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Comment, Rule 23: Categories of Subsection (b)

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RULE 23: CATEGORIES OF SUBSECTION (b)

I. INTRODUCTION

Present Rule 23 of the Federal Rules of Civil Procedure[1] was designed to alleviate the problems inherent in old Rule 23.[2] These problems had arisen from the separation of class actions into three categories cast in terms of "jural relations."[3] Each category was determined by the type of right sought to be enforced. If the right were "joint, or common, or secondary," the class action was considered to be a "true" class action; if it were "several" and affecting "specific property," the action was a "hybrid" class action; and if the right to be enforced were "several" with "common questions of law or fact" and "common relief," the class action was known as a "spurious" class action.[4] Because the terms "joint," "common" and "several" had little or no clear meaning in the context of a class action,[5] categorization of a class action became extremely difficult.[6] In addition, different consequences could result from each classification.[7] For example, in a "true" class action the result was res judicata for all members of the class;[8] however, only the members who had actually intervened were bound by the decision in an action labeled a "spurious" class action.[9]

Amended Rule 23 attempts to avoid these problems by creating effect-orientated categories. The effect which a class action may have on interested persons determines the category of the action. These new categories are called, for want of a better terminology, (b)(1), (b)(2) and (b)(3) class actions.

Even though the present Rule 23 has adopted an entirely new system of categories, Rule 23 still contains basic prerequisites similar to those in the old Rule. These requirements, stated in subsection (a) of Rule 23, are: (1) a class impractical of joinder, (2) common questions of law or fact, (3) claims or defenses which are representative of those of the whole class and (4) adequate protection of the interests of the class by the representative parties.[10] Whether an action lies within one of the three "(b)" categories is a question considered only after the 23(a) requirements are satisfied. Thus, even if an action meets the prerequisites of 23(a), in order to be a class action, it must still meet the requirements of one of the three (b) categories. This comment will examine the three (b) categories, and analyze the important decisions

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1 Fed. R. Civ. P. 23 became effective July 1, 1966.

2 Fed. R. Civ. P. 23, 28 U.S.C. App., at 6101 (1964).

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

4 Id.

5 B. Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure, 81 Harv. L. Rev. 356, 380 (1967).

6 The courts have applied different labels to the same case. 2 W. Barron & A. Holtzoff, Federal Practice and Procedure § 562 n.18.2. (Rules ed. 1961).

7 Id. § 562, at 262-63.

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

9 Id.

10 Fed. R. Civ. P. 23(a).

dealing with each. For the purposes of discussion, the prerequisites of 23(a) are considered fulfilled wherever necessary.

II. The (b)(1) Category

The (b)(1) category permits class actions where the risk of certain undesirable effects exists either for the class or for the party opposing the class if separate actions were prosecuted. Clause (A) of 23 (b)(1) is concerned with the effect on the opposing party and clause (B) with the effect on the class.

Under clause (A), where a risk arises that the result of lawsuits involving individual members of the class would be "inconsistent or varying adjudications" establishing "incompatible standards of conduct for the party opposing the class" an action is a (b)(1) class action. This risk occurs as a possibility of inconsistent adjudications in suits brought by or aganst individual members of the class. A municipal bond issuance serves as an example of a clause (A) situation.[11] Separate actions concerning the bond issue could be brought by the taxpayers of the municipality. One taxpayer could sue to have the bond issue declared invalid while another could sue to limit or condition issuance of the bond. If these actions were allowed to continue separately, the party opposing the class (the municipality) would be forced to establish inconsistent defenses and, ultimately, could be forced into incompatible courses of conduct. For example, the municipality may be ordered by one court to discontinue the bond issue because it is invalid; while another court may order the municipality to set conditions on the issuance of bonds. In such a situation, the class action, by bringing all the litigants into a single forum, would be a practical and a fair means of achieving a uniform adjudication.

Although at first glance every situation involving separate actions by individual members of a class appears to create risks of inconsistent adjudications, the actual hazards with which the Rule is concerned are those risks creating incompatible standards of conduct for the opposing party. Thus, actions for money damages would not be a clause (A) situation. Although the opposing party may have to pay some members of the class and not other members, this kind of incompatible conduct does not fall within the specific concern of (b)(1)(A). An example of incompatible conduct within (b)(1)(A) occurs in a patent infringement situation where, if separate actions are brought, the patentee might be allowed to protect his patent from infringement from some but not from other alleged infringers.

The patent infringement and municipal bond cases could produce incompatible standards of conduct for the opposing party but the money damages case does not. The reason for these seemingly contradictory results lies in the phrase "incompatible standards of conduct." This phrase implies that the separate judgments will affect an opposing party's continuing course of conduct brought into issue by the suits and not that the judgments will

[11] Advisory Committee's Note to Amendment to Fed. R. Civ. P. 23, 39 F.R.D. 98, 100 (1966) [hereinafter cited as Advisory Note].

cause inconsistent isolated actions. In the damages example, the payment or nonpayment of money damages are single inconsistent actions which may not affect the party's continuing course of conduct. But in the municipal bond example, the judgments of the invalidity of the bond issue and of limitations on the issue will place the municipality in a dilemma as to its continuing course of conduct with respect to the bonds. It cannot stop issuance of the bonds yet still issue bonds with certain limitations. Thus, where separate actions will cause the risk of inconsistent judgments establishing incompatible standards of action for the opposing party and affecting his continuing course of conduct, a (b)(1)(A) class action arises.

