Actions

The courts have recognized two concepts when considering whether or not notice is required for class actions in general. The first is whether the statutory provisions of Rule 23 require that pretrial notice be given to absent class members in the particular situation. The second is whether minimum due process requirements necessitate pretrial notice.

There are two subdivisions of Rule 23 which discuss notice to absent members of class action suits: subdivisions (c) (2) and (d) (2). Subdivision (c) (2) has been labeled the "mandatory notice" provision since it provides that the court shall direct the best notice practicable to all members of the class if the action is maintained under Rule 23(b) (3). Subdivision (d) (2) provides for discretionary notice which permits the court to order notice when it is deemed necessary,[18] but this subdivision cannot be construed as requiring such notice.[19] The (c) (2) mandatory notice provision has recently been interpreted as requiring notice in all class actions brought under Rule 23(b) (3),[20] but its application is expressly limited to only subdivision (b) (3) class actions.[21] Thus, when determining if notice is *required* in a (b) (2) class action, the only relevant consideration is whether due process requires that such notice be given to all absent class members.

The right to notice under Rule 23 (b) (2) has not yet been considered by the Supreme Court. The lower courts, however, have split on their

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[18] Fed. R. Civ. P. 23(d) (2) provides:

> (d) Orders in Conduct of Actions. In conduct of actions to which this rule applies, the court may make appropriate orders:
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> . . . .
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> (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; . . .

[19] *See* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969) (no notice is specifically required under Rule 23(b) (2)); Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619 (D. Kan. 1968), *aff'd in part, rev'd in part on other grounds*, 441 F.2d 704 (10th Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972); Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313 (1973). *See also* Wright & Miller, *supra* note 5, at § 1793.

[20] Eisen v. Carlisle & Jacquelin (Eisen IV), 417 U.S. 156 (1974).

[21] Fed. R. Civ. P. 23(c) (2). In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 n.14 (1974), the Court stated in part: "By its terms subdivision (c) (2) is inapplicable to class actions for injunctive or declaratory relief maintained under subdivision (b) (2)." Other courts have held that the mandatory notice provision is inapplicable to class actions brought under subdivisions (b) (1) and (b) (2), *Francis v. Davidson*, 340 F. Supp. 351 (D. Md.), *aff'd without opinion*, 409 U.S. 904 (1972), and that the mandatory notice provision is expressly limited to class actions brought under subdivision (b) (3). *See, e.g.*, Hammond v. Powell, 462 F.2d 1053 (4th Cir. 1972); Baxter v. Savannah Sugar Refining Corp. 350 F. Supp. 139 (S.D. Ga. 1972), *modified*, 495 F.2d 437 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974); Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619 (D. Kan. 1968), *aff'd in part, rev'd in part on other grounds*, 441 F.2d 704 (10th Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972). *See also* CCH Manual for Complex Litigation, § 1.45 (3d ed. 1973).

resolution of the issue — a result primarily ascribable to differing interpretations of the Supreme Court's statements in *Mullane v. Central Hanover Bank & Trust Co.*[22] Some jurisdictions have ruled that due process requires notice in all class actions.[23] In contrast, a greater number of jurisdictions have reached the conclusion that "the essential requisite of due process as to absent members of class [actions] is not notice, but the adequacy of representation of their interests by [the] named parties."[24] One of the first courts to comment on the due process notice requirements under the amended Rule 23 was the Second Circuit Court of Appeals in its 1968 decision in *Eisen v. Carlisle & Jacquelin*,[25] now referred to as *Eisen II*.[26]

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[22] 339 U.S. 306 (1950).

[23] The following jurisdictions have held that due process requires notice in all class actions:

2d Cir. — Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968) (alternatively known as *Eisen* II). For a complete case history of all the *Eisen* decisions see note 26, *infra*.

La. — Clark v. American Marine Corp., 297 F. Supp. 1305, 1306 (E.D. La. 1969). *But see* Johnson v. City of Baton Rouge, 50 F.R.D. 295, 301 (E.D. La.1970).

N.Y. — United States *ex rel.* Walker v. Mancusi, 338 F. Supp. 311, 316 (W.D.N.Y. 1971); Lopez v. Wyman, 329 F. Supp. 483, 486 (W.D.N.Y. 1971), *aff'd mem.*, 404 U.S. 1055 (1972); Zachary v. Chase Manhattan Bank, 52 F.R.D. 532, 535 (S.D.N.Y. 1971); Fowles v. American Export Lines, Inc., 300 F. Supp. 1293, 1295 (S.D.N.Y. 1969).

Va. — Moss v. Lane Co., 50 F.R.D. 122, 124 (W.D. Va. 1970).

[24] Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636 (D. Kan. 1968), *aff'd in part, rev'd in part on other grounds*, 441 F.2d 704 (10th Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972). The following jurisdictions have followed the *Northern Natural Gas* position and have held that due process does not require notice in all class actions:

1st Cir. — Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972);

3d Cir. — Katz v. Carte Blanche Corp., 496 F.2d 747, 756 (3d Cir. 1974);

5th Cir. — Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969);

10th Cir. — *In re* Four Seasons Securities Laws Litigation, 502 F.2d 834, 842 (10th Cir. 1974);

Conn. — Lynch v. Household Finance Corp., 360 F. Supp. 720, 722 (D. Conn. 1973); Wilczynski v. Harder, 323 F. Supp. 509, 512 n.3 (D. Conn. 1971);

D.C. — Woodward v. Rodgers, 344 F. Supp. 974, 980 (D.D.C. 1972);

Fla. — Hooks v. Wainwright, 352 F. Supp. 163, 166 (M.D. Fla. 1972); Mungin v. Florida East Coast Ry., 318 F. Supp. 720, 732 (M.D. Fla. 1970);

Ga. — Baxter v. Savannah Sugar Refining Corp., 350 F. Supp. 139, 141 (S.D. Ga. 1972), *modified*, 495 F.2d 437 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974).

Kan. — Citizens Environmental Council v. Volpe, 364 F. Supp. 286, 288 (D. Kan. 1973); Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636 (D. Kan. 1968), *aff'd in part, rev'd in part on other grounds*, 441 F.2d 704 (10th Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972).

La. — Johnson v. City of Baton Rouge, 50 F.R.D. 295, 301 (E.D. La. 1970);

Md. — Harper v. Mayor and City Council of Baltimore, 359 F. Supp. 1187, 1192 (D. Md. 1973); Vaughns v. Board of Educ. of Prince George's County, 355 F. Supp. 1034, 1035 (D. Md. 1972); Francis v. Davidson, 340 F. Supp. 351, 361 (D. Md. 1972), *aff'd without opinion*, 409 U.S. 904 (1972).

