1982

Conflicts In Class Actions and Protection of Absent Class Members

Follow this and additional works at: https://digitalcommons.law.yale.edu/ylj

Recommended Citation
Conflicts In Class Actions and Protection of Absent Class Members, 91 Yale L.J. (1982).
Available at: https://digitalcommons.law.yale.edu/ylj/vol91/iss3/6

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law Journal by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Conflicts In Class Actions and Protection of Absent Class Members

Rule 23 of the Federal Rules of Civil Procedure mandates early judicial determination of whether a suit can be maintained as a class action. After examining the factual and legal positions of the named representative and of class members, the trial judge must determine whether utilization of the class action device is appropriate. At a minimum, the judge must be satisfied that the suit meets the class action prerequisites of numerosity, commonality, typicality, and adequacy of representation.

This Note analyzes the extent to which the certification process protects absent class members. It discusses the information relevant to class certification and the deficiencies of the several methods employed to obtain that information. The Note proposes a regulated system of precomplaint attorney-class communication that would encourage class attorneys to solicit information necessary for an informed class decision. The regulated communication will enable the class attorney to assess more accurately the propriety of a class suit while simultaneously minimizing the dangers tra-

1. Rule 23 provides: “As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.” FED. R. CIV. P. 23(c)(1).

2. See Horn v. Associated Wholesale Grocers, 23 Fed. R. Serv. 2d 489, 492 (10th Cir. 1977) (even where named plaintiffs fail to move for class certification court has independent obligation to determine propriety of class suit); Harris v. Pan Am. World Airways, 74 F.R.D. 24, 36 (N.D. Cal. 1977) (trial court’s class certification decision must necessarily pass on maintainability of class action), aff’d in part, rev’d in part, 649 F.2d 670 (9th Cir. 1980); 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1785, at 128 (2d ed. 1972) [hereinafter cited as WRIGHT & MILLER].

3. Certification constitutes a formal judicial declaration that all the class prerequisites have been met. Failure to comply with any of these prerequisites may preclude maintenance of a class suit because of the potential prejudicial impact on the legal rights and claims of the absent class members. See generally Comment, Class Actions: Certification and Notice Requirements, 68 GEO. L.J. 1009, 1025 (1980). In addition to these prerequisites proposed class action suits must fall within at least one of the three types of class actions prescribed in Rule 23(b):

(a) the prosecution of separate actions by or against individual members of the class would create a risk of

(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

(c) 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

(d) 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.

FED. R. CIV. P. 23(b).
Class Actions

ditionally associated with attorney-initiated communication. If a class suit is filed, the trial court, equipped with the solicited information, will be able to monitor and protect more effectively the interests of absent class members.

I. The Class Certification Device as a Mechanism to Protect Absent Class Members

The court's management responsibility typically includes timely determination of class status, regardless of whether either party has made a motion for certification. The trial judge must guard the interests of absent class members. If there are antagonisms among class members or between the named representative and the class, the judge is obliged either to deny class status or to attempt a reconciliation of the disparate interests. Rule 23 provides a variety of procedural mechanisms—such as subclassing, in-

4. The ambiguous phraseology of Rule 23(c)(1) has generated much controversy over whether the proponent of the class suit or the court bears the burden of seeking class certification on a timely basis. Compare Peritz v. Liberty Loan Corp., 523 F.2d 349, 354 (7th Cir. 1975) (plaintiff bears burden of seeking certification) with Horn v. Associated Wholesale Grocers 555 F.2d 270, 274 (10th Cir. 1977) (trial judge obligated to take up class issue whether or not requested to do so by a party). Since the certification process is designed, in part, to protect absent class members, the latter position is more consistent with the class rule. See Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 41 (1967) (importance of class certification to rights of absent class members may make it unacceptable to leave to parties control over timing of certification determination).


6. See, e.g., Harris v. Pan Am. World Airways, 74 F.R.D. 24, 39 (N.D. Cal. 1977) (court reconciled conflicts by redefining class and creating subclasses although not urged in pleadings) aff'd in part, rev'd in part, 649 F.2d 670 (9th Cir. 1980); cf. Gibson v. Local 40, Supercargoes & Checkers, 543 F.2d 1259, 1264-65 (9th Cir. 1976) (trial judge should narrow class to appropriate scope rather than deny class altogether).

7. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 179 n.16 (1974) (subclasses can be utilized to resolve conflicts among class members); Mendoza v. United States, 623 F.2d 1338, 1349-50 (9th Cir. 1980), cert. denied, 101 S. Ct. 1351 (1981) (subclassification appropriate when class members hold divergent views and court believes it would materially improve representation); Monarch Asphalt Sales Co. v. Wilshire Oil Co., 511 F.2d 1073, 1077 (10th Cir. 1975) (subclasses properly created when two groups within class were more divergent than similar). FED. R. CIV. P. 23(c)(4) authorizes the trial judge to create subclasses "when appropriate . . . a class may be divided into subclasses and each subclass treated as a class . . . ." See generally Developments—Class Actions, supra note 5, at 1479 (subclassing provides trial judge with means of increasing reliability of representation of absentees).
tervention, 9 bifurcation, 10 and exclusion 11—to accommodate conflicting interests within a class and to prevent prejudice to absentees. The court can use these techniques to modify or redefine 12 the proposed class so that the representative suit meets the mandates of due process.

Three of the four prerequisites to class certification—commonality, typicality, and adequacy of representation—are intended to safeguard the interests of absent class members, by reducing to an acceptable level possible conflicts of interest among class members or between the named representative and the class. 13 These three prerequisites are interrelated, and

9. Rule 24 provides for mandatory and discretionary intervention. FED. R. CIV. P. 24. See Developments—Class Actions, supra note 5, at 1483 (provision for intervention necessary if full range of absentee interests is to be effectively represented in class litigation. Since intervention is prospective and thereby requires the identification of possibly antagonistic or unrepresented interests before the absentees are aware that their interests may be in jeopardy, a court may encounter difficulty in attempting to identify and induce particular absentees to come into the lawsuit. Id. at 1483.

Intervention before class certification may upgrade the adequacy of representation. See, e.g., McCausland v. Shareholders Management Co., F.R.D. 521, 524 (S.D.N.Y. 1971) (permissive intervention granted to ensure adequate class representation); First Am. Corp. v. Foster, 51 F.R.D. 248, 251 (N.D. Ga. 1970) (intervention of right by class members to broaden representation). Intervention may be utilized to avoid mootness, thereby protecting the absent class members. Norman v. Connecticut State Bd. of Parole, 458 F.2d 497, 499 (2d Cir. 1972) (dismissal of civil rights class action unless member of class granted leave to intervene); Vanguard Justice Soc'y v. Hughes, 19 F.E.P. 587, 592 (D. Md. 1979) (in fairness to members of class decertified for inadequate representation claims held open for 30 days to permit adequate class representative to come forward).


Bifurcation is frequently employed in Title VII class actions where it attempts to guarantee absentees participation in the remedy which may consist of back pay or other affirmative injunctive relief. See generally Edwards, The Back Pay Remedy in Title VII Class Actions: Problems of Procedure, 8 GA. L. REV. 781, 797 (1974) (advocates use of bifurcation in Title VII class actions for protection of absentees).

11. See Developments—Class Actions, supra note 5, at 1486-87 (judicial use of exclusion one way to resolve conflicts of interest problem provided excluded class carefully defined).

12. See Vuyanich v. Republic Nat'l Bank, 78 F.R.D. 352, 357 (N.D. Tex. 1978) (class redefinition available tool to deal with problems of class dissimilarity); Harriss v. Pan Am. World Airways, 74 F.R.D. 24, 36 (N.D. Cal. 1977) (in rendering certification decision court must arrive at its own tentative definition of class on whose behalf action may be maintained), aff'd in part, rev'd in part, 649 F.2d 670 (9th Cir. 1980).

13. Conflicts or antagonisms among class members or between the named representative and one or more subclasses may preclude a class suit. See Hansberry v. Lee, 311 U.S. 32, 44-46 (1940) (class suit precluded when requested relief would directly injure some or all class members); Bailey v. Ryan Stevedoring Co., 528 F.2d 551, 553 (5th Cir. 1976), cert. denied sub nom, Longshore Workers, Int'l. Longshoremen's Ass'n v. Bailey, 429 U.S. 1052 (1977) (if significant proportion of class members voice opposition to action, conflict may be sufficient to deny class status); In re Value Line Special Situation Fund Litigation, [1973-74 Transfer Binder] FED. SEC. L. REP. (CCH) 94,601 (S.D.N.Y. 1974) (class certification denied because interest of class representative could be pursued only at expense of interests of all class members). But see United States v. Trucking Employers, 75 F.R.D. 682, 688 (D.D.C.) vacated 561 F.2d 313 (D.C. Cir. 1977) (critical question regarding class certification is what degree of dissimilarity among class members can be tolerated without sacrificing fairness to absentees). The mere existence of some degree of class conflict or disagreement does not automatically preclude certification. See, e.g., Oneida Indian Nation v. State, 85 F.R.D. 701, 706 (N.D.N.Y. 1980) (possibility of antagonistic interests prevent certification only if extends to subject matter of litigation);
overlap is inevitable. The different emphases of the requirements are nonetheless essential to ensure a fully considered certification decision.14

Commonality requires an identifiable pattern or practice affecting a definable class in common ways.15 For example, commonality in a Title VII employment discrimination lawsuit is contingent upon the uniformity of the challenged employment practices with respect to factors such as size of the work force, number of plants and installations involved, and diversity of employment conditions, occupations, and work activities. Commonality also requires consideration of the length of time covered by the allegations and the likelihood that similar conditions prevailed throughout the relevant period.