Clause (B) of 23(b)(1) is concerned with the effect of separate actions on the class. More specifically, clause (B) contemplates the situation where a class has a cause of action against a party and where some members sue the party individually in separate non-class actions with the possibility resulting that the ability of the non-litigating members to protect their interests will be adversely affected.[12] By permitting a class action under these circumstances, clause (B) protects the members not represented in the separate suits.

An example of a clause (B) situation occurs where numerous persons have a claim against a fund insufficient to satisfy all the claims.[13] Here the adverse effect on the members not represented in the individual suits is striking. The individual suits could exhaust the fund before all members of the class were able to protect their interests. A class action allows the final determination of all the claims of the members of the class and subsequently the separate proof of the amount of each claim and its pro rata share of the fund.[14] Thus the thrust of clause (B) is the protection of the rights of members of a class by ensured representation through the vehicle of a class action.

A (b)(1) class action requires a risk that one of these undesirable effects will occur. For clause (A), therefore, the possibility must exist that separate individual actions would be brought. For example, if the alleged class is composed of small claimants individually unable to afford the expense of litigation, clause (A) would not apply.[15] In such cases, separate actions would be unlikely and consequently little danger of incompatible standards would arise. The class action would have to be maintained under a different (b) category. If the possibility of separate actions were not a requirement, clause (A) would be meaningless.

However, this requirement of the possibility of separate actions should not apply to the (b)(1)(B) category. The risk in clause (B) is that of an adverse effect upon the interests of class members who would not be represented in individual non-class actions. The argument that, if the unrepresented class members do not intend to bring suit, the court should not be concerned that their rights may be injured, is unacceptable. The purpose of (b)(1)(B) should not be limited to the protection of the interests of claimants who can afford to and may bring separate suits. But (b)(1)(B)

[12] Clause (B) also applies when the actions are brought against individual members of the class.

[13] Advisory Note, 39 F.R.D. at 101.

[14] Id.

[15] Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968).

should also protect the interests of small claimants by permitting a class action to represent them where an individual member's suit would adversely affect their rights.

There has been little litigation interpreting the (b)(1) category. The need for the possibility that other suits could be brought is the only requirement prescribed by the courts.[16] However, some courts have mentioned the adverse effects which would result if the action were not permitted to proceed as a class action.[17] For example, in a patent infringement case, the court stated that the weight of comity between courts and the threat of defending expensive patent infringement suits would adversely affect the rights of members of the class of alleged patent infringers who would not be represented in the non-class infringement suit.[18] This same court also held that (b)(1)(A) would apply because separate actions against individual members would create a risk of establishment of incompatible standards of conduct for the patentee.[19] Specifically, he may be permitted to protect his patent from some infringers but not from others.

Perhaps the reason for so little litigation interpreting the (b)(1) category is that (b)(1) describes a natural test for a class action. Whether inconsistent results would create incompatible standards of conduct for the opposing party or whether the interests of individual members would be adversely affected by separate non-class actions may be determined easily by the court from the nature of the relief which is sought or which may subsequently be sought in other actions.

III. The (b)(2) Category

A (b)(2) class action exists when the requirements of 23(a) are satisfied and when

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole.[20]

This category applies when the party opposing the class has acted or refused to act on grounds *generally applicable* to the class. This phrase signifies that the party opposing the class does not have to act directly against each member of the class. As long as his actions would affect all persons similarly situated, his acts apply generally to the whole class. For example, a refusal by an employer to hire a qualified female applicant because of her sex could be considered an act "generally applicable" to the entire class (qualified females). Thus, through a class action the employer

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[16] Id.

[17] Cranston v. Freeman, 290 F. Supp. 785 (N.D.N.Y. 1968); Booth v. General Dynamics Corp., 264 F. Supp. 465 (N.D. Ill. 1967).

[18] Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., 285 F. Supp. 714, 723 (N.D. Ill. 1968).

[19] Id. at 722.

[20] Fed. R. Civ. P. 23(b)(2).

would be enjoined from discriminating against all future, qualified female applicants.

The (b)(2) category does not include all actions seeking injunctive or declaratory relief. Only those actions in which "final injunctive or corresponding declaratory relief" is appropriate to the class qualify for a (b)(2) class action.[21] A final injunction is one having the same force and effect as any other final judgment, that is, it cannot be opened without a justifying cause.[22] Also, a permanent injunction is not necessarily a final injunction because the former may or may not be a final judgment. If the permanent injunction is not final, it is an interlocutory decree and may be modified or rescinded by the court at any time before a final decree.[23] For example, where a permanent injunction was granted but an accounting was necessary to bring the suit to a conclusion, the permanent injunction was considered interlocutory.[24] Thus a request for a permanent injunction may not qualify the action as a (b)(2) action. In addition, a request for a temporary or preliminary injunction is obviously not a request for a final injunction and would not by itself qualify the action as a (b)(2) class action.