N.Y. — Dolgow v. Anderson, 43 F.R.D. 472, 498 (E.D.N.Y. 1968);

Pa. — Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972);

R.I. — Giguere v. Affleck, 370 F. Supp. 154, 159 (D. R.I. 1974); Berman v. Narragansett Racing Ass'n, 48 F.R.D. 333, 338 (D. R.I. 1969).

[25] 391 F.2d 555, 564-65 (2d Cir. 1968).

[26] During its eight years of litigation to date, the *Eisen* case has produced eight reported

A. *The Minority Rule — Due Process Requires Notice in all Class Actions*

In 1966, Morton Eisen initiated a class action on behalf of himself and all other odd-lot traders on the New York Stock Exchange charging brokerage firms and defendant stock exchange with violations of the antitrust and securities laws.[27] As the defendants recognized the tactical advantage of having a large class, estimates of the size of the class grew to over six million class members for which the defendant was able to supply names and addresses of over two million.[28] The district court initially dismissed the class action feature of the *Eisen* case partly as a result of the trial judge's belief that a class that large suggests "almost insuperable difficulties in fair and proper management of this suit as a class action."[29] During the appeal of this dismissal, plaintiff apparently became aware of the fact that even if the court of appeals reversed, plaintiff might be foreclosed from proceeding with his suit as a class action because of an inability to pay for notice if the action was classified under Rule 23(b) (3) which arguably would have required expensive notice to all of the millions of absent class members. Therefore, plaintiff argued to the court of appeals that the action could be maintained as a (b) (1) or (b) (2) class action and that if so maintained individual notice was thus not required.

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opinions covering approximately 105 pages of various West's reporters. To facilitate discussion of the decisions, commentators have labeled the Circuit Court and Supreme Court opinions as *Eisen* I, *Eisen* II, etc. The following chart should aid in the understanding of the *Eisen* history:

Alternate Name	*Citation*	*Synopsis of Holding*
-(None)-	41 F.R.D. 147 (S.D.N.Y. 1966).	Class action aspect of Eisen case summarily dismissed.
Eisen I	370 F.2d 119 (2d Cir. 1966).	Held that the denial of class action was final appealable order even though individual action was not dismissed, thus endorsing the "death knell" theory.
Eisen II	391 F.2d 555 (2d Cir. 1968).	Reversed dismissal of the class action aspect holding in essence that district court could not dismiss merely because the class is large; remanded but retained jurisdiction.
-(None)-	50 F.R.D. 471 (S.D.N.Y. 1970).	On remand, trial court held that additional hearings would be required to build record.
-(None)-	52 F.R.D. 253 (S.D.N.Y. 1971).	Held class action could be maintained; individual notice not necessary.
-(None)-	54 F.R.D. 565 (S.D.N.Y. 1972).	Mini-hearings on merits.
Eisen III	479 F.2d 1005 (2d Cir. 1973).	Reversed the granting of class action certification; held individual notice required for (b) (3) class action.
Eisen IV	417 U.S. 156 (1974).	Held *inter alia* that notice is required for (b) (3) class actions.

[27] Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147 (S.D.N.Y. 1971).

[28] Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 257 (S.D.N.Y. 1971).

[29] Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147, 152 (S.D.N.Y. 1966).

In *Eisen II*,[30] the court of appeals expressed its disagreement with both contentions offered by the plaintiff. The circuit court held, first, that the *Eisen* class could not be categorized under either Rule 23(b) (1) or (b) (2);[31] instead, subdivision (b) (3) was the only type of class action applicable in the plaintiff's situation. Second, the court in dicta observed that due process required notice in all representative actions and that "23 (c) (2) merely requires a particularized form of notice in 23 (b) (3) actions."[32] To support this view the circuit court simply cited *Mullane v. Central Hanover Bank & Trust Co.*[33] and a section of the Advisory Committee's Notes,[34] neither of which fully deals with the issue. The section of the Advisory Committee's Notes cited refers to "mandatory notice pursuant to subdivision (c) (2)" which is not applicable to class actions brought under subdivisions (b) (1) or (b) (2).[35] Thus, it does not support the proposition for which it was cited.

The holding of the *Eisen II* court was also much too broad to be based solely upon the holding of *Mullane* and, in fact, the author submits that *Mullane* does not support the Second Circuit's position. In *Mullane* the Court addressed the constitutional sufficiency of publication notice to known beneficiaries of a common trust fund during a judicial settlement. *Mullane* did not deal with a suit even vaguely comparable to a subdivision (b) (2) class action. The judicial action in *Mullane* was not for injunctive or declaratory relief, but rather was an action predominently for the division of money in the fund — a division of the property of the absent parties. All of the absentee beneficiaries in *Mullane* had a known property interest in the trust fund, a property interest of which they could not be deprived without due process of law. Moreover, *Mullane* was not a class action in which one party litigated the controversy as a representative of a class. The individual notice which the Supreme Court ultimately ordered in *Mullane* was not typical of class action notice from the class representative to the absent class members, but was notice

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[30] Eisen v. Carlisle & Jacquelin (Eisen II), 391 F.2d 555, 564-65 (2d Cir. 1968).

[31] *Id.* The court reasoned that the *Eisen* suit could not be classified as a (b) (1) action because there was no chance of inconsistent adjudications since no individuals could afford the expense of lengthy antitrust litigation on their own to create varying and inconsistent standards for the defendant. The court also found that the primary claim was for damages and thus subdivision (b) (2) was not applicable.

[32] Eisen v. Carlisle & Jacquelin (Eisen II), 391 F.2d 555, 564-65 (2d Cir. 1968).

[33] 339 U.S. 306 (1950).

[34] The court in *Eisen II* cited "Advisory Committee's Note at 107." Eisen v. Carlisle & Jacquelin (Eisen II), 391 F.2d 555, 565 (2d Cir. 1968). This citation refers to the Advisory Committee's Note to Rule 23, 39 F.R.D. 69, 107 (1966). (For the *Eisen II* court's own explanation of this citation see 391 F.2d at 560). The page and section cited by the court in *Eisen II*, at 106, provides:

> Indeed, under subdivision (c) (2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b) (3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c) (2), together with any discretionary notice which the court may find it advisable to give under subdivision (d) (2), is designed to fulfill requirements of due process to which the class action procedure is of course subject.

[35] *See* discussion accompanying notes 18-21, *supra*.

from the party opposing the class to the absent class members informing the class members of the action which was being taken against them. The Second Circuit, unfortunately, failed to make these distinctions.