The typicality requirement necessitates a slightly different analysis.16

Gill v. Monroe County, 79 F.R.D. 316, 327 (N.D.N.Y. 1978) (mere existence of intraclass antagonisms does not automatically defeat motion to proceed as class); Rutherford v. United States, 429 F. Supp. 506, 509-10 (W.D. Okla. 1977) (not fatal to maintenance of class that some members preferred violation of rights to go unremedied); Grogan v. American Brands, 70 F.R.D. 570, 582 (M.D.N.C. 1976) (disagreement among class members not sufficiently antagonistic to preclude certification).

14. Once a class is certified vindication of the legal rights of class members is the responsibility of the class attorney and the class representative. See Greenfield v. Village Indus., 483 F.2d 824, 832 (3d Cir. 1973) (representative plaintiff and class attorney have fiduciary duty to absent class members); Cullen v. New York State Civil Serv. Comm'n, 435 F. Supp. 546, 560 (E.D.N.Y. 1977), appeal dismissed, 566 F.2d 846 (2d Cir. 1977) (granting class status places attorney for named plaintiffs in position of public trust and responsibility vis-a-vis absent class members).

15. See, e.g., Bailey v. Ryan Stevedoring Co., 528 F.2d 551, 553-54 (5th Cir. 1976) (lack of requisite commonality where there exists merely aggregation of individual complaints rather than common pattern, practice or policy); Jamerson v. Board of Trustees, 80 F.R.D. 744, 748 (N.D. Ala. 1978) (commonality requires examination of commonality of relationship among class claims). Some commentators, have suggested that commonality is unnecessary or at least partially redundant. They contend that common questions are an essential ingredient of a class action under any of the Rule 23(b) categories, and that implicit in a (b)(1), (b)(2) or (b)(3) action is the decision that common questions are shared by class members. 3B J. MOORE, MOORE'S FEDERAL PRACTICE § 23.06-1 (2d ed. 1976); WRIGHT & MILLER, supra note 2, § 1763, at 609-10.

The Advisory Committee Notes do not clarify what the commonality analysis requires, and courts have failed to provide a uniform or consistent pattern of analysis. Compare Green v. Wolf Corp., 406 F.2d 291, 300 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969) ("common and consistent course of conduct") with Harris v. Pan Am. World Airways, 74 F.R.D. 24, 39 (N.D. Cal. 1977) (tripartite analysis—claim is justiciable, named plaintiff a class member, claim asserted common to class), aff'd in part, rev'd in part, 649 F.2d 670 (9th Cir. 1980).

16. The typicality prerequisite refers to the claim or defense of the class representative and not to the specific facts from which the action arose or to the relief sought. Factual differences among class members will not render a class atypical. The claim must arise, however, from the same practice or to the relief sought. Factual differences among class members. 3B J. MOORE, supra note 2, § 23.06-1 (2d ed. 1976); WRIGHT & MILLER, supra note 2, § 1763, at 609-10.

The Advisory Committee Notes do not clarify what the commonality analysis requires, and courts have failed to provide a uniform or consistent pattern of analysis. Compare Green v. Wolf Corp., 406 F.2d 291, 300 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969) ("common and consistent course of conduct") with Harris v. Pan Am. World Airways, 74 F.R.D. 24, 39 (N.D. Cal. 1977) (tripartite analysis—claim is justiciable, named plaintiff a class member, claim asserted common to class), aff'd in part, rev'd in part, 649 F.2d 670 (9th Cir. 1980).

16. The typicality prerequisite refers to the claim or defense of the class representative and not to the specific facts from which the action arose or to the relief sought. Factual differences among class members will not render a class atypical. The claim must arise, however, from the same practice or course of conduct that gives rise to the absentees' claims and must be premised upon the same legal theory.

The typicality requirement has been equated with the Rule 23 (a)(4) requirement that the representative party must adequately represent the class, or with one of the elements usually considered as part of this adequacy requirement, that the interest of the representative party be coextensive with the interests of the other members of the class. J. MOORE, supra note 15, at § 23.06-2. The scope of the term has prompted the suggestion that there is no need for the 23 (a)(3) typicality prerequisite since all meanings attributable to it duplicate other requirements in Rule 23. Id. But see Taylor v. Safeway Stores, 524 F.2d 263, 270 (10th Cir. 1975) (subsection (a)(3) has a meaning independent of other provisions of Rule 23(a)). Advocates of the Taylor position recommend an (a)(3) analysis in which the focal point is the representative plaintiff's claims in relationship to the claims of the putative class. Id; Poinsett v. Teubert, 462 F.2d 1096, 1097 (4th Cir. 1972) (dismissal of class action sustained on ground that plaintiff's claim not typical of claims and defenses of class). See Jamerson v. Board of
Are the circumstances surrounding the plaintiff's claim typical of those surrounding the claims of the class members? Will the relief sought by the plaintiff be beneficial to the class, and will the plaintiff seek to benefit the class rather than just himself? In the Title VII example, the court must consider whether the plaintiff's position, occupation and terms and conditions of employment are typical of those he purports to represent.

Since final judgment in a class action is binding on all class members, due process requires that the nature and quality of the representation be tantamount to a “day in court” for the absentees. Courts use a two-tier inquiry to evaluate adequacy of representation. First, the court must determine whether the representative party’s attorney is qualified, experienced, and capable of conducting the litigation. Second, the court must be satisfied that there are no antagonistic interests within the class, despite the existence of trustees, 80 F.R.D. 744, 748 (N.D. Ala. 1978) (typicality requires that claims and defenses of representative typify those of the class).

17. See, e.g., Hansberry v. Lee, 311 U.S. 32, 42-45 (1940) (interests of party not before court must be adequately represented to bind absentees by judgment); Nguyen Da Yen v. Kissinger, 70 F.R.D. 656, 666 (N.D. Cal. 1976), modified on other grounds, 528 F.2d 1194 (9th Cir. 1975) (class members whose interests are antagonistic to or in conflict with interests of representative party cannot be bound consistent with requirements of due process); Westcott v. Califano, 460 F. Supp. 737, 746 (D. Mass. 1978) (certification process important to protect absent class members against mootness of named plaintiffs claim and to facilitate enforcement of favorable judgment); cf. In re Fine Paper Litigation, 632 F.2d 1081, 1086 (3rd Cir. 1980) (certification is significant step in class litigation establishing certain rights and obligations of class members and representatives); Mendoza v. United States, 623 F.2d 1338, 1344, 1346 (9th Cir. 1980), cert. denied, 101 S. Ct. 1351 (1981) (representative suits carry inherent dangers of conflict and compromise of absentee interests); Gonzales v. Cassidy, 474 F.2d 67, 68 (5th Cir. 1973), aff'd on other grounds, 493 U.S. 76 (1974) (judgment in class suit not res judicata for absentees unless adequately represented); see generally Developments—Class Actions, supra note 5, at 1366-72 (whether absentee interests reinforce or diverge from interests of named plaintiff is relevant factor in adjudication).

18. Adequacy of representation is the most crucial requirement of the class action rule, since the judgment in a class action conclusively determines the rights of absent class members. See Hansberry v. Lee, 311 U.S. 32, 41-42 (1940).


tence of commonality and typicality. Although in some cases conflicting interests may be easily discerned from the pleadings, in other cases subtle class differences may compel the court to extend its analysis beyond the surface of the complaint. For example, in an employment discrimination class suit, employees may differ strongly with respect to opportunities for promotion or advancement, seniority rights, lay-off and call-back priorities, access to training programs, dependency on the employer, and other conditions of employment. The court’s assessment of compliance with the class prerequisites must be informed by consideration of absent member’s interests. Certification implies the absence of serious class conflicts and the presence of a representative plaintiff who, acting on behalf of the class, is capable of vindicating the legal claims they mutually share.

II. Current Certification Procedures

Effective exercise of the court’s function in protecting absentees depends upon a comprehensive overview of the class and its multiplicity of interests. Currently, however, courts lack an effective means of obtaining information essential for a class ruling. The techniques now utilized contribute to delays in litigation, impose heavy costs on plaintiffs, and jeopardize the interests of absentees.