"Corresponding declaratory relief" means the declaration sought must correspond to injunctive relief to qualify as a (b)(2) action. "Declaratory relief 'corresponds' to injunctive relief when, as a practical matter, it affords injunctive relief or serves as a basis for later injunctive relief."[25] Thus a declaratory action to construe an obligation and to determine the existence of a breach permitting damages would not be "corresponding declaratory relief." The action serves as a basis for later money damages and not for injunctive relief. On the other hand, an action contesting the constitutionality of the taxing sections of a statute would "serve as a basis for later injunctive relief." If the act were declared unconstitutional, injunctive relief could be given in the event of an attempt to collect taxes.[26] Also, an action to declare defendant's patents invalid would "afford" injunctive relief. The plaintiff could request both a declaration that the defendant's patents were invalid and an injunction to enjoin the defendant from suing or threatening to sue the plaintiff for patent infringement.[27]

However, a request for other appropriate relief in addition to injunctive or corresponding declaratory relief does not prevent the action from being a (b)(2) class action.[28] As long as the appropriate relief is not exclusively or predominately damages, an action in which final injunctive or corresponding declaratory relief is appropriate and which includes a request for the addi-

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[21] Advisory Note, 39 F.R.D. at 102.

[22] Morse-Starrett Prods. Co. v. Steccone, 205 F.2d 244, 248-49 (9th Cir. 1953). See United States v. Swift & Co., 286 U.S. 106, 119 (1932); Fed. R. Civ. P. 60(b).

[23] Simmons Co. v. Grier Bros. Co., 258 U.S. 82, 88 (1922).

[24] Id. at 89.

[25] Advisory Note, 39 F.R.D. at 102.

[26] F.G. Vogt & Sons, Inc. v. Rothensies, 11 F. Supp. 225, 231-32 (E.D. Pa. 1935).

[27] United States Galvanizing & Plating Equip. Corp. v. Hanson-Van Winkle-Munning Co., 104 F.2d 856 (4th Cir. 1939).

[28] See Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., 285 F. Supp. 714 (N.D. Ill. 1968).

tional relief should qualify as a (b)(2) class action.[29] When injunctive or declaratory relief is sought for the sole reason of meeting the requirements of (b)(2), and when other relief predominates or is the sole appropriate relief, the action is not a (b)(2) action. Since suits for injunctive and declaratory relief are not uncommon, the courts should have little difficulty in determining whether final injunctive or corresponding declaratory relief is appropriate to the situation.[30]

The (b)(2) category is clearly applicable to civil rights cases and indeed it was intended to permit class actions in the civil rights field.[31] Under the old Rule, confusion arose as to whether civil rights cases should be considered class actions.[32] Because actions seeking redress for discrimination concerned individual rights, and because a class action was to enforce the "joint," "common" or "several" rights of a class, courts, under the old Rule, occasionally held that a class action could not be maintained because the plaintiff had "no standing to sue for the deprivation of the civil rights of others."[33] Rule 23 has discarded the dubious terms of the old Rule and has made clear the availability of class actions to the civil rights area. Discriminatory conduct against any one of a group could be considered as conduct "generally applicable" to the entire group. Thus a representative of the class can bring a (b)(2) class action seeking, for the entire class, final injunctive or corresponding declaratory relief from the discriminatory behavior of the opposing party.

Class actions under (b)(2) should not be limited to civil rights cases, but should include actions to enjoin other practices, for example, price fixing or the use of "tying" conditions.[34] The language of (b)(2) is sufficiently broad to accommodate such types of grievances in addition to civil rights actions.[35] For example, a group of consumers charged illegal sales prices by a price-fixing retailer could bring a class action to enjoin the retailer from selling at the higher price.[36] Since the excess portion of the prices could be very small, even though trebled, in relation to the large cost of prosecuting an antitrust suit, the threat of litigation required for a (b)(1)(A) class action would be non-existent. However, because the action falls within the broad

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[29] See Advisory Note, 39 F.R.D. at 102.

[30] But see Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968), where the circuit court, after determining the judicial review exercisable in the case, reversed. The district court had held that final injunctive relief was inappropriate. See id. at 937 n.42.

[31] Advisory Note, 39 F.R.D. at 102.

[32] A vast majority of courts permitted the class action in desegregation cases. See Potts v. Flax, 313 F.2d 284 (5th Cir. 1963); Brunson v. Board of Trustees, 311 F.2d 107 (4th Cir. 1962), cert. denied, 373 U.S. 933 (1963); Northcross v. Board of Educ., 302 F.2d 818 (6th Cir.), cert. denied, 370 U.S. 944 (1962). Contra, Clark v. Thompson, 206 F. Supp. 539 (S.D. Miss. 1962), aff'd, 313 F.2d 637 (5th Cir. 1963), cert. denied, 375 U.S. 951 (1963).