Aside from the factual differences between *Mullane* and *Eisen II*, the rule of *Mullane* is not so clear as to justify a mere cite to the case as authority for the proposition that notice is required in all class actions. Indeed, in *Dolgow v. Anderson*,[36] Judge Weinstein, writing for a New York District Court at the same time the *Eisen II* opinion was being written, examined and analyzed *Mullane* quite differently in arriving at the conclusion that "[t]he Supreme Court has indicated that adequacy of representation, not form of notice, is the crucial consideration."[37] In an extensive analysis of the due process notice requirements, including cites to numerous authorities in addition to *Mullane*, Judge Weinstein interpreted the holding of *Mullane* as denoting that notice is not to be required in all representative actions. According to Judge Weinstein, the Supreme Court indicated "that a pragmatic, case-by-case approach to this issue is warranted,"[38] with due process requiring " 'notice and opportunity for hearing appropriate to the nature of the case,' taking into account its 'practicalities and peculiarities.' "[39] Given this analysis, the Second Circuit's interpretation of *Mullane*, if not inaccurate, is at least an overbroad use of authority.

Nonetheless, the courts within the Second Circuit have routinely cited this dicta in *Eisen II* for the proposition that notice is required in all class actions, without supplying any additional analysis or rationale.[40] One court, for example, found it sufficient to state that "notification of all members of the class is required as a matter of due process" and to cite *Eisen II* as authority.[41] As a result of this misapplication of *Eisen II*, the rule that due process requires notice in all representative actions is now recognized as the controlling view in the courts of the Second Circuit.[42]

B. *The Majority Rule — Adequate Representation*

The courts are divided on the issue of notice with the *Eisen II* rule controlling in only a minority of jurisdictions.[43] Interestingly, the split in authority arose subsequent to the Second Circuit's decision. In *Northern*

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[36] 43 F.R.D. 472 (E.D.N.Y.1968).

[37] *Id.* at 500.

[38] *Id.*

[39] *Id.*

[40] *See, e.g.*, Lynch v. Sperry Rand Corp., 62 F.R.D. 78, 85 (S.D.N.Y. 1973); Zachary v. Chase Manhattan Bank, 52 F.R.D. 532, 535 (S.D.N.Y. 1971).

[41] Lopez v. Wyman, 329 F. Supp. 483, 486 (W.D.N.Y. 1971), *aff'd mem.*, 404 U.S. 1055 (1972).

[42] *See* Lynch v. Sperry Rand Corp., 62 F.R.D. 78, 85 (S.D.N.Y. 1973), where the court stated that

> [a]s for the question of notice: in this Circuit notice is required in all class actions as a matter of due process, Eisen v. Carlisle & Jacquelin (II), 391 F.2d 555, 564 (2d Cir. 1968) . . . .

[43] Compare cases cited note 24, *with* cases cited note 23, *supra*.

Natural Gas Co. v. Grounds,[44] Judge Brown carefully analyzed the *Eisen II* position, repudiated the Second Circuit's holding, and stated that "the essential requisite of due process . . . is not notice, but the adequacy of representation."[45] Judge Brown cited *Dolgow v. Anderson*[46] and endorsed Judge Weinstein's interpretation of *Mullane* rather than the Second Circuit's treatment in *Eisen II*.

Judge Brown rejected the contention that due process required notice to be given in all (b) (2) class actions and found that the Supreme Court's statements on minimum due process standards did not dictate the necessity for such a rule. He adopted instead a flexible rule permitting the trial court in a (b) (2) action to determine on a case-by-case method whether notice need be given, and if so, the nature of such notice. Accordingly, in *Northern Natural Gas*, Judge Brown determined, that providing notice did not impose an extraordinary burden upon the plaintiff and thus ordered that notice be given.

The *Northern Natural Gas* position has not only found more acceptance in the courts outside of the Second Circuit than has the restrictive *Eisen II* position,[47] but has also merited the approval of the commentators.[48] *Moore's Federal Practice*, for example, states:

> We believe [Judge Brown] is right and, with deference, the *Eisen* [*II*] position is not sound. The Rule [23] does not demand notice in the (b) (1) and (b) (2) actions; and, although the operation of the Rule in a particular case might violate due process, there is a strong presumption that the Rule *qua* rule is valid. And practicalities support the same conclusion. The *Eisen* [*II*] approach is too inflexible. Some (b) (1) and (b) (2) actions will have gained wide notoriety. Notice would add little or nothing. There will be situations where the class is cohesive, or where the legal relationship of the members enable one or more to stand in judgment for all, and where the representatives are truly representative and faithful — a most important factor.[49]

The case-by-case approach to (b) (2) notice, as adopted by the majority, provides the flexibility needed to cope with diverse situations.

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[44] 292 F. Supp. 619 (D. Kan. 1968), *aff'd in part, rev'd in part on other grounds*, 441 F.2d 704 (10th Cir.), *cert. denied*, 404 U.S. 951 (1971).

[45] 292 F. Supp. at 636.

[46] 43 F.R.D. 472 (E.D. N.Y. 1968).

[47] *Compare* the cases which support the *Northern Natural Gas* position, note 24, *with* the cases which support the *Eisen II* position, note 23 *supra*.

[48] Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 314 (1973); WRIGHT & MILLER, *supra* note 5, at § 1786; 3B J. MOORE'S FEDERAL PRACTICE, ¶ 23.55 (1974).

[49] 3B J. MOORE'S FEDERAL PRACTICE, ¶ 23.55 (1974).

C. *A Third View — Absolute Failure to Give Notice Violates Due Process*

The split in authority on the issue of whether due process requires that notice be given to absent class members under Rule 23(b) (2) has been further confused by a line of cases in which the defendants have challenged unnotified plaintiff class members' use of the res judicata effect of previous (b) (2) class action decisions. Commencing with *Gregory v. Hershey*,[50] these cases have held that the absolute failure of the class representative to give notice to absent class members in the original class action rendered the purported class action invalid thus forming a basis for collateral attack on the decision. In *Gregory*, the plaintiff had obtained a declaratory judgment, purportedly on behalf of all selective service registrants, that invalidated the selective service regulation which precluded those who had received student deferments from later becoming eligible for fatherhood deferments. After certification as a subdivision (b) (2) class action on behalf of Gregory and all other similarly situated draft inductees, the district court found the regulation unconstitutional and enjoined its enforcement. No notice was ordered or given to the absent members of the class.