A. Inadequate Information

Because of the important consequences of class certification, a certifica-
tion decision should be made as promptly as possible.\textsuperscript{25} Class certification significantly affects not only the litigation posture of the named plaintiff,\textsuperscript{24} but also the rights of absent class members. Once a class is certified, absent members may have a variety of rights, including a right to notice of the action,\textsuperscript{27} to request exclusion,\textsuperscript{28} to notice of a proposed settlement or

\begin{quote}
25. Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267 (4th Cir. 1980), describes the problem encountered by courts making a certification ruling at the start of litigation:

The resulting difficulty of making a fair determination of class action status in advance of trial on the merits produces a dilemma for trial courts that is well known and for which no happy general solution has yet been, or is likely to be found. On the one hand—for perfectly good and obvious reasons—Rule 23(c)(1) admonishes that the class action determination shall be made 'as soon as practicable.' On the other hand—for equally good and obvious reasons—trial courts have been cautioned not to act too precipitously, on insufficient records, in making the determination.

\textit{Id.} at 275.

26. The litigational posture of the named plaintiff is usually enhanced significantly once a class is certified since it increases bargaining power as a result of the increased potential liability imposed upon the defendant. The underlying nature of the class, however, dictates whether this advantage must be balanced against the potential costs of certification. In actions seeking primarily declaratory or injunctive relief, the absence of mandatory notice requirements makes the advantage relatively costless. Where the class suit seeks primarily damages and is certified under Rule 23(b)(3), however, Rule 23(c)(1) requires mandatory notice to each class member who can be identified through reasonable effort. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974) (individual notice to all members who can be identified through reasonable effort required in (b)(3) suits). In certain cases the costs incurred in complying with the notice requirement may be burdensome or even prohibitive. Efforts to frame a more equitable regime whereby the defendant assumes some of the financial burden, see, e.g., Ostapowicz v. Johnson Bronze, 54 F.R.D. 465, 467 (W.D. Pa. 1972) (cost of notice equally divided between plaintiff and defendant), have been rejected by the Supreme Court. See Oppenheimer Fund v. Sanders, 437 U.S. 340, 356 (1978) (general rule is that representative plaintiff bears cost of notice); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974) (plaintiff must initially bear the cost of notice). In \textit{Oppenheimer}, however, the Court did not absolutely foreclose cost-allocation. It recognized instances where the cost may be so insubstantial to the defendant that shifting it to the plaintiff is not warranted. \textit{Oppenheimer}, 437 U.S. at 358.

27. A function of the certification order is to specify the type of class action to be maintained. Shipp v. Tennessee Dept of Employment Sec., 25 Fed. R. Serv. 2d 1435, 1438 (6th Cir. 1978) (certification indicates whether action maintainable as a 23(b)(1), 23(b)(2) or 23(b)(3) class); Shane v. Northwest Indus., 49 F.R.D. 46, 47 (N.D. Ill. 1970) (interests of class members can be fully protected only once class is certified and type of action determined). Once a class is certified as a 23(b)(3) action, individual notice to the absent class members is mandatory.

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.

\textit{Fed. R. Civ. P. 23(c)(2)}. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974) (notice mandatory in Rule 23(b)(3) action); \textit{In re Nissan Motor Corp. Antitrust Litigation}, 552 F. 2d 1088, 1097 (5th Cir. 1977) (once class certified as (b)(3) action notice to each identifiable class member required). The earlier the class is certified, the earlier notice can be sent to absent class members who can then seek to protect their interests. See \textit{In re Home State Production Company Securities Litigation}, 76 F.R.D. 351, 380 (N.D. Okla. 1977) (notice must be distributed to all class members at earliest possible time); Buchholtz v. Swift & Co., 62 F.R.D. 581, 588 (D. Minn. 1973) (same).

Rule 23(d)(2) governs notice in actions certified under subdivision (b)(1) or (b)(2). Although discretionary on the part of the court, notice under these circumstances is important to apprise absent class members of the action, to invite their participation in the suit, and to enable them to object to the adequacy of representation. Oneida Indian Nation v. State, 85 F.R.D. 701, 707 n.9 (N.D.N.Y. 1980) (court may fashion notice necessary to protect rights of absent class members in Rule 23(b)(1)(B) action); Arey v. Providence Hosp., 55 F.R.D. 62, 71 (D.D.C. 1972) (due process may require notice in Rule 23(b)(1) or Rule 23(b)(2) actions). The earlier notice is received, the more meaningful is the
Class Actions

dismissal, and to participate in the action or to object to the adequacy of representation. These rights can be fully protected only if the certification decision is made during the early stages of litigation.

At the commencement of litigation, however, the primary sources of class information are the named plaintiff’s complaint and supporting affidavits, which are usually framed in broad and conclusory language and

opportunity for class members to protect their interests.

Since certification dictates the type of notice the class is entitled to receive, the decision should be rendered as early as practicable. As Judge Frankel has observed:

There is no occasion for any notice until after the propriety of the class action has been determined. If notice is to be effective—if class members are to have a meaningful opportunity to request exclusion, appear in the action, object to representation, etc.—the invitation must go out as promptly as the circumstances will permit.

Frankel, supra note 4, at 40-41.

28. In Jimenez v. Weinberger, 523 F.2d 689, 697 (7th Cir. 1975), cert. denied, 424 U.S. 920 (1976), the court indicated that in 23(b)(3) actions it is imperative that class members be identified early enough to provide them with notice that may give them a meaningful opportunity to request exclusion from the class. See also Sander v. John Nuveen, 463 F.2d 1075, 1082 (7th Cir. 1972), cert. denied, 409 U.S. 1009 (purpose of mandatory notice is to advise all class members of rights and privileges). Frankel, supra note 4, (meaningful opportunity to request exclusion contingent on early certification).

29. Rule 23(e) requires that a proposed settlement or dismissal of a class action be approved by the court and that notice be sent to the class in a manner prescribed by the court. The rule is designed to protect absent class members: “[T]he primary concern of the court under Rule 23(e) is to assure that any person whose rights will be affected by a dismissal or compromise has the opportunity to contest the proposed action.” WRIGHT & MILLER, supra note 2, ¶1797, at 234. Such protection is generally not feasible prior to class certification since the class members have yet to be determined. J. MOORE, supra note 15, at ¶23.80 [2-1].

In their respective treatises, Moore and Wright & Miller contend that for rule 23(e) purposes an action should be treated as a class action prior to class certification determination. J. MOORE, supra note 15, at ¶20.50; 7A WRIGHT & MILLER, supra note 2, ¶1785, at 1797. While many courts have adopted this approach, see, e.g., Kahan v. Rosenstiel, 424 F.2d 161, 169 (2d Cir.), cert. denied, 398 U.S. 950 (1970); American Fin. Sys. v. Pickerel, 18 Fed. R. Serv. 2d 292, 292 (D. Md. 1974) other courts have indicated that Rule 23(e) is operative only after a class has been certified, see, e.g., Shelton v. Pargo, Inc., 25 Fed. R. Serv. 2d 1441, 1451 (4th Cir. 1978); Pan Am. World Airways v. United States Dist. Court for Cent. Dist. of Cal., 523 F.2d 1073, 1079 (9th Cir. 1975); Wallican v. Waterloo Community School Dist., 80 F.R.D. 492, 493-94 (N.D. Iowa 1978). Irrespective of the approach adopted to deal with precertification settlement or dismissal, protection of absent class members during this stage is greatest when the trial judge obtains a comprehensive overview of the class interests early in the litigation. See generally Wheeler, Predismissal Notice and Statute of Limitations in Federal Class Action After American Pipe & Construction Co. v. Utah, 48 S. CALIF. L. REV. 771 (1975) (pre-dismissal, pre-certification notice should be required upon showing of substantial likelihood of detrimental reliance).

30. In Souza v. Scalone, 563 F.2d 385, 386 (9th Cir. 1977), the court indicated that although notice is not mandatory in a suit certified under Rule 23(b)(1) or Rule 23(b)(2), notice may be required to provide class members an opportunity to signify whether representation is fair and adequate, to intervene to present additional claims, or to otherwise come into the action, to submit views as amicus curiae, for example. See also Chappelle v. E.I. duPont DeNemours & Co., 75 F.R.D. 74, 79 n.12 (E.D. Va. 1977) (notice to class certified important so each class member is on notice that he will be bound by judgment and that he is entitled to intervene through counsel). Notice purporting to invite intervention or monitoring of the adjudication is most effective if sent during the earliest stages of litigation, when critical decisions are made and the contours of the suit are developed.

which are inadequate and unreliable sources of class certification information. The typical complaint is only a schematic compilation of one party’s untested factual and legal allegations including unsupported allegations that Rule 23 requirements have been fulfilled. The complaint may set out a broadly defined plaintiff class as part of litigation strategy, but more likely it will do so because of the class attorney’s lack of relevant information. Even if the class attorney is fully cognizant of a multiplicity of interests within the proposed class, he may minimize or omit reference to apparent conflicts in an effort to gain certification. Thus, unless the court receives comprehensive and objective information relevant to the class action prerequisites during the early stages of litigation, the kind of rigorous analysis that would effectively protect absent class members is not possible.