[33] Brown v. Board of Trustees, 187 F.2d 20, 25 (5th Cir. 1951).

[34] Advisory Note, 39 F.R.D. at 102.

[35] For an opinion which seeks to limit the application of (b)(2), see Note Proposed Rule 23: Class Actions Reclassified, 51 Va. L. Rev. 629, 648-49 (1965).

[36] 15 U.S.C. § 15 (1964).

language of (b)(2), a class action should be permitted especially in light of the present trend to protect the consumer and the small claimant.

IV. The (b)(3) Category

The (b)(3) category is slightly different from the other two (b) categories. The explicit purpose of (b)(3) is to permit a class action to "achieve economies of time, effort and expense and promote uniformity of decision."[37] Thus, while (b)(1) is designed to prevent an undesirable effect on the parties involved, and (b)(2) is concerned with the type of relief sought, (b)(3) seeks to promote more immediate practical ends. Under (b)(3) the court is required to make specific findings. These findings are that common questions of law or fact "predominate over any questions affecting only individual members" and that "a class action is superior" in fairness and efficiency to any other form of settlement.[38]

The common-questions requirement is very similar to one of the basic 23(a) prerequisites, "questions of law or fact common to the class." By this restatement of a previous requirement in stronger terms, the drafters seem to have created (b)(3) as a broad catch-all category.[39] This conclusion draws support from the likelihood of predominance in the (b)(1) and (b)(2) categories. In (b)(2), since the concern is with the acts of the opposing party which are generally applicable to the class and since the relief is of an injunctive or declaratory nature, common questions should predominate. For example, one issue under a (b)(2) action could be whether the opposing party refused to render service because of race or religion. Whether common questions predominate in the (b)(1) category cannot be accurately determined because (b)(1) is concerned with the effects of different suits which, when united, may or may not contain a predominance of common issues.

Another indication that (b)(3) is designed to be a broad category is the other requirement, superiority of the class action. If it is agreed that the requirement of predominance is basically a reiteration of a previous requirement, the requirement of superiority permits a class action in diverse situations where the only limit is that the class action be a better method of settling the controversy. In this light the (b)(3) provision fashions a broad, residual category.

A. *Purposes*

Aside from the explicit purpose of promoting efficiencies of time, effort and expense, sympathy for the small claimant seems to be one of the reasons underlying this broad (b)(3) category. The small claimant unable to afford litigation may not fare too well under the requirements of (b)(1), and he may not be seeking final injunctive or corresponding declaratory relief as required by (b)(2).

Prior to the new Rule, the small claimant has always had difficulty in litigation through the class action. Since the class action originated as an

[37] Advisory Note, 39 F.R.D. at 102-03.
[38] Fed. R. Civ. P. 23(b)(3).
[39] See Advisory Note, 39 F.R.D. at 102.

equitable device,[40] actions which sought only damages were not included. The original Rule 23 abolished the prohibition against class actions for damages and established the "spurious" category. Through a spurious class action a party could sue for himself and all others similarly situated if common questions of law or fact were present and common relief were sought. Although damages were permitted, the small claimant was not helped because the spurious class action was, in effect, not a class action at all. In order to be included in the judgment, a party had actually to intervene and become a party to the action.[41] For this reason, the spurious action served merely as a device for "permissive joinder."[42] Thus the small claimant who could not afford to intervene was, in effect, prohibited from obtaining relief. Some courts avoided this problem by permitting a small claimant to intervene and present his individual claim for damages after defendant's liability had been determined.[43] This "one-way intervention" procedure was subject to much criticism since it allowed members of a class to reap the benefits of a favorable verdict, without risking loss.[44]

Category (b)(3) has alleviated the problems caused by the spurious class action. In a (b)(3) class action, as in (b)(1) and (b)(2), all members of the class are represented and bound by the judgment.[45] This arrangement eliminates the need for both intervention before a final adjudication and one-way interventions as a means of protecting the small claimant. Since the (b)(3) class action is broader than the (b)(1) and (b)(2) categories, more class actions will be permitted and more parties will be bound. Rule 23 makes an allowance for this effect by permitting an individual to litigate his own action if he requests to be excluded from the class.[46]

While (b)(3) is able to function as a vehicle of relief for the small claimant, its announced purpose is to "achieve economies of time, effort and expense." This policy of efficiency exists in potential conflict with the protection desired for the small claimant. For example, in the case of a vast number of small claimants unable to bring individual suits, it would certainly be more "economical" to avoid the class action altogether. But (b)(3) is concerned also with the "*fair* and efficient adjudication of the controversy."[47] (Emphasis added.) Efficiency is a goal to be reconciled with, not sacrificed to, procedural fairness.[48] Dismissal of the class action because the individual claims are too small to be individual actions could not be considered a "fair

40 Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948); Edgerton v. Armour & Co., 94 F. Supp. 549, 554 (S.D. Cal. 1950); Equity R. 38, 226 U.S. 659 (1912).