Several suits followed in which individuals alleged they were members of the *Gregory* class and sought to enforce the *Gregory* decision. In their attempts to get fatherhood deferments they asserted the *Gregory* decision as res judicata. Two district courts ruled that since plaintiffs in these subsequent suits were described as members of the *Gregory* class, the original decision in that case was binding on them.[51] Thus, they enjoined the draft boards from enforcing the regulation against the uninformed class members.

Several other district courts, however, refused to be bound by the *Gregory* decision and allowed the government to relitigate the issue of the constitutionality of the selective service regulation.[52] Since there had been absolutely no notice given to the absent class members in the original class action, the court reasoned, those absent members were not members of the original plaintiff class. By this means these courts held that the *Gregory* decision was not binding upon them.

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[50] 311 F. Supp. 1 (E.D. Mich. 1969), *rev'd on the merits sub nom.*, Gregory v. Tarr, 436 F.2d 513 (6th Cir.), *cert. denied*, 401 U.S. 990 (1971).

[51] Whitmore v. Tarr, 318 F. Supp. 1279 (D. Neb. 1970), *vacated*, 443 F.2d 1370 (8th Cir.), *cert. denied*, 403 U.S. 922 (1971); Germonprez v. Director of Selective Service, 318 F. Supp. 829 (D.D.C. 1970). *See also* Judge Eschbach's well articulated dissent in Schrader v. Selective Service System, 470 F.2d 73, 77 (7th Cir.), *cert. denied*, 409 U.S. 1085 (1972).

[52] Schrader v. Selective Service System, 470 F.2d 73 (7th Cir. 1972); Pasquier v. Tarr, 318 F. Supp. 1350 (E.D. La. 1970), *aff'd*, 444 F.2d 116 (5th Cir. 1971); McCarthy v. Director of Selective Service System, 322 F. Supp. 1032 (E.D. Wis. 1970), *aff'd*, 460 F.2d 1089 (1972).

The Sixth Circuit subsequently reversed *Gregory* on the merits[53] but it did not decide the issue of notice until the case of *Zeilstra v. Tarr*.[54] In that case the Sixth Circuit held that the failure to give notice rendered the class action futile.[55] *Zeilstra* relied on *Eisen II*[56] for the proposition that due process required notice in all class actions and since no notice was given in *Gregory* there was never a valid class.[57]

The decisions that invalidated the *Gregory* class action because of a lack of notice tended to rely on the dying "doctrine of mutuality"[58] in that if the individual plaintiff in the original *Gregory* class action had been unsuccessful in his attempt to invalidate the selective service regulation, the absent members of Gregory's purported class would be able to enter other courts and relitigate the validity of the regulation. These courts' rationale was based on the premise that the unnotified absent class members would not be bound by the res judicata effect of the original class action and could collaterally attack that judgment due to the lack of notification.[59] Thus, the argument continues, to rule that the defendant-government was bound by the decision of the original class action would give "absent members of the class two bites at the apple at the expense of the defendant."[60]

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[53] Gregory v. Tarr, 436 F.2d 513 (6th Cir. 1971).

[54] 466 F.2d 111 (6th Cir. 1972).

[55] *Id.*

[56] Eisen v. Carlisle & Jacquelin (Eisen II), 391 F.2d 555 (2d Cir. 1968).

[57] 466 F.2d at 113.

[58] Even assuming *arguendo* the validity of the minority position that absence of notice is *per se* violative of due process in all representative suits, the holdings in the *Gregory* line of cases seem to be totally inconsistent with modern res judicata notions. *See* Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301 (1961); Polasky, *Collateral Estoppel — Effects of Prior Litigation*, 39 IOWA L. REV. 217 (1954); Note, *Collateral Estoppel: The Demise of Mutuality*, 52 CORNELL L.Q. 724 (1967). Under the doctrine of mutuality, in order to take advantage of a judgment one must have been so related to the case that he would have been bound by it if the judgment had gone the other way. The government in these cases argued that unnotified class members were not related closely enough to the original case to be bound. Thus, the government contended that if the unnotified class members were not bound, then under the doctrine of mutuality, the government in subsequent actions would also not be bound.

Many recent cases have discussed the question if and under what conditions the rule of mutuality should be abandoned. *See* Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971); Nickerson v. Pep Boys — Manny, Moe & Jack, 247 F. Supp. 221 (D. Del. 1965). *See also* Annot., 31 A.L.R.3d 1044 (1970). Some courts have abandoned or made exceptions to the mutuality rule. Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal.2d 807, 122 P.2d 892 (1942); Elder v. New York & Pa. Motor Express, 284 N.Y. 350, 31 N.E.2d 188 (1940); Good Health Dairy Prods. Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937). The reasoning is that a strict application of the mutuality rule would result in expensive and time consuming litigation of an issue which had been thoroughly tried in a previous case. Furthermore, it did not seem unfair to hold the first judgment conclusive, since the party adverse to the judgment already had his day in court. *See generally* Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, *supra*.

[59] This hypothesis relies on the unrealistic assumption that in a subsequent action by an unnotified class member a court would completely ignore the persuasive authority and stare decisis effect of a previous decision adverse to the class of draft inductees.

[60] Pascrieger v. Tarr, 318 F. Supp. 1350, 1354 (E.D. La. 1970).

The courts' fear of giving the plaintiff "two bites at the apple" resulted in giving the defendant-government at least two bites. In the original *Gregory* action the court implicitly found that the plaintiff adequately represented the class as a whole.[61] The government at the time had a full opportunity to litigate the issues of the plaintiff's ability to represent the class and the lack of notification to absent class members. The government declined the challenge in *Gregory* but was allowed to pursue the same issues in subsequent cases.

The gross error which these courts made in interpreting the nature of Rule 23(b) (2) class actions was in part due to a belief that the district court in the original *Gregory* action erred in its disposition of the merits of the case.[62] In their attempts to reach the correct decision, these courts created a regrettable precedent in the area of class actions. The courts in these cases used the minority view that notice is required in subdivision (b) (2) actions to satisfy due process, without even recognizing the conflicting majority position. Thus the defendant-government was given a second chance to argue the validity of its draft regulation. If any feature in this line of cases is violative of due process, it is the "second chance doctrine" for which the government argued and the courts adopted — not the lack of notice to the absent class members.