B. Judicial Response

Trial courts have used several methods in attempting to remedy the information deficiencies in the certification process. These methods include the following: conducting a preliminary evidentiary hearing on the merits, conducting a preliminary evidentiary hearing on the class issue, granting or denying certification conditionally, and rendering speculative

Doninger v. Pacific Northwest Bell, 564 F.2d 1304 (9th Cir. 1977), illustrates the insufficiency of some class complaints. Upon review of the plaintiffs’ (appellants’) papers, the court stated:

The appellants’ complaint merely mimics the language of Rule 23 in a parallel fashion. Moreover, only two affidavits were submitted . . . [and these] added little, if any, factual support to the class allegations. . .. The memoranda of authority in support of appellants’ motions are likewise lacking in articulable facts, offering only vague and conclusory statements with little specific content.

Id. at 1309.

32. A very broadly defined class may be deemed advantageous in actions primarily for injunctive or declaratory relief, to enhance the scope of a decree and to facilitate its enforcement. See 1 H. NEWBERG, NEWBERG ON CLASS ACTIONS §1410, at 498 (1977 & Supp. 1981).

33. See Developments-Class Actions, supra note 5, at 1440 (hazardous to rely on named plaintiffs for class facts that may reveal conflict of interest).

34. Dolgow v. Anderson, 53 F.R.D. 664, 668 (E.D.N.Y. 1971) (preliminary evidentiary hearing on the merits necessary during certification process); Milberg v. Western Pacific R.R., 51 F.R.D. 280, 282 (S.D.N.Y. 1970), appeal dismissed, 443 F.2d 1301 (2d Cir. 1971) (certification contingent upon showing substantial possibility of success on merits); cf. Jimenez v. Weinberger, 523 F.2d 689, 698 (7th Cir. 1975) (permissible to enter single order determining both merits and class certification issue in (b)(1) and (b)(2) actions); Note, supra note 31, at 1144 (cases reviewed in study reveal courts tend to consider merits along with class issue from outset of litigation).

Some commentators advocate the use of a preliminary hearing on the merits as part of the certification process. See NATIONAL INSTITUTE FOR CONSUMER JUSTICE, REDRESS OF CONSUMER GRIEVANCES 31 (1973).

35. See, e.g., Doctor v. Seaboard Coast Line Ry., 540 F.2d 699, 707 (4th Cir. 1976); Johnson v. Georgia Highway Express, 417 F.2d 1122, 1124-25 (5th Cir. 1969).

Class Actions
determinations. All these methods, however, are inadequate ways to achieve the goal of an early and informed class certification decision.

1. Preliminary Evidentiary Hearing on the Merits

At one time courts conditioned class certification on the merits of the underlying action. Some courts refused to certify a class unless the plaintiff demonstrated a reasonable probability of success on the merits. In Eisen v. Carlisle & Jacquelin, however, the Supreme Court expressly rejected any approach that conditioned certification upon a preliminary examination of the merits. Such a procedure, the Court declared, subverts the purpose of the class action rule by allowing a representative plaintiff to secure the benefits of a class action without satisfying the rule's requirements.

In determining the propriety of a class action, the question is not whether the plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the Rule 23 prerequisites have been met. Though information necessary to resolve the class issue may also bear on the merits in particular cases, it is essential to maintain a clear distinc-


38. This approach probably resulted from a confusion of the interrelationship between the certification requirements and the merits of the class claim. Under Rule 23, determination of the propriety of a class action is a strictly procedural matter, and not dependent upon whether a cause of action exists. If the defendant seeks dismissal of the class claim on the ground that it is meritless, a Rule 12(b)(6) ("dismissal for failure to state a claim upon which relief can be granted") or Rule 56 ("summary judgment") motion is the proper vehicle. DuPont v. Woodlawn Trustees, 64 F.R.D. 16, 19 (D. Del. 1974); Cusick v. Nederlandsche Indus. 317 F. Supp. 1022, 1024 (E.D. Pa. 1970) (contentions relating to legal possibility of recovery properly made pursuant to Rule 56 or Rule 12(b)(6), not Rule 23(c)(1)). Early court cases that conditioned certification upon a preliminary showing of success on the merits, see supra note 34, may have failed to distinguish between the procedural character of the former and substantive nature of the latter.


41. Id.

42. See Long v. Sapp, 502 F.2d 34, 42 (5th Cir. 1974) (consideration of likelihood of success on individual claim no more proper in determining membership in class than in determining adequacy of representation); Harris v. Pan Am. World Airways, 74 F.R.D. 24, 37 (N.D. Cal. 1977) (class determination not dependent upon representative plaintiff having meritorious claim), aff'd in part, rev'd in part, 649 F.2d 670 (9th Cir. 1980); 1 H. NEWBERG, supra note 32, §2120, at 610 (resolution of commonality, typicality, and adequacy of representation doesn't depend on substantive resolution of disputed facts but rather on appraisal of attendant facts and circumstances of action in procedural framework).

43. See Huff v. N.D. Cases Co., 485 F.2d 710, 714 (5th Cir. 1973) (en banc) (inescapable over-
tion between the two types of inquiries. The due process concern for safeguarding the absentees' day in court is procedural and separable from the substantive issues. Regardless of whether or not the class proponent can succeed on the merits of the claim, he may have established the Rule 23 requirements for maintenance of a class action.  

2. Preliminary Evidentiary Hearing on the Class Issue

A second judicial response to the information problem is to conduct a preliminary evidentiary hearing on the class issue. At such a hearing, the participants typically will be the representative party, the defendants, and the trial judge. There is no requirement of notice to class members during this stage of litigation, and it is thus improbable that evidence of a conflict between the representative and prospective class members will be forthcoming. By itself, a preliminary hearing on class certification will not provide the trial judge with information that is contrary to the interests of the class representatives.

While it may be in the defendant's interest, at times, to allege class conflicts, it is inappropriate to rely upon the defendant to safeguard the interests of the absent class members. The defendant may be unaware of many potential conflicts within the proposed class. Even if the defendant is aware of such conflicts, it may be in his interest to conceal them and to seek the broader res judicata effect that will result if he is successful on the merits.

Aside from these incentive problems, an evidentiary hearing does not in itself give the parties greater access to relevant class information. In an attempt to alleviate this problem, many courts have permitted discovery of absent class members prior to the class hearing. This solution, however,
Class Actions

creates difficulties that may outweigh its benefits. As in the case of a hearing, it is hazardous to rely upon the representative plaintiffs to develop class information contrary to their interests. Furthermore, while the equal availability of discovery to the defendant may impede such concealment, it also provides the defendant with the means to abuse or intimidate class members and to create delays. Even without such abuse, precertification discovery exacerbates the problem of sprawling, extraordinarily protracted and costly class litigation. Any alteration of the current process should be consistent with the policy of efficiency and effectiveness that is the underlying rationale of the class action device, and should not contribute to the enormous delay associated with representative adjudication. Finally, discovery rights pertaining to the class issue may increase the number of strike suits brought by plaintiffs to harass or threaten defendants. The class action device may be greatly abused if the mere filing of a class complaint provides the plaintiff with class-wide discovery rights. Representative suits may then be commenced only upon the hope that colorable class claims will be disclosed during discovery.

3. Conditional and Speculative Determination

Two other techniques are employed by trial judges to remedy the information deficiency. One method is to render a conditional decision on the

325, 327 (S.D.N.Y. 1980) (strong showing of need for absentee information required before discovery of absent class members is compelled); United States v. Trucking Employers, 72 F.R.D. 101, 104-05 (D.D.C. 1976) (reasonable discovery of absent class members permissible where necessary information can be obtained only from absent class members). Other courts refuse to permit discovery of absent class members. See, e.g., Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972) (discovery of absent class members improper); Fischer v. Wolfhanger, 55 F.R.D. 129, 132 (W.D. Ky. 1971) (same). See generally Note, Civil Procedure: Absentee Class Members Subjected To Discovery And Claims Dismissed For Failure to Respond, 1971 DUKE L.J. 1007, 1014 (proposition that class members may be subject to discovery diverges from traditional concept of class action).

49. See, e.g., Saylor v. Lindsley, 456 F.2d 896, 904 (2d Cir. 1972) (reversing settlement approved by district court because discovery was inadequate); Developments—Class Actions, supra note 5, at 1441 (private control of discovery may be inadequate to provide requisite class information). This limitation of the discovery device is clearly illustrated in Weiss v. Chalker, 55 F.R.D. 168, 169 (S.D.N.Y. 1972). The court postponed approval of the settlement proposal because the scope of discovery was inadequate for an intelligent assessment of the fairness of the settlement to absent class members.