41 All American Airways, Inc. v. Elderd, 209 F.2d 247, 248 (2d Cir. 1954).

42 Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 560 (2d Cir. 1968); Van Gemert v. Boeing Co., 259 F. Supp. 125, 129 (S.D.N.Y. 1966).

43 E.g., Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 588 (10th Cir. 1961), petition for cert. dismissed, 371 U.S. 801 (1962).

44 Developments in the Law—Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 936 (1958); see Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684, 713 (1941).

45 Fed. R. Civ. P. 23(c)(3).

46 Fed. R. Civ. P. 23(c)(2).

47 Fed. R. Civ. P. 23(b)(3).

48 Advisory Note, 39 F.R.D. at 102-03.

. . . adjudication of the controversy" even though (b)(3) would "create" litigation where none had previously existed, and, in this sense, would be "unfair" to the party opposing the class. Permitting a class action to adjudicate legitimate rights cannot be considered "unfair." Nor can dismissal of the small claimants' action be considered an "efficient adjudication of the controversy." Prevention of expense by preclusion of the class action where the small claimant cannot afford individual suits is neither an "adjudication" nor an "efficient" settlement of the controversy. It is nothing more or less than the foreclosure of small but legitimate grievances.

B. *The Four Factors Pertinent to the (b)(3) Findings*

In contrast to actions under (b)(1) and (b)(2), in (b)(3) the court is specifically requested to find that the action qualifies as a (b)(3) class action. The court must find that common questions predominate and that a class action would be superior to other methods of resolving the controversy. The (b)(3) category specifies four factors which are pertinent to the court's findings. These are

> (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.[49]

Under factor (A), the interests of individual members of the class in conducting or defending separate lawsuits weighs against the use of the class action device. The word "interest" in this context should mean something more than a mere desire of certain individuals to have their own separate lawsuits. An individual's interest should include a valid reason why he desires to conduct a separate suit if that interest is to weigh against the superiority of the class action. Such an interest would exist if the individual has special issues which require separate litigation as, for example, an issue of reliance in a case of misrepresentation. The absence of intent of individual members to bring separate actions indicates that they do not consider their separate interests strong enough to justify separate suits. Furthermore, if individuals are so poor or their claims so small that separate lawsuits are unlikely, they will probably have little interest in suing separately.

Even though the interests of the individual is only one of the four factors which are to be considered, a strong interest among the members in conducting separate suits could cause a denial of the class action. The predominance of common issues and the superiority of the class action are directly related to members' individual interests. As the issues affecting individuals increase, the desirability of conducting separate suits will also increase. The result is a lack of a predominance of common issues and a concomitant lack of superiority in the class action.

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[49] Fed. R. Civ. P. 23(b)(3).

Factor (B) is concerned with the individual actions already commenced. If the nature of such actions varies, the likelihood increases that common issues do not predominate. Thus the class action would not be superior.

Under factor (B) the court should consider especially the fairness of making a class action out of multiple pending litigation. If the actions do vary in nature, then one (b)(3) class action may not give the relief desired by each individual.[50] In addition, if the individual actions have proceeded substantially toward conclusion, a new class action could well waste considerable time, effort and expense. Where litigation is already in progress, the court should consider also whether a requested exclusion from the class under (c)(3) would permit the individual actions without destroying the usefullness and superiority of the class action. Thus, if an individual's suit is in its final stages, or is seeking a different form of relief, the individual may be allowed to exclude himself from the class. The class action would then proceed without effect upon the individual or his action. Of course in the absence of other litigation factor (B) would not affect the findings since it is concerned only with the nature and extent of litigation already commenced.

Factor (C) considers the desirability of concentrating the litigation in a particular forum. It is relevant only to the findings of the superiority of the class action and not to whether common issues predominate. One important criterion of concentration must be the location of the claimants. As more of the parties are present in the forum, concentration more effectively achieves "economies of time, effort and expense." Other criteria typically include considerations of forum shopping and of the location of the pertinent evidence and witnesses.

Under factor (D), the court is to consider the difficulties of management of the class action. If such difficulties are overwhelming, the class action device would not be superior to other methods of deciding the controversy. Since the judge must notify the parties who are members of the class,[51] if the class is so vague as to make any form of notification impossible, the class action should be considered as being unmanageable.

Even if the problems of managing a large class suit are numerous, the class action might still be the superior means of adjudicating the controversy. If the individual claimants intend to prosecute separate actions, the administrative burden on the court would exceed the difficulties of managing a class action. Thus, the court should consider the difficulties of management of the class suit in relation to the difficulties inherent in the prosecution of separate actions.

The Advisory Committee states that the factors (A) to (D) are not exhaustive.[52] Making the appropriate findings under (b)(3), the court should keep in mind the broad purposes of the (b)(3) category. Considerations of fairness, efficiency and protection of the small claimant permeate this category. In large classes involving small claimants, the attorneys' fees

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[50] But see Fed. R. Civ. P. 23(b)(1), where the variance in each member's action provides a basis for a class action.