III. Effect of Eisen IV on the Majority Rule

Although there is some indication that the minority rule on (b) (2) notice needs reconsideration in light of the recent Supreme Court decision in *Eisen IV*,[63] the majority position that due process requires adequate representation of the absent members of a (b) (2) class, rather than notice, remains unaffected. The Court in *Eisen IV* dealt only with the interpretation of the notice requirements of subdivision (c) (2) of Rule 23 and its application to class actions brought under 23(b) (3). The Supreme Court in *Eisen IV* did not deal with the consitutional requirements of due process with respect to all types of class actions.

At first glance, however, one small passage in Justice Powell's opinion seems to be contrary to the view held in the majority of jurisdictions. After explaining the Rule 23(c) (2) mandatory notice provision and its non-discretionary application to the *Eisen* (b) (3) class, Justice Powell stated:

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[61] As a prerequisite to certifying a suit as a class action, Rule 23(a) (4) requires a finding that the class representative is adequately representing the class. The district court's certification of the original *Gregory* suit as a class action evidences that this finding was made. Gregory v. Hershey, 311 F. Supp. 1 (E.D. Mich. 1969).

[62] Watson v. Branch County Bank, 380 F. Supp. 945 (W.D. Mich. 1974) recently refused to follow the rationale of the *Gregory-Zielstra* line of cases even though they were supposedly the controlling law of its jurisdiction. The court noted that these cases were tainted with "implications for national security which may have influenced the [Sixth Circuit] Court to take such a broad position" and that the recent Supreme Court decision in *Eisen IV* "seems to require that the matter be re-examined." *Id.* at 960 n.11.

[63] Eisen v. Carlisle & Jacquelin (Eisen IV), 417 U.S. 156 (1974).

> Petitioner further contends that adequate representation, rather than notice, is the touchstone of due process in a class action and therefore satisfies Rule 23. We think this view has little to commend it. To begin with, Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided. Moreover, petitioner's argument proves too much, for it quickly leads to the conclusion that no notice at all, published or otherwise, would be required in the present case. This cannot be so, for quite apart from what due process may require, the command of Rule 23 is clearly to the contrary. We therefore conclude that Rule 23(c) (2) requires that individual notice be sent to all class members who can be identified with reasonable effort.[64]

Powell's opinion could mislead one into believing that due process required something more than adequate representation in all class actions. Perhaps fearful of an erroneous conclusion, the Court pointed out in a footnote to the passage that their concern was only with the notice requirements of class actions brought under subdivision (b) (3).[65] Thus, the Supreme Court's holding in *Eisen IV* is not inconsistent with the view held by the majority of courts on the issue of minimum due process requirements for class actions.

A. *Four Reasons Why Notice is Not Required in (b) (2) Actions*

One or more of four reasons are usually given by the courts following the majority view in order to justify their decision that due process does not require notice in all (b) (2) class actions. Chief Judge Fox of the Western District of Michigan recently presented an excellent discussion of the four reasons in *Watson v. Branch County Bank*.[66] An examination of these four reasons illustrates why the restrictive mandatory notice rule is not required in all (b) (2) class actions.

1. *The Drafting of Rule 23*

In 1966 when Rule 23 was adopted, many basic constitutional principles concerning the due process requirements of notice had already been developed. The drafters of the Rule were aware of these due process principles, and carefully considered their requirements when drafting Rule 23. Nothing in the Rule requires that notice be given in all (b) (2) class actions even though such a requirement is imposed on (b) (3) class actions. "Although it is axiomatic that a rule of civil procedure cannot take precedence over the Due Process Clause of the Fifth Amendment, the Supreme Court's approach in *Eisen* indicates that Rule 23 is presump-

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[64] *Id.* at 176-77.

[65] *Id.* at 177 n. 14.

[66] 380 F. Supp. 945 (W.D. Mich. 1974).

tively valid as comprehending adequate due process protections."[67] Thus, there is a strong presumption that if the Rule does not require notice in all (b) (2) class actions, then such notice is not required by due process. It is further reasoned that the drafters anticipated that those (b) (2) actions which do require notice to satisfy due process would be the exceptions and could be handled on a case-by-case basis pursuant to the discretionary notice provision.

2. *The Absence of Property Rights*

The fifth amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law."[68] Actions under 23(b) (2) generally do not involve property rights but "involve broad questions of constitutional or statutory law and public policy."[69] In contrast, actions brought under 23(b) (3) nearly always deal with absent class members' substantive property interests or legal claims against the party opposing the class. Due process prohibits in these cases the adjudication of an individual's right to property or claim for damages in his absence when he has not been notified of the action.[70] Since adjudication of property interests are unusual in (b) (2) actions, and since claims predominantly for monetary damages are not permitted in this type of action,[71] absent class members in a (b) (2) action often have no legal interest to which due process will attach. Again it is reasoned that discretionary notice can be ordered in the unusual (b) (2) action where legally protectable interests are being adjudicated.

3. *The Right to "Opt Out"*

Subdivision (b) (2) class members are not permitted to "opt out" of a class action[72] and thus they must remain a part of the class whether they are notified of the action or not. In contrast, every member of a (b) (3) class action has an absolute right to be excluded from the adjudication.[73] To make this right to opt out effective, members of the (b) (3) class must be notified of the pendency of the action and of their right to exclude themselves. Therefore, as a practical matter, notice must be provided in all (b) (3) class actions. Since this pragmatic justification for ordering notice to all class members is not applicable to (b) (2) class actions, the only practical reason remaining to require notice in (b) (2) actions is to inform absent class members of their right to intervene and

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[67] *Id.* at 956.

[68] U.S. CONST. amend. V.

[69] Watson v. Branch County Bank, 380 F. Supp. 945, 958 (W.D. Mich. 1974).

[70] Schroeder v. City of New York, 371 U.S. 208 (1962); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

[71] *See* notes 16-17, *supra*, and accompanying text.

[72] *See* notes 13-15, *supra*, and accompanying text.

[73] FED. R. CIV. P. 23(c)(2).

participate personally in the litigation. It has been held, however, that there is no absolute right to intervene in a (b) (2) class action.[74] Moreover, it can be assumed that fewer absent class members will be interested enough in the litigation to intervene, as compared with the number of absent class members who might exercise the minimal effort required to opt out of a (b) (3) class action. In those actions where absent class members are more likely to intervene in the action, the courts may order discretionary notice.[75]

4. *The Objective of the Federal Rules of Civil Procedure*

Rule 1 of the Federal Rules of Civil Procedure declares that the basic objective of the Rules is "to secure the just, speedy, and inexpensive determination of every action."[76] One court has observed that:

> Class actions are a relatively inexpensive, expeditious, and socially desirable way for a few named plaintiffs, usually represented by highly professional public interest attorneys, to raise substantial questions concerning the constitutional or statutory rights of a large number of people and to secure comprehensive and just remedies where rights are shown to be violated.[77]

Thus, given the purpose of the class action there are many (b) (2) actions which may be adjudicated without prejudicing the rights of absent class members notwithstanding the fact that they were not notified of the pendency of the action.[78] A rule requiring notice in all (b) (2) class actions requires excessive and unnecessary notice which imposes substantial burdens on the parties and necessarily involves procedural complications in contravention of Rule 1 of the Federal Rules. Furthermore, requiring notice may place a substantial burden on the courts in that absent class member are often required to communicate directly with the court.[79] Much court time would necessarily be required to respond to these inquiries.