50. See Dellums v. Powell, 566 F.2d 231, 236 (D.C. Cir. 1977) (discovery of class members may be used to take advantage of class members or strategem to reduce number of claimants); Gardner v. Awards Mktg. Corp., 55 F.R.D. 460, 463-66 (D. Utah 1972) (defendant discovery of class members denied because it would impose substantial burden); Developments—Class Actions, supra note 5, at 1440 (defendant discovery of absentees must be limited to prevent abuse).

51. See FED. R. CIV. P. 23 advisory committee note, reprinted in 39 F.R.D. 98, 102 (1966) (policy underlying class action rule is to achieve economies of time and effort).

52. The class action device has been characterized as permitting "legalized blackmail," and often is criticized because of its potential for abuse. See generally Handler, The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review, 71 COLUM. L. REV. 1, 6-12 (1971); Simon, Class Actions—Useful Tool or Engine of Destruction, 55 F.R.D. 375, 375 (1972).
class issue until more information is available. A similar technique is to make a speculative determination, premised upon unsupported and unproven assumptions of compliance with the class action requirements.

Each option is potentially prejudicial to either the absentees or the defendants, and increases the chances of abuse of the class action device. The use of either technique may indicate uncertainty over whether the class representative can adequately represent the interests of the class members. Both provide minimal protection for absentees' interests, especially during settlement negotiations that precede the certification decision. During these negotiations the class representative must necessarily compromise certain interests. Since there has been no judicial finding as to the adequacy of representation and no clear definition of the class, the plaintiff may be more likely to misrepresent or underrepresent class members' claims.

53. To the extent any certification order is subject to modification in light of new information or changed circumstances, it is a "conditional" order. An order "conditional" in this sense must be distinguished from an explicitly conditional certification order. In the case of the former, the trial court has usually assessed the class facts and concluded that the class prerequisites have been met. See, e.g., Zenith Laboratories v. Carter-Wallace, Inc., 530 F.2d 508, 512 (3d Cir. 1976) (certification always subject to amendment or decertification); Taylor v. Safeway Stores, 524 F.2d 263, 269 (10th Cir. 1975) (same). In the case of the latter, the court believes the prerequisites have not been met but grants class status nonetheless, which is made expressly conditional upon subsequent compliance with the requirements. See, e.g., Basch v. Talley Indus., 53 F.R.D. 14, 20-21 (S.D.N.Y. 1971) (certification conditioned upon later compliance with prerequisites of fair and adequate representation); Gerstle v. Continental Airlines, 50 F.R.D. 213, 216 (D. Colo. 1970) (same). But cf. Green v. Wolf Corp., 406 F.2d 291, 295 n.6 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969) (conditional denial of certification criticized because results in inability to continue litigation). The primary purpose of explicit conditional certification is to permit a suit to be maintained as a class action when the court has insufficient information to render a "final" certification order, in the hope that new information will be forthcoming.

54. See Blackie v. Barrack, 524 F.2d 891, 901 n.17 (9th Cir. 1975) (court forced to speculate by uncertain state of record at time of ruling on motion for certification), 1 H. NEWBERG, supra note 32, ¶2085, at 587-88 (due to early certification requirement and information deficiency courts resort to presumption of entitlement to maintain class actions).

55. The need to resort to a conditional certification is usually a result of the absence of a full factual foundation on which to render a class decision. This lack of class information precludes an appraisal of compliance with the class prerequisites, necessary to protect class members' interests. The overall nature and quality of the representation proffered by the named plaintiff is indeterminate, and possibly inadequate and prejudicial to the rights of class members since certification requirements have not been met. See supra pp. 592-97. Rendering a conditional or speculative certification fails to meet the standard described in Clark v. South Central Bell Telephone, 419 F. Supp. 697, 701 (W.D. La. 1976):

"The class action certification procedure of Rule 23(c) imposes a stringent duty on the court to protect the interests of absent class members. . . . The court carefully must scrutinize the representation of the class members at every turn as a trustee for the absent putative class members."

56. See Developments—Class Actions, supra note 5, at 1537 (during private negotiations of class action issues class attorney must forego some relief beneficial to some class members to avoid need for trial).

57. See Developments—Class Actions, supra note 5, at 1553 (conflicts of interest between named plaintiff and class members frequently arise in context of settlement negotiations). When both parties support dismissal, the lack of adversary proceedings may deprive the trial judge of information pertinent to the certification decision. See Rothman v. Gould, 52 F.R.D. 494, 500-01 (S.D.N.Y. 1971).
Class Actions

Ostensibly, any settlement reached between the parties must be expressly approved by the court as consistent with the interests of the absent class members. Either a conditional or a speculative decision indicates, however, that the class representative has failed to provide, and the court lacks, the information necessary to comprehend fully the interests of the class. Without that information, the court's approval of a compromise cannot provide adequate protection of the class interests.

The defendant also is placed in a precarious position when the opposing class is certified on the basis of inadequate information. Certification of the class gives the plaintiff a substantial strategic advantage in negotiations regardless of whether compliance with class prerequisites is demonstrated. Therefore, conditional or speculative class determination increases the potential for abuse of the class action as a strike suit.

III. A Proposal for Attorney Solicitation to Facilitate Class Certification

To minimize inappropriate use of the class action device, the trial judge should reach a fully informed determination on class certification at the outset of litigation. That class attorneys, and therefore the court, lack the information about potential class members necessary to make such a determination is largely attributable to the absence of a timely and reliable procedure for obtaining the necessary information about the class. Ethical rules restricting attorney solicitation further impeded the flow of informa-

58. "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." FED. R. CIV. P. 23(c). See Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975) (court has independent duty to protect interests of class members in settlements); Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir.), cert. denied, 423 U.S. 864 (1975) (trial court's role as fiduciary of absentee interests is particularly crucial during settlement stage); American Fin. Sys. v. Pickere1, 19 Fed. R. Serv. 2d 491, 492 (D. Md. 1974) (trial judge may dissolve or redefine class, or both, to protect rights of all absent members).

59. See Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324, 328 (E.D. Pa. 1967) ("[N]o litigant should be permitted to enhance his own bargaining power by merely alleging that he is acting for a class of litigants.")

60. See supra pp. 595-97 (prompt certification increases protection of absent class members); 1 H. NEWBERG, supra note 32, ¶2085, at 587-88 (Rule 23(c) contemplates prompt ruling by court—often at pleading stage). Some courts have adopted local rules governing the timing of motions for class certification, see, e.g., Sanders v. Lum's Inc., 76 F.R.D. 1, 2 (S.D.N.Y. 1976) (local rule requiring certification motion within sixty days), and others have found noncompliance with such rules a factor relevant in resolving the adequacy of representation issue, see, e.g., East Tex. Motor Freight v. Rodriguez, 431 U.S. 395, 405 (1977) (delay in moving for class certification may be indicative of inadequate representation); Burns v. Georgia, 15 Fair Empl. Prac. Cas. (BNA) 1566, 1568 (N.D. Ga. 1977) (noncompliance with local rule factor in denial of class certification). But see Marquez v. Killey, 436 F. Supp. 100, 109 (S.D.N.Y. 1977) (plaintiffs failure to move for certification as required by local rule may not be sufficient ground to deny class status).

61. The class attorney has three primary responsibilities: to discover the range of interests within the proposed class; to report conflicts of interest detected among class members; and to indicate which groups will be inadequately represented. See Developments—Class Actions, supra note 5, at 1592-95.
tion. Relaxing such proscriptions in the context of attorney-initiated communication with potential class members would help generate class information that could facilitate an early certification decision. Any ethical objections to attorney-initiated class communication can be satisfied by appropriate regulations. Such regulations could also ensure that the information collected through solicitation is made available to the trial judge for the class certification decision.

A. The Case for Solicitation

The class action rule provides no procedure for obtaining information relevant to whether a representative suit is appropriate or, if so, how the class should be defined. The only current, direct response to this shortcoming—the authorization by some courts of ordinary discovery of absent class members—invites abuse and delay, and is ultimately ineffective. Moreover, discovery of class information necessarily occurs after the class complaint has been filed and the proposed class defined, even though the most propitious time for obtaining such information is prior to the filing of a formal complaint, when the class attorney must determine whether a class action is appropriate and attempt to define the contours of the class.

Permitting attorneys to solicit class information enhances the represen-

62. The Model Code of Professional Responsibility explicitly discourages attorney solicitation of clients. One provision of the Code provides that:

A lawyer should not initiate an in-person contact with a non-client, personally or through a representative, for the purpose of being retained to represent him for compensation.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-3 (1979). A similar provision states that:

A lawyer who volunteers in-person advice that one should obtain the services of a lawyer generally should not himself accept employment compensation, or other benefit in connection with the matter.

Id. at EC 2-4.

The Code does, however, make a limited exception to these rules:

If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

Id. at DR 2-104(A)(5).