[51] Fed. R. Civ. P. 23(c)(3).

[52] Advisory Note, 39 F.R.D. at 104.

plus the cost of printing, postage and special masters' fees may be so exorbitant as to absorb any compensation which the claimants might recover. In such instances the courts should consider alternative means of adjudication. If no other means are practicable and if the small claimants will benefit from a determination of the opposing party's liability, the class action should be permitted to protect their rights even though each individual member would not recover damages.

C. *The Predominance of Common Questions*

To assign an action to the (b)(3) category, the court must first find that common questions of law or fact predominate over questions affecting only individual members. The presence of an abundance of issues affecting the individual members would destroy the effectiveness of a class action. Predominance does not mean that the common questions must be dispositive of the entire litigation.[53] The court must draw the line in each case and determine when the individual questions are so overwhelming as to destroy the utility of the class action. The Advisory Committee's Note to Rule 23 gives the situation of a "mass accident" injuring numerous persons as an example where common questions would not predominate.[54] In such cases, the defendant may have committed one negligent act creating a common question of law or fact. However, varied questions regarding each class member are usually present, such as damages and contributory negligence. "In these circumstances an action . . . would degenerate in practice into multiple lawsuits separately tried."[55]

Although this conclusion is reasonable for some "mass accidents" such as a chain of automobile collisions on a foggy highway, in other mass accidents, such as an explosion or fire in a large theatre, common questions would predominate. The individual issues would involve only damages, and a class action would be entirely appropriate to decide the defendant's liability. A class action would be ideal where the defendant insists that he is not liable and refuses to settle damages without an initial court determination of liability. Economy would be achieved by the determination of liability in one action and then, if necessary, separate suits for individual damages could proceed quickly and economically. The defendant would also be protected by the class action since he would receive his day in court and would not be forced to settle because of the threat of numerous individual suits.[56]

The courts have discussed the problem whether common questions predominate in two situations: antitrust actions and fraudulent misrepresentation actions involving securities. In most antitrust cases the courts conclude that the existence of a conspiracy to violate the antitrust laws is a large enough issue to make the class action device a desirable method of solving the controversy. However, one court has held that the individual issues out-

[53] Dolgow v. Anderson, 43 F.R.D. 472, 490 (E.D.N.Y. 1968).

[54] Advisory Note, 39 F.R.D. at 103.

[55] Id.

[56] For a cogent argument in support of the impracticability of using a class action in a mass accident situation, see Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 469 (1960).

weigh the predominance of the conspiracy issue. In *School Dist. v. Harper & Row Publishers, Inc.*,[57] a school district, a state and a city were suing publishers, distributors and wholesalers for treble damages for conspiring to fix the prices of children's library books. The court held that the uniqueness of the product, the method of purchase, the volume of demand and other product-involved issues affecting individual members predominated over issues common to all members of the class.[58] The court seemed more concerned with binding absent members of the class[59] and with the clerical work involved in sending notice to the class members[60] than with whether a conspiracy could be the common core for a class action.

Other cases have held that the class action is an appropriate device where an alleged antitrust conspiracy is the common issue.[61] The problems of variations in products, prices and markets were not considered sufficient to outweigh the advantages of determination of the conspiracy question for all members of the class in one suit.[62] These cases also involved large classes whose members had to be notified and would be bound by the decision.[63] Also, the problem of allocation of damages among individual claimants has not prevented the predominance of the conspiracy issue.[64]

Whenever the existence of the conspiracy is the common issue, the class action should be used to resolve this part of the controversy. Without the class action to determine liability, the small claimant would lack adequate protection in light of the expense, length and massive evidentiary requirements of an antitrust suit. Thus the better view in antitrust cases is that the issue of the existence of a conspiracy predominates and produces a common core for a (b)(3) class action.

In the fraudulent misrepresentation actions the difficulty of determining whether common questions predominate receives emphasis in an example given by the Advisory Committee. The Committee notes the possibility of material variations in the representations made to each individual and thus potential variations in the issue of misrepresentation for members of the class.[65] However, the issue of misrepresentation would not vary, for example,

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[57] 267 F. Supp. 1001 (E.D. Pa. 1967).

[58] Id. at 1004.

[59] Id. at 1005.

[60] Id. at 1004-05.

[61] Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968); Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391 (S.D. Iowa 1968); Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967).

[62] Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 565-66 (2d Cir. 1968); Philadelphia Elec. Co., v. Anaconda Am. Brass Co., 43 F.R.D. 452, 457 (E.D. Pa. 1968); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 401 (S.D. Iowa 1968); Seigel v. Chicken Delight, Inc., 271 F. Supp. 722, 726 (N.D. Cal. 1967).

[63] Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968) (3,750,000 odd-lots investors); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968) (governmental entities throughout the United States); Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967) (650 franchisees throughout the United States).