Consideration of these four factors is the reason why the courts in the majority of jurisdictions have rejected a restrictive rule requiring notice

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[74] *See* Watson v. Branch County Bank, 380 F. Supp. 945 (W.D. Mich. 1974). In *Watson*, Judge Fox reasoned that:

> There is no compelling reason why the court ought to invite absent class members to intervene. Certainly individual class members have no absolute right to intervene in a class action. The very existence of Rule 23 negatives the idea that absent members of a 23(b) (2) class are indispensible under Rule 19(b). In the circumstances of this case and probably most or all other 23(b) (2) actions, no absent class member is even "necessary" under Rule 19(a). Individual class members are thus merely "permissive" parties, and the court may in its discretion refuse to allow them to intervene personally. *Id.* at 960.

[75] *See* discussion accompanying note 85 *infra*, for additional explanation of notice for the purpose of facilitating intervention.

[76] FED. R. CIV. P. 1.

[77] Watson v. Branch County Bank, 380 F. Supp. 945, 957 (W.D. Mich. 1974).

[78] *See* notes 67-71, *supra*, and accompanying text.

[79] Watson v. Branch County Bank, 380 F. Supp. 945, 959 (W.D. Mich. 1974).

in all (b) (2) actions. Yet these courts recognize and retain their right to order discretionary notice in those exceptional (b) (2) cases where notice may be warranted to insure the fair conduct of the action.

Notice presents no problem when the class is small and the cost of giving individually mailed notice is very slight. In this situation the court should allow notice to be given unless there are unusual circumstances militating against such notice.[80] The difficulty arises when the class is so large that the cost of individual notice would be prohibitive or when the class and its representatives are indigent and cannot afford even the slightest cost of giving notice.[81] In such situations the court is faced with a number of questions. When should discretionary notice be ordered? What type of notice should be given? Must the cost of notice be the burden of the class representative in all cases? Some of these questions have not as yet been answered — or at least their status after the *Eisen IV* has not yet been determined. The following discussion however may provide some insight into how these questions may be answered in the future.

IV. Discretionary Notice: When and How

A. *When is Discretionary Notice Warranted?*

Judge Fox has concluded that given "the high cost to the parties and the court" notice only need be given in "special circumstances,"[82] though the courts have not as yet compiled a list of those situations in which notice ought to be given. Indeed, Judge Fox indicated that it is probably impossible to draw an exhaustive list to cover all recognizable circumstances and thus, he offered only a few examples.[83] In this setting, an analysis of the functions of (b) (2) notice is the only appropriate means of determining whether discretionary notice is warranted.

Generally there are four functions which can be served by the issuance of notice in the (b) (2) class action. These include:

> First, informing absent class members of an adjudication which might result in the deprivation of their "property" rights, in the unusual (b) (2) action when property rights are being adjudicated;

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[80] There may be instances where countervailing considerations such as protecting public interest may militate against giving any type of notice at all. One court refused to allow even notice by publication in a civil rights case against allegedly discriminatory police practices taking place in Baton Rouge, Louisiana in the late 1960's. Johnson v. City of Baton Rouge, 50 F.R.D. 295, 302 (E.D. La. 1970). *See also* Hooks v. Wainwright, 352 F. Supp. 163, 166 (M.D. Fla. 1972), where the court declined to order notice, concluding that notice "would serve no useful purpose." *Id.* at 166.

[81] *See, e.g.*, Lopez v. Wyman, 329 F. Supp. 483 (W.D.N.Y. 1971), *aff'd mem.*, 404 U.S. 1055 (1972).

[82] Watson v. Branch County Bank, 380 F. Supp. 945, 959 (W.D. Mich. 1974).

[83] *Id.* Judge Fox suggested two examples of special circumstances where notice ought to be given.

> One such circumstance might be the presence of a damage claim in connection with a suit under 42 U.S.C. Sec. 1983. Another might be the presence of a defendant class. *Id.* at 959.

Second, informing absent class members of their opportunity to intervene in appropriate cases;

Third, testing the adequacy of named parties' representation of the absent class members' interests, and;

Fourth, providing information concerning the litigation to absent class members as well as the general public, consistent with the concept that the members of a free society have a "right to know."

Within this framework, if the particular (b) (2) action is, for example, of the unusual type which adjudicates property rights, then notice must certainly be provided prior to any judicial action which could deprive absent members of property without due process of law.[84]

If, however, the function of the notice is only to inform absent members that they may intervene, then notice is not as necessary since there is no absolute right to intervene.[85] The factor determining whether notice should be ordered rests on the consideration of the likelihood that absent class members would seek to intervene. Bearing upon this decision is whether the issue being litigated will have significant effect on the individual class member, with special consideration given if the disposition of the suit would involve any possibility of monetary awards; whether the members of the class lack the financial resources to intervene, and; whether the class representative has the ability and is adequately representing the interests of the class without the help of intervenors.

In some cases, the function of notice may additionally aid in the determination of whether named parties adequately represent the views of the class. Notice could be ordered to serve this function in the appropriate case where adequacy of representation is seriously brought into issue.

Finally, the "right to know" function may warrant some type of notice in cases where ordering such notice would not impose an excessive burden on the party supplying the notice. Notice to achieve this function is desirable to maintain the integrity of the class action device. For example, notice helps to militate against allegations of corruption of the class action process by illuminating situations where collusive settlements, favorable to named parties but detrimental to the class, can arise. Yet the mere fulfillment of this "right to know" function, however desirable, should not be used as grounds to order notice which would bring an end to the action without reaching the merits of the case. In fact, of the four functions of (b) (2) notice only the first function, when property

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[84] Schroeder v. City of New York, 371 U.S. 208 (1962); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

[85] Watson v. Branch County Bank, 380 F. Supp. 945, 960 (W.D. Mich. 1974). In this case the court stated with respect to the intervention function that

> [n]otice might invite members of the class to intervene to present claims or defenses, or otherwise come into the action to provide, for example, a broader representation of named plaintiffs, or to submit views as amici curiae. *Id.* at 959.

rights are involved, requires that notice be given without regard to the oppressiveness of the notice burden.