The effect of these restrictions on precomplaint attorney-initiated communication with potential class members is unclear. Is a potential class member in a prospective class action a “non-client” within the meaning of EC 2-3? If a class attorney, who is representing a named plaintiff, communicates with a potential class member and decides the latter is a more adequate representative of the class, is substitution of the member for the original named plaintiff prohibited by EC 2-4 or DR 2-104(5)? These uncertainties may discourage pre-complaint attorney communication with potential class members for purposes of ascertaining whether a class exists, because such communication may be indistinguishable from solicitation of potential clients.

63. See infra pp. 608-11.

64. The broad discretionary authority granted the court under Rule 23 to frame orders for the protection of absent class members may obviate the adoption of any specific procedure for collecting class information prior to certification. FED. R. CIV. P. 23(d). Acknowledging, however, the protective function of certification, one may argue that a more precise procedure can reduce the uncertainty and perfunctory nature of many certification decisions. See supra notes 53-55, 58.

65. See supra notes 48-50.
Class Actions

tative plaintiff’s litigation posture, prevents abuse of the class action device against defendants, and allows the trial court to protect absentees effectively, making class adjudication more effective and equitable. With greater precomplaint information about the potential class, the attorney would be in a better position to determine whether class adjudication is warranted. This would preclude many lawsuits, brought as class actions due to lack of attorney information, in which no class exists and which ultimately are denied certification. Consequently, any increase in class suits resulting from relaxing restrictions on lawyer initiated class contact will be offset by the likely reduction in unmeritorious class allegations. Where the information suggests that a class suit is appropriate, the attorney should be able to provide a clear and precise definition of the class, thus replacing unsupported allegations and conclusory assertions with well-founded and relatively accurate statements of compliance with class requirements. This should allow an early certification decision without recourse to preliminary hearings and discovery. Finally, through solicitation the class attorney may learn of substantive violations not initially apparent. This information may provide further support for the original claim or give rise to new claims.66

Equipped with a comprehensive understanding of the class claim, class counsel’s litigation position is substantially strengthened without impairing the rights of defendants. The primary advantage to the class defendant will be a decrease in the number of frivolous class suits filed to harass defendants and to induce unfair settlements.67 Abuse of the class action as

66. A potential objection to claims solicited in this fashion is that the result is indistinguishable from solicitation of the original named plaintiff, and therefore in direct contravention of the current antisolicitation rules. See supra note 62. Concededly, solicitation of the original named plaintiff is conceivable under the proposed scheme. Several considerations indicate, however, that this form of solicitation can be minimized, and where such solicitation does occur, the harmful effects with which it is associated can be effectively negated. See, e.g., Comment, A Critical Analysis of Rules Against Solicitation By Lawyers, 25 U. CHI. L. REV. 674, 675-84 (1958) (critical analysis of alleged harms associated with attorney solicitation); Note, The Profession's Duty, infra note 77, at 1184. Under the proposed regulations, the class attorney is required to file an affidavit that identifies the original named plaintiff, provides a general description of the claim, and indicates the intent to solicit information. See infra p. 611. Solicitation of legal representation is objectionable only when accompanied by misrepresentation, underrepresentation, overreaching, or fraud. If solicitation of the named plaintiff occurs in spite of the regulations, the certification process, coupled with the class information made available to the court under the proposal, should enable the trial judge to ascertain whether such a violation exists and to deal with it accordingly.

67. See Handler, supra note 52, at 9. Professor Handler underscores the “in terrorem” effect caused by utilization of the class procedure. The “blackmail effect” of the increased pressure to settle (IP) caused by the existence of the class rule is described as the difference between the expected cost of losing the class action (Ecs) and the expected cost of losing all the individual suits that would be brought in the absence of a class action rule (Ec). Symbolically this is represented:

$$IP = E_{c} - S \left( P_{1} \cdot P_{2} \cdot (C_{c} - C_{i}) \right)$$

where:

- L = probability that the defendant will lose the suit on the merits if it goes to trial;
- S = average size of each named plaintiff’s or class member’s claim;
- P1 = number of named plaintiffs in the class action who would not file individual suits in the
a blackmail device will become increasingly difficult if the trial judge has the means to scrutinize rigorously the class that is purportedly represented. Solicited information will facilitate detection of frivolous suits at an early stage of litigation, thus affording additional protection against early settlement pressures. Admittedly, no advantage accrues to defendants from the possible increase in the number of class suits or the liability resulting from such suits. Any advantage derived from the ignorance or lack of legal sophistication of potential litigants, however, is clearly undeserved. Where a substantive violation exists, redress of legal grievances should be the paramount goal of a legal system.

Once a complaint is filed, some courts explicitly restrict communication between the class representative and actual or potential class members, thus exacerbating the difficulty of obtaining class information. Courts justify "gag orders" or local rules that restrict attorney-class communication as essential to prevent specifically forbidden communication such as solicitation of legal representation of class members, solicitation of fees and expenses, and misleading communication. The absence of a class action rule;

\[ P_a = \text{number of class members in the class action who would not file individual suits in the absence of a class action rule} \]

\[ C_c = \text{cost to the defendant of defending the class suit} \]

\[ C_i = \text{cost to the defendant of defending all of the individual actions that would be brought in the absence of a class action rule} \]

Schoor, infra note 77, at 239 n.82.


The Manual for Complex Litigation, an important handbook for class action lawyers, contains widely adopted recommendations that district courts prohibit, either by local rule or pretrial order, all unapproved communications of the class attorney with actual and potential class members. See 1 MOORE'S FEDERAL PRACTICE, FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (2d ed. 1976) [hereinafter cited as MANUAL]. The Manual also urges the prohibition of communication initiated by the representative party. Id. § 1.41, at 32. Since the trial judge has jurisdiction of an action only after the complaint is filed, such restrictions may not be imposed prior to the complaint. Before formally filing a complaint, however, class attorneys are restricted in their communications with potential class members by the professional rules of ethical conduct.

69. Precomplaint solicitation of persons to become class representatives, see, e.g., Simon v. Merrill Lynch, Pierce, Fenner & Smith, 16 Fed. R. Serv. 2d 1021, 1022 (N.D. Tex. 1972), aff'd on other grounds, 482 F.2d 880 (5th Cir. 1973) (class suit dismissed where result of successful search for person to act as named representative), is proscribed by the MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CANONS OF JUDICIAL ETHICS DR-104(A)(5) & EC 2-3 (1979). See supra note 62. After the suit is filed, attorney-initiated communication with class members to solicit legal representation in other matters, see, e.g., Korn v. Franchard Corp., 1970 FED. SEC. L. REP. (CCH) ¶92,845, at 90,169 (S.D.N.Y.) (class attorney unethically sent letter to all class members soliciting their participation in entirely different suit), may be restricted by court orders or local rules. See supra note 68.

70. See, e.g., In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1138 n.57 (7th Cir.), cert. denied, 444 U.S. 870 (1979); Gouldman v. Seligman & Latz, 82 F.R.D. 727,
In the class action context, where the attorney must investigate the nature and composition of the class to obtain a positive ruling on certification, the court should encourage, not hinder, attorney communication with potential class members. This communication would provide the class counsel with more information about the nature of the class suit. It would also enable the trial judge to make a more informed certification decision, because the information the trial judge needs to decide the class issue is precisely the type of information the class attorney could secure through communication with class members. In particular, the class attorney could solicit information sufficient to reveal any fundamental antagonisms or conflicts of interests among class members, or between the representative plaintiff and the class. The information sought by the attorney to obtain a positive certification decision could also be made available to the court, thereby enabling it to make informed decisions regarding protective procedural devices such as subclassing and intervention.

In the class action context the trial judge is under a special obligation to safeguard the interests of the absent class members against anything that might impair their interests. Equipped with greater information about the class whose claims are to be adjudicated, the court can more effectively discharge its obligation. Upon motion for certification, the court can carefully analyze the proposed class on the basis of solicited information to determine whether certification is appropriate, whether redefinition of the class must precede certification, or whether denial is essential to protect absent class members. Moreover, since the information will usually be available when the class complaint is filed, the trial judge will be able to monitor the interests of the proposed class during the early stages of any

728 (S.D. Tex. 1979) (local rule intended to prevent abuses of class action); Waldo v. Lakeshore Estates, 433 F. Supp. 782, 786-89 (E.D. La. 1977), appeal dismissed, 529 F.2d 642 (1978) (local rule designed to eliminate abuse of class action through solicitation and misrepresentation); Zarate v. Younglove, 86 F.R.D. 80 (C.D. Cal. 1980) (danger of misrepresentation and unfair pressure inherent in unsupervised communications during class suits). See generally MANUAL, supra note 68, § 1.41, at 225; Wilson, Control of Class Action Abuses Through Regulation of Communications, 4 Class Action Rpts. 632, 634 (1975) (proposes more narrowly drawn rules restricting class communication to minimize conflict with First Amendment rights of court access).