[64] Minnesota v. United States Steel Corp., 44 F.R.D. 559, 569 (D. Minn. 1968).

[65] Advisory Note, 39 F.R.D. at 103.

when the misrepresentation was made in a stock prospectus. Here liability would be an adequate subject for a (b)(3) class action and a later determination might be made for individual damages. Thus, a court should determine whether a common core of issues exists which must necessarily be decided before the surrounding issues may be reached. This core would provide a subject for a (b)(3) class action. For example, a (b)(3) class action has been permitted where the complaint had alleged (as the core issue) that the prospectus contained a fraudulent misrepresentation.[66]

An equally appropriate instance for a (b)(3) class action arises where a failure to report information concerning securities amounts to a fraudulent withholding of information.[67] An extension of this situation arose in *Esplin v. Hirschi*,[68] where the defendants were being sued for selling the stock of their corporation to the plaintiffs in violation of the Securities Exchange Act of 1934 and the Investment Company Act of 1940. The trial court found that the variations in the oral misrepresentations given to individual investors precluded a class action.[69] Usually, oral misrepresentations in which the contents vary among the individual members would preclude a finding of predominance.[70] In reversing the denial of a class action, the Court of Appeals for the Tenth Circuit held that the basis of the action was the omission of certain material facts which were withheld from all members of the class.[71] Consequently, there was a common core issue of fraudulent withholding of information which predominated and which would determine liability without involvement of individual issues. In such cases the courts have fashioned a "common course of conduct" test to determine the presence of a predominance of common questions. Class actions alleging that the defendant followed a common course of conduct have been permitted where the complaints have alleged a series of false financial statements,[72] a plan to manipulate stock prices[73] and conduct to induce fraudulently the purchase of securities.[74]

When a common course of conduct is alleged, a member's individual reliance on the conduct is an issue which weighs against the predominance of the common course issue. In *Berger v. Purolator Prods., Inc.*,[75] the defendants made public statements causing the price of a stock to drop and then bought the stock. The plaintiffs who had sold their stock at the lower prices were suing the defendants for fraud. The court concluded that a main issue was the reliance on these statements by members of the class and, therefore, that questions common to members of the class did not predomi-

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66 Hohmann v. Packard Instruments Co., 399 F.2d 711 (7th Cir. 1968).

67 Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673 (N.D. Ind. 1966).

68 402 F.2d 94 (10th Cir. 1968), cert. denied, 89 S. Ct. 1194 (1969).

69 Hirschi v. B. & E. Sec., Inc., 41 F.R.D. 64 (D. Utah 1966).

70 See Moscarelli v. Stamm, 288 F. Supp. 453, 462-63 (E.D.N.Y. 1968).

71 Esplin v. Hirschi, 402 F.2d 94, 98-100 (10th Cir. 1968), cert. denied, 89 S. Ct. 1194 (1969).

72 Fischer v. Kletz, 41 F.R.D. 377 (S.D.N.Y. 1966).

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

74 Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42 (S.D.N.Y. 1966).

75 41 F.R.D. 542 (S.D.N.Y. 1966).

nate.[76] However, other courts have held that questions of individual reliance do not outweigh the predominance of the common issue of defendant's course of conduct.[77]

In *Dolgow v. Anderson*,[78] stockholders sued the corporation and its principal officers alleging a "continuous and common plan" to manipulate the price of the stock of the corporation. The defense contended that, since the alleged misrepresentations were disseminated to the general public in a variety of statements, each of which were not necessarily relied upon by all members of the class, common issues did not predominate.[79] The court found the defendants' contention unpersuasive since the case was within the "common course of conduct" test and the statements were made to the general public rather than to the individuals.[80]

A situation calling for denial of a class action because of the lack of a common course of conduct arose in *Moscarelli v. Stamm & Co.*[81] Customers were suing their broker to recover damages resulting from the numerous trades which the broker made for their account. The plaintiffs tried to qualify the suit as a class action by claiming a common course of conduct. The claim was that through his misrepresentations, the defendant induced members of the class to purchase and sell an excessive amount of securities.[82] The court held that common questions did not predominate because recovery depended upon a breach of the fiduciary relationship involving individual and personal ingredients.[83] To hold otherwise would have been an unfortunate over-extension of the "common course of conduct" standard. Even if the defendant did "plan" to violate his fiduciary relationship with all his customers, unless perhaps overt acts or statements could be found to establish independently defendant's plan, liability depended upon proof by each individual of a breach of the confidential relationship. The common issues did not predominate.

The common course of conduct test has resulted in two extreme situations. In *Kronenberg v. Hotel (Governor) Clinton, Inc.*[84] the complaint alleged fraud and the defendant took "great pain" to demonstrate that the alleged false misrepresentations were so diverse that a finding of a predominance of common questions was precluded. Without elaboration of the defendant's course of conduct, the court simply adhered to the language of another decision and concluded flatly that the class action could be maintained because of the common course of conduct.[85] The *Kronenberg* court should have re-

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[76] Id. at 545. This case has been considered doubtful authority by a circuit court. Hohmann v. Packard Instruments Co., 399 F.2d 711, 715 (7th Cir. 1968).