B. *What Type of Notice Should be Ordered?*

Prior to Eisen IV, discretionary notice pursuant to subdivision (d) (2) was routinely held not to require individual mailed notice in all situations. For example, in *Lopez v. Wyman*,[86] a decision from the Second Circuit which held that notice is required in all class actions, the district court directed notice of an action challenging the residency requirement of a welfare statute to be given to "local departments of social services throughout the state . . . , and see to it that appropriate notice is posted in these offices."[87] Even the *Gregory*[88] line of cases did not state that the notice had to be individually mailed. Those cases merely held that "absolute failure" to find in the trial court's record that absent members had been notified invalidated the class. Presumably posting notices in local selective service offices or on the campuses where men would have obtained student deferments would have satisfied the notice requirements in those cases. Other courts and authorities have advocated alternative methods of notification designed to satisfy the (d) (2) discretionary notice requirements.[89]

The *Eisen IV* decision did not disturb the general rule that (d) (2) discretionary notice need not be individually mailed notice. The terms of subdivision (d) (2) support this position stating that "notice be given in such manner as the court may direct to some or all of the members. . . ."[90] Individual notice has proven to be wasteful, expensive, and unduly burdensome in large classes, and often less effective than other methods of giving notice.[91]

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[86] 329 F. Supp. 483 (W.D.N.Y. 1971), *aff'd mem.*, 404 U.S. 1055 (1972).

[87] *Id.* at 486.

[88] Gregory v. Hershey, 311 F. Supp. 1 (E.D. Mich. 1969). *See* discussion accompanying notes 50-62 *supra*. The court in *Pasquier v. Tarr*, 318 F. Supp. 1350, 1354 (E.D. La. 1970), suggested that notice by publication in a prominent newspaper would have satisfied the notice requirements in the original *Gregory* action.

[89] The following cases illustrate imaginative notification, including use of publication notice, notice in the form of commercials via television or radio, and the posting of notice in areas frequented by purported class members. Fujishima v. Board of Educ., 460 F.2d 1355, 1360 (7th Cir. 1972); Rota v. Brotherhood of Ry., Airline & S.S. Clerks, 64 F.R.D. 699, 707 (N.D. Ill. 1974); Collins v. Schoonfield, 344 F. Supp. 257, 263 (D. Md. 1972); Lopez v. Wyman, 329 F. Supp. 483, 486 (W.D.N.Y. 1971); Berman v. Narragansett Racing Ass'n, 48 F.R.D. 333 (D.R.I. 1969). *See also* examples listed in Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313 (1973).

[90] FED. R. CIV. P. 23(d) (2).

[91] Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 321-22 (1973). Professor Miller has come to the conclusion that the "sad truth is that notices issued by courts or attorneys typically are much too larded with legal jargon to be understood by the average citizen." *Id.* at 321. To illustrate this conclusion, he reproduced several responses from North Carolina citizens who had received such notices from their state Attorney General in connection with the "tetracycline cases." Professor Miller stated that

> [s]ome of the responses are worth reading because they are symptomatic of the

One exception to the general rule is made when property interests are involved. In such cases the form of notice would necessarily have to be individually mailed notice.[92] If the function of notice is merely to inform class members of the existence of the class action suit, or to enable them to intervene in the suit, or to test the adequacy of representation, then there is no need to provide individual notice. Alternative methods should suffice.

Finally, an improved method of testing the adequacy of representation, may take the form of a questionnaire or a survey poll whereby the court, or one of the parties, may question the class or a representative cross-section of the class to determine whether the named representative party represents an interest which is not inconsistent with the interests of the class.[93]

C. *Who Should Bear the Cost?*

Prior to Eisen IV, there was authority to support the view that the class representative in a (b) (2) action need not always be burdened with the responsibility of providing and paying for notice. In one case, the defendant correctional authorities were ordered, at their own expense, to give notice to the plaintiff inmate class.[94] In another case, the party opposing the class was ordered to give notice of a challenge to a welfare statute.[95] Upon considering the plaintiff's indigency and the media coverage given the case, the court ordered the defendant to give notice through the local departments of social service.[96]

The validity of these decisions is questionable, however, in light of the Court's broad statement in *Eisen IV*, that

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difficulty with the wording of most notices and reflect the problem of communicating to lay people about legal matters. *Id.*

Some of the responses from the class members were as follows:

> Dear Mr. Clerk: I have your notice that I owe you $300 for selling drugs. I have never sold any drugs, especially those you have listed; but I have sold a little whiskey once in a while.
>
> Dear Sir: I received this paper from you. I guess I really don't understand it, but if I have been given one of those drugs, nobody told me why. If it means what I think it does, I have not been with a man in nine years.
>
> Dear Sir: I received your pamphlet on drugs, which I think will be of great value to me in the future. I am unable to attend your class, however.
>
> Dear Mr. Attorney General: I am sorry to say this, but you have the wrong John Doe, because in 1954, I wasn't but three years old and didn't even have a name. Mother named me when I got my driver's license. Up to then, they just called me Baby Doe. *Id.* at 322.

[92] Schroeder v. City of New York, 371 U.S. 208 (1962); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

[93] *See* discussion accompanying note 99 *infra* for a more detailed explanation of this proposal.

[94] United States, *ex rel.* Walker v. Mancusi, 338 F. Supp. 311, 316 n.4, 319 n.2 (W.D.N.Y. 1971).

[95] Lopez v. Wyman, 329 F. Supp. 483, 486 (W.D.N.Y. 1971), *aff'd mem.*, 404 U.S. 1055 (1972).

[96] *Id.* at 486.

> [t]he usual rule is that a plaintiff must initially bear the cost of notice to the class . . . . Where, as here, the relationship between the parties is truly adversary, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit.[97]

The only exception to this rule which the Court did not rule out was a preexistent fiduciary duty between the plaintiff and the defendant.[98] Regrettably, even though the *Eisen* case was maintained as a (b) (3) action, it appears that the Court's statement with no qualifying notation limiting its scope, may be construed to require plaintiffs in all types of class actions to always pay for notice.