71. Permitting precomplaint communication will increase the class attorney's incentive to procure class information. Until the complaint is filed, the attorney is not bound by any specific class definition and, logically, should desire to obtain as much information about the prospective class as possible in order to avoid subsequent challenges to the proposed class from either the defendant or the court during the certification process. This contrasts markedly with post-complaint information gathering techniques currently used. Despite the possibility of amending the complaint after it is filed, the attorney may attempt only to substantiate allegations in the pleadings, and direct his efforts to this purpose. Of course, if the attorney demonstrates an unwillingness to procure class information, the court may always demand such information or deny class status to the proposed class. However, under the current procedures courts rarely demand further class information. See supra note 54.

72. See supra notes 8-11.

73. See supra pp. 591-92.
settlement negotiations. Approval or denial of a proposed settlement will be premised upon a well-informed analysis of the interests at stake.

Furthermore, the necessary information may be obtained without resorting to the questionable practices currently employed. While these techniques—preliminary class hearings, speculative determinations, and conditional certifications—may at times be effective, they pose serious threats to the interests of both defendants and class members. Because solicitation will usually occur prior to the filing of the class complaint, it is also superior to allowing discovery aimed at absent class members. Unlike postcomplaint discovery, it could not be exploited by a class defendant at the expense of the absent class members or by a plaintiff attempting to turn the class action device into a strike suit. Finally, by obviating the delay and expense associated with postcomplaint discovery devices and other current procedures to obtain class information, the court will conserve scarce judicial resources without compromising its special obligation to protect absent class members.

B. A Proposed Scheme for Regulated Solicitation

The present restrictions against attorney-class communication can be relaxed substantially under a regulated procedure that minimizes any potential for abuse. Attorney communication with potential class members

---

74. See supra p. 602.
75. See supra p. 601.
76. See supra notes 52 & 67.
77. The primary "abuse" envisioned is that lawyer-initiated communication with potential class members may lead class attorneys to solicit legal representation of the class members. See supra note 62. In the class action context this would constitute proscribed solicitation of the original representative plaintiff. A recent Supreme Court case, however, indicated that attorney solicitation of clients may not be prohibited under certain circumstances. See In re Primus, 436 U.S. 412 (1978). In Primus, an attorney, who was also a cooperating lawyer with a branch of the American Civil Liberties Union (ACLU), provided a group of women with information regarding their legal rights resulting from their being sterilized as a condition of receiving public medical assistance. The attorney subsequently informed one of the women, by means of a letter, that free legal assistance was available from the ACLU. The South Carolina Supreme Court determined that the attorney had solicited a client, and issued a public reprimand. The Supreme Court reversed underscoring the fact that the solicitation was on behalf of "nonprofit organizations" engaged in litigation as a "form of political expression" and "political association," and therefore that such solicitation was expressive and associational conduct entitled to First Amendment protection. Id. at 422-25. Examination of the record established that none of the dangers associated with solicitation, such as undue influence, overreaching, misrepresentation, invasion of privacy and conflict of interest, were present.

The Committee on Ethics and Professional Responsibility of the American Bar Association has ruled that a lawyer, who was the director of a legal services program, could seek out and advise members of a certified class who had not been notified of their inclusion in the class or of their legal rights. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1439 (1979). The Committee based its conclusion, in part, on the reasoning of In re Primus, 436 U.S. 412 (1978). The Committee opinion, however, does not address the more difficult issue of attorney communication with potential members of a class that has not been certified by the court or defined in a class complaint. The scope of Primus, which appears to sanction precomplaint solicitation, is extremely limited since it is premised on existence of a nonprofit organization that engaged in litigation as "a form of political
Class Actions

should be freely permitted subject to compliance with three requirements: first, solicitation should be conducted so that the information generated can be used by the court to verify subsequent class allegations; second, the class attorney should elicit information relevant to the proposed class action without suggesting the desired factual paradigm; and third, the information generated should be filed with the clerk of the court or some other "retention center."  

Compliance with the verification requirement can be achieved if solicitation of class information is undertaken in written form. It is essential that the information generated through solicitation be retained so that the court can verify the allegations made by the representative plaintiff in the subsequent class certification proceeding.

Solicitation should be an open-ended inquiry requesting the respondent to describe his factual situation if appropriate. The solicitation form should include information sufficient to put the solicitee on notice as to the type of response that will be relevant, but should not be leading or suggestive of any specific factual paradigm, which might induce a response solely expression" and "political association" entitled to First Amendment protection.

Several commentators have recommended easing the restrictions against attorney-class communication. See generally Schoor, Class Actions: The Right to Solicit, 16 SANTA CLARA L. REV. 215 (1976) (restrictions against attorney solicitation should be abolished in class action context where existing judicial procedures may be modified to curb actual or potential misconduct); Note, Lawyer Solicitation: The Effect of Ohralik and Primus, 13 SUFFOLK U.L. REV. 960 (1976) (advocating adoption of less restrictive solicitation policy); Note, Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available, 81 YALE L.J. 1181 (1972) (bar association prohibitions upon advertising and solicitation constitute indefensible curtailment of essential information in violation of First Amendment) [hereinafter cited as Note, The Profession's Duty].

78. Filing information with a specific court clerk should not preclude filing a class complaint in another court. Otherwise there might be a disincentive to solicit information since many tactical considerations affect forum selection.

79. Solicitation of information would, in many instances, be by means of correspondence with potential class members. This, however, presupposes attorney knowledge of the exact whereabouts of the absentees; if such knowledge is lacking the utility of the solicitation scheme may be restricted. This restrictive effect may be minimized by attorney solicitation in the form of advertising. See, e.g., Zarate v. Younglove, 86 F.R.D. 80 (C.D. Cal. 1980).

In Zarate a suit was brought to challenge alleged discrimination against Hispanics in employment and promotion. The class attorney published the following advertisement in English and Spanish newspapers:

Attention All Hispanics: If you have been an applicant for employment or promotion for the County of Riverside since 1975 and have received an interview and not hired, a rejection notice, or no response, you are a potential recipient of back pay because of discriminatory employment practices.

Id. at 85. If a respondent provided information indicating the possibility of discrimination a follow-up letter was sent, seeking further information and suggesting an interview.

The District Court imposed a strict standard by which to evaluate such communication: The situation had to pose a "serious and imminent threat to the fair administration of justice." Id. at 106. In rejecting the imposition of an order restricting attorney-class communication, the court relied, in part, on the written nature of the communication: "[T]he absence of in-person solicitation here reduces, if not eliminates, the likelihood of these evils ensuing, and the court's powers to set the attorney's fee, and to monitor the quality of representation . . . further reduce any risk of harm from solicitation." Id. at 99.
because it may prove beneficial to the respondent.\textsuperscript{80} Admittedly, there is a tenuous line between providing information sufficient to elicit an accurate and appropriate response and providing information that induces misrepresentation or untruthful acquiescence. This problem is inherent in any communication directed to class members\textsuperscript{81} and demands careful drafting of the solicitation form. Attorney abuses of the solicitation process may be checked, however, by subsequent judicial review of the solicitation form during the certification process.\textsuperscript{82}

Not every solicitation form will be returned with the relevant information. A one hundred percent response rate is not necessary, however, to disclose potential antagonisms or conflicts within the proposed class.\textsuperscript{83} Those solicitees who feel that the information provided relates to them in some way will have an incentive to respond. Where a cause of action actually exists, the solicitee will be motivated by the desire to have his grievances heard and redressed. In other cases, civic duty alone may provide sufficient incentive to elicit a response.\textsuperscript{84}

\textsuperscript{80} A solicitation form capable of generating the relevant information without suggesting the "correct" answer might read as follows:

\textit{Dear __________________________}

\textit{An Employee of the ___________ company, employed in Plant X, contemplates initiating legal proceedings against said employer alleging employment discrimination on the basis of race. Uncertainty exists as to whether the alleged discrimination constitutes a single, isolated incident or whether there exist other such cases. If you have any concrete, factual basis for believing that you may be affected by this action or believe that you may be a victim of discrimination please state such facts; if not, please disregard this notice. If you feel you have factual support for an affirmative answer, please provide as much information as you feel is relevant. (Include position, seniority, etc.).}

\textsuperscript{81} Postcomplaint authorization of notice to class members gives rise to analogous problems. If the notice contains too much information, it may become incomprehensible or seem threatening to class members, thereby encouraging them to take the path of least resistance and opt out; if it contains too little information, it will not fully inform absentees and may render meaningless their rights to opt out or to contest adequacy of representation. Miller, \textit{Problems of Giving Notice in Class Actions}, 58 F.R.D. 313, 327 (1973).

\textsuperscript{82} See supra p. 607.