[77] Weisman v. MCA Inc., 45 F.R.D. 258, 263 (D. Del. 1968); Dolgow v. Anderson, 43 F.R.D. 472, 490-91 (E.D.N.Y. 1968); Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42, 45 (S.D.N.Y. 1966).

[78] 43 F.R.D. 472, 489 (E.D.N.Y. 1968).

[79] Id. at 488.

[80] Id. at 489.

[81] 288 F. Supp. 453 (E.D.N.Y. 1968).

[82] Id. at 461.

[83] Id. at 462.

[84] 41 F.R.D. 42, 44 (S.D.N.Y. 1966).

[85] Id. at 45.

quested the class to allege more specifically the conduct upon which they sought relief. If the court had knowledge of the alleged acts, the nature of these acts should have been stated in the decision.

The *Kronenberg* method of proceeding should be contrasted with the method used in *Dolgow v. Anderson*.[86] A common and continuous plan to manipulate prices was alleged. Because harmful publicity to the defendants might result from the class action, the court required the class to present evidence that they had a substantial possibility of prevailing on the merits before they were allowed to proceed in a class action.[87]

Neither of these two methods is desirable. The court should permit a class action to continue where the reasonably interpreted requirements are met,[88] but at the same time the court should be certain that sufficient acts are alleged to constitute a common course of conduct. In most instances no great harm will result if a class action is permitted to proceed and is later amended to a non-class action. However, the time, effort and expense of preparation of the class action and the inconvenience to the class members should preclude hastily reached decisions concerning the predominance of common questions of law or fact.

D. *The Superiority of the Class Action*

Even if common questions of law or fact do predominate, the court must still find that a class action is superior to other available methods of settling the controversy. If an alternate procedure offers a more expeditious disposition of the suit, the request for a class action should be denied. Alternatives to a class action would include joinder, consolidation, intervention, a test case, and resort to the administrative agencies.[89]

The decision whether joinder is superior to a class action should not be difficult in practice. Joinder unites two or more persons as coplaintiffs or as codefendants in one suit.[90] A fundamental difference between joinder and a class action is the number of people actually bound by the decision. In joinder, only those who are litigants are bound, whereas in a class action all members of the class, whether litigants or not, are bound. Moreover, one prerequisite for a class action is that "the class is so numerous that joinder of all members is impracticable."[91] Thus, if joinder is feasible, not only is the class action not superior, but one of the prerequisites of a class action is unfulfilled.

Consolidation occurs when separate actions are pending before the court and the court orders a joint trial or hearing on common questions.[92] Thus, if individuals have pending actions in different courts, the actions could not be consolidated into one action. More important, consolidation is a practical

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86 43 F.R.D. 472 (E.D.N.Y. 1968).

87 Id. at 501.

88 Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968); see Esplin v. Hirschi, 402 F.2d 94, 100 (10th Cir. 1968), cert. denied, 89 S. Ct. 1194 (1969).

89 Dolgow v. Anderson, 43 F.R.D. 472, 482 (E.D.N.Y. 1968).

90 See Fed. R. Civ. P. 19, 20.

91 Fed. R. Civ. P. 23(a)(1).

92 Fed. R. Civ. P. 42(a).

alternative to a class action only when all the members of the class are represented by the various suits. Otherwise, a consolidated action would represent only a part of the class. Thus consolidation is superior to the class action when the class is adequately defined and completely represented in individual suits. The individual suits could be consolidated for the designated common issues and then separated to proceed as individual actions again.

By intervention, a party simply enters an action already in progress.[93] A large class could not effectively intervene without making the proceedings unmanageable. Furthermore, intervention is a voluntary action. To be effective, the parties must be aware of their rights and be able to afford the costs of litigation. Thus, if there were a large class or if the class consisted of small claimants, intervention would be inappropriate. The class action would not be superior to intervention only where the class is of manageable size, knows of its rights and can afford litigation.

A test action is a case selected from numerous similar cases pending before the court.[94] The test case proceeds to trial and determines the right of recovery in the other actions, the other litigants having agreed to be bound by the results of the test action.[95] A test action would be superior to the class action only when all the members of the class have brought individual suits. Class members unaware of their rights, or who have just not brought suit, would be neither bound nor represented by a test action.

A final alternative lies in administrative remedies. An administrative agency is especially helpful in very complicated actions. For example, the individual claimants in a large antitrust case could await an action by the Justice Department. If the defendant is found guilty, all civil plaintiffs may use the judgment in their civil suits for damages as prima facie evidence of liability.[96] Thus class members could wait until the defendant's liability has been determined and then bring individual actions for damages, rather than bring a class action based on the existence of the antitrust violation as the common issue. However, the Justice Department is not designed for such an extensive policing purpose. Because of budgetary limitations and the lack of manpower, this organization, like most administrative agencies, cannot fully investigate or take action in every possible case.[97] Only in a limited number of cases would