This rule, if it is held to be so, is unfortunate, as there is at least one situation where plaintiff should not be required to pay for notice in a (b) (2) action. This situation involves notice ordered by the court for the purpose of testing the adequacy of representation, as a result of defendants' allegation that the named plaintiff is inadequate as the class representative. In these circumstances, if the plaintiff has made a prima facie showing that he is an adequate representative, the defendant should be required to pay for notice to support his allegation of inadequate representation.[99] Conversely, if the court should initially rule that the named plaintiff is not an adequate representative of the class, then he should be permitted to demonstrate to the court his adequacy by providing for verification notice. This latter proposal of conditioning a named plaintiff's class certification on a verification of adequacy of representation has already been utilized by several courts.[100]

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[97] Eisen v. Carlisle & Jacquelin (Eisen IV), 417 U.S. 156, 178-79 (1974).

[98] *Id.* at 178. The Court gave an example of a shareholder derivative action though they specifically expressed no opinion on the proper allocation of the cost of notice in such cases. Thus, the Court expressly avoided ruling on the validity of Judge Weinstein's formulation for cost of notice allocation used in Dolgow v. Anderson, 43 F.R.D. 472, 498-500 (E.D.N.Y. 1968).

[99] A prima facie showing of adequate representation is already required before class certification as part of the 23(a) prerequisites. FED. R. CIV. P. 23(a) (4). In the proposed procedure, the party adverse to the adequacy of representation determination would be permitted to challenge its soundness by means of a survey. This challenge could be in the form of a court supervised questionnaire-notice to the class members or a cross-section of the members of the class. The purpose of the questionnaire-notice would be either to verify the adequacy of the representatives' position or to illustrate that the class representative is not adequately representing the views and interests of the class. Under this proposed plan the party challenging, or conversely verifying, the adequacy of representation would bear the burden of the cost of the questionnaire-notice. For example, if the court should decide that the class representative adequately represents the interests of the class, then it would be up to the party opposing the class to show by means of the survey that the class representative is not representing the interests of the class. Conversely, if the court should find after the preliminary examination that the class representative was not an adequate representative of the class, then it would be up to him to illustrate his adequacy as such by means of a court approved questionnaire. Of course, as with other analogous procedures in law, if the court's initial determination is not challenged, then it would stand as being determined. This procedure would safeguard the rights of absent class members by allowing the decisive settlement of the issue.

[100] *See In re* Goldchip Funding Co., 61 F.R.D. 592 (M.D. Pa. 1974), where the court denied

V. Conclusion

Class actions can play a vital part in enforcing the law of today's complex society although in recent years this vitality has apparently been ignored by the federal judicial system. For a brief period of time the federal courts appeared to be applying Rule 23 liberally in order to adopt appropriate remedies and redress many of the problems of our society.[101] Liberal use of class actions suddenly appeared to spark enforcement of laws which were adopted more than a decade ago in the area of civil rights.[102] Big business began to comply with new consumer legislation, primarily as a result of the threat of class actions which could subject them to enormous liabilities.[103] For example, it has been reported that the threat of class actions was the major reason for the immediate compliance of the business community with the Truth-In-Lending Act.[104]

Since 1971, the federal courts have decisively retreated from the liberal approach of allowing almost all suits to be certified as class actions. The present restrictive view is in response to either the great increase in the number of class action suits, the allegations of attorney abuse in this area,[105] the result of a fear on the part of the courts to assume the tremendous power the class action device gives them,[106] or a combination of all of these factors. Because of the problems of class actions, the courts are adopting rigid rules for narrowing and restricting the use of

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the plaintiff class representative's motion for class certification without prejudice to reinstitute until such time as the class representative could

> affirmatively show, by affidavit or upon evidentiary hearing, preferably the latter, that they alone or in conjunction with others will provide adequate representation. *Id.* at 595.

See also Parish v. Boetel & Co., 60 F.R.D. 680, 681 (D. Neb. 1973), where the court made a conditional finding of adequate representation pursuant to its authority under Rule 23(c) (1) of the Federal Rules of Civil Procedure.

[101] *See, e.g.*, Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968).

[102] This is especially true in the area of employment discrimination. *See, e.g.*, Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); Baxter v. Savannah Sugar Refining Corp., 350 F. Supp. 139 (S.D. Ga. 1972), *modified*, 495 F.2d 437 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974).

[103] *See, e.g.*, Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972), where under the threat of a class action which, if successful, could have yielded a recovery of about $13 million, the defendant, Chemical Bank of New York, immediately made the disclosure of the nominal annual percentage rate demanded by the plaintiff-class in compliance with the Truth-in-Lending Act. *Id.* at 415.

[104] D. Rothschild & D. Carroll, Consumer Protection: Reporting Service, § 13.01 (1974). Rothschild states that:

> The threat of class actions has been described as the major factor in gaining compliance with the [Truth-in-Lending] Act among major United States creditors. *Id.* at 244(o).

See also Ratner v. Chemical Bank New York Trust Co., 309 F. Supp. 983, 986 n.4 (S.D.N.Y. 1969).

[105] *See* Comment, *Ethical Obligations of the Attorney Under Rule 23 — Abuses and Reforms*, 12 San Diego L. Rev. 224 (1974). *See also* Annot., 16 A.L.R. Fed. 883 (1973).

[106] *See* Shaw v. Mobil Oil Corp., 60 F.R.D. 566 (D.N.H. 1973), where the court seemed fearful of ruling against the oil companies during the period of the fuel shortage.

such actions.[107] The hours which have already been spent in litigating class action issues should not be wasted by adopting a narrow inflexible rule. The continuation of the case-by-case interpretation of subtle doctrines and standards must continue to keep the class action a living and workable apparatus. Rule 23(b) (2) must not be shackled by a restrictive rule requiring expensive notice in all cases. Alternative procedural safeguards can and should be used to provide adequate protection and assurance of adequate representation of the interests of the absent class members.

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[107] *See, e.g.*, Zahn v. International Paper Co., 414 U.S. 291 (1973); Snyder v. Harris, 394 U.S. 332 (1969). Unfortunately, the rest of the federal judiciary apparently felt that the Supreme Court wanted to put an end to the liberal use of Rule 23. Thus the district and circuit courts after these Supreme Court decisions began developing their own restrictive and rigid rules against class actions. *See, e.g.*, Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972), where Judge Frankel interpreted the class action procedures as inconsistent with the specific remedy that Congress created in the Truth-in-Lending Act. Other courts have cited *Ratner* as prohibiting all class actions under the Truth-in-Lending Act. Goldman v. First Nat'l Bank of Chicago, 56 F.R.D. 587 (N.D. Ill. 1972); Rodriguez v. Family Publications Serv., Inc., 57 F.R.D. 189, 194 (C.D. Cal. 1972).