\textsuperscript{83} The solicitation letter itself need not be sent to all members of the proposed class. Important factors in the number of solicitation letters required include the size of the class and the attorney's ability to locate potential class members. See supra note 79. In cases where the class is unmanageably large, random mailings should be sufficient to serve the information-gathering purpose of the proposal. Even in cases where mandatory postcertification notice to class members is ordered, the plaintiff need not notify every class member. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (Rule 23(c)(2) requires individual notice to class members identifiable through "reasonable" effort); Spector v. City of New York, 71 F.R.D. 550, 551-52 (S.D.N.Y. 1976) (Rule 23 requires only "best notice practicable under the circumstances").

\textsuperscript{84} Complex motivational and psychological factors preclude accurate forecasting of response rates to the solicitation forms. Advanced mail questionnaire techniques, however, have raised average response rates to more than 70\%. Goudy, \textit{Interim Responses to Mail Questionnaire: Impacts on Variable Relationships}, 19 SOC. Q. 253, 254 (1978). In any given case, the interrelationship of innumerable variables will be determinative of the response rate. McGrohan, \textit{A Cost/Benefit Approach to Postage Used on Mail Questionnaires}, 45 J. OF MARKETING 130-33 (1981) (business reply envelope improves response rate). Optimal operation of the proposed solicitation scheme depends upon a relatively high response rate from those that will be affected by the adjudication. According to one study, this is precisely the group found to have a relatively high response rate. See Rudd, \textit{Mail Survey Response
Class Actions

The soliciting attorney should be required to file the information generated from solicitation with a court clerk, a local bar association, or some other "retention center." To ensure the acquisition of information both beneficial and prejudicial to the managing parties, the information should be transferred to the retention center prior to any form of screening or selection by the class counsel. This could be accomplished easily by requiring the class attorney to distribute the solicitation form in duplicate and to request that the solicitee mail one copy to the attorney and the other to the retention center. The class attorney who wishes to solicit should also also be required to file an affidavit indicating the potential named plaintiff and a general outline of the prospective cause of action. This would authenticate the basis for solicitation and alert the court that responses will be arriving.

The uncensored, solicited information in the court's possession will provide the attorney with an incentive to depict the proposed class accurately in subsequent stages of litigation. If conflicts or antagonisms exist, concealment will become extremely difficult and potentially harmful to the attorney's credibility. The class attorney would be forced to reconcile such conflicts prior to filing the complaint or, if the interests are irreconcilable, to recognize that a class suit is inappropriate. The solicited information should also be made available to the defendant, thus providing further assurance that class conflicts will be identified.

C. Ethical Objections to Solicitation and Attorney-Class Communication

Current restrictions on attorney-class communication are premised upon the belief that such communication is potentially detrimental to the

Rates: Effects of Questionnaire Topic and Length and Recipients' Community, 46 PSYCHOLOGY REP. 435, 436 (1980) (people most likely to respond to questionnaire when particular subject is relevant to them).

85. This method of handling class information will be particularly useful in determining the necessity of intervention and in facilitating the use of procedural devices to upgrade adequacy of representation. Class counsel may exclude from the class definition certain solicited potential class members who have some relation to the underlying adjudication. Such exclusion may be attributable to an irreconcilable conflict of interest, and places the trial court on notice as to potential class members who may need a representative advocate to prevent prejudice to their interests as a result of adjudication of the class claim. See supra note 9 (trial judge may allow permissive intervention to upgrade representation).

86. The information collected should remain confidential until it is made available to the trial judge and the defendants for review in the certification process. Confidentiality is important to the litigation posture of the soliciting attorney; it is necessary to protect his prerogative to select the most advantageous forum for litigation. A potential defendant, alerted by the court to the accumulation of information, might shop for a more favorable forum and bring a preemptive declaratory judgment action. While the solicitation process will to some degree put the defendant on notice, it is nonetheless essential that no official disclosure is made as to the potential lawsuit.

87. But cf. supra pp. 600-01 (reliance upon defendant to identify such conflicts inappropriate).
plaintiff, the defendant, the court and the legal profession in general.88 Opponents of attorney solicitation contend that any lawyer-initiated communication process is likely to foster fraudulent or frivolous claims,89 misrepresentation,90 underrepresentation or “selling-out,”91 and overreaching.92 Under the proposed scheme these objections are satisfied; in fact, the process of regulated communication should actually deter such abuse of the class action device.

The prospect of close scrutiny by the court of information solicited from potential class members will in all probability reduce the number of fraudulent or frivolous suits. The class certification requirement is ineffective as a device for screening meritless claims to class action status unless the trial judge possesses the requisite information during the early stages of litigation. Regulated solicitation would thus transform this requirement into an effective screening device. If the class allegations lack merit, it will be difficult for the attorney to obtain the required information. Moreover, the trial judge and defense attorneys will be able to detect deficient allegations on the basis of the solicitation responses.

Lack of appropriate responses to solicitation should constitute prima facie evidence that the class claim cannot be substantiated.93 The court could then require further solicitation if the managing parties persist in maintaining a class suit; if the parties refuse to engage in further solicitation or other information gathering, the court could deny class status.

Restriction of communication is also defended on the ground that it protects potential class members from misrepresentation. Particularly where the solicitees lack legal sophistication, it is contended that they may be vulnerable to misrepresentations of a class attorney whose interests may conflict with their own. It is fair to assume that a soliciting attorney may be more likely in the class context to misrepresent the costs and benefits of participation in litigation.94 But the proposed solicitation process, unlike unregulated communication, permits subsequent evaluation of the propriety of solicitation in any particular case. The danger of misrepresentation is mitigated, therefore, rather than enhanced. The class informa-

88. See Schoor, supra note 77, at 227 (critically analyzing dangers of solicitation).
89. See Note, The Profession’s Duty, supra note 77, at 1184.
90. See Schoor, supra note 77, at 227-28.
91. See id. at 229-32.
92. See Note, The Profession’s Duty, supra note 77, at 1184.
93. An exception must be provided for cases in which the low response rate can be attributed to factors unrelated to the propriety of bringing a class suit. Such factors include limited sophistication of the respondents and fear of retaliatory action by the prospective defendant. See Seymour, The Use of “Proof-of-Claim” Forms and Gag Orders In Employment Discrimination Class Actions, 10 CONN. L. REV. 920, 923-29 (1978) (inability to respond effectively to claim forms may be due to lack of necessary factual information or lack at legal sophistication).
94. See Developments—Class Actions, supra note 5, at 1582.
Class Actions

tion generated from the regulated solicitation process will enable the trial
court and the defendants to identify any misrepresentation or need for
redefinition of the proposed class. An effective determination of compli-
ance with the class action prerequisites is the most direct method of
preventing misrepresentation by class counsel. Moreover, increased com-
prehension by class counsel of the factual situation will reduce frivolous
class suits rooted in misinformation and speculation.

It is also claimed that soliciting attorneys will underrepresent the class,
that they will settle class claims for less than they are realistically
worth. The class members' interests supposedly will be subordinated to the attor-
ney's efforts to maximize his own income by acquiescing in a quick settle-
ment of the plaintiff's claim for an amount less than could be obtained
through greater time and effort.

The "selling-out" problem is in part attributable to the inability of the
trial court to protect the interests of the class members during the early
stages of litigation. Any settlement or dismissal of a class action is contin-
gent upon court approval. Furthermore, notice of a proposed settlement
or dismissal must be given to all class members in such manner as the
court directs. Presumably, these powers enable the trial judge to prevent
quick settlements that are unfair to the class. The logic of a sell-out, how-
ever, requires the attorney to reach a settlement or dismissal prior to any
substantial investment of time and effort. Withdrawal of a class allegation
in a complaint or a precertification settlement agreement may be an indi-
cation that an attorney is selling out. At this stage, under current proce-
dures, the court has little knowledge of the identity and interests of the
class. Therefore, while the court possesses the power to scrutinize and
reject any proposed dismissals or settlements, that power is ineffective be-
cause the court lacks early access to the necessary class information.
Under the proposed system, this information, so crucial in dealing with
the sell-out problem, will be provided to the trial judge at the outset of
litigation. In effect, what has been identified as a cause of the sell-out
problem can be transformed into an effective remedy.

Conclusion

Enforcing compliance with the class action prerequisites is the mecha-
nism employed to ensure that the rights of absent class members are ade-
quately protected. Such enforcement is realistic only if the trial judge ob-
tains a comprehensive overview of the nature and composition of the
proposed class during the certification process. Class counsel, a critical

95. See Schoor, supra note 77, at 224-32.
96. See supra p. 603.
97. Id.
98. See supra pp. 597-98.
source of class information, is also under an obligation to comprehend, assess and accommodate potentially conflicting or divergent interests capable of impeding fair and adequate representation. This information should be available during the drafting of the complaint and should be incorporated into an accurate class definition. With appropriate regulations, attorney solicitation of information from potential class members could provide the class attorney with information needed to determine whether class adjudication is appropriate and the trial court with the class information necessary for an informed certification decision. This will thus contribute to ensuring that the representative plaintiff's advocacy is tantamount to a day in court for absent class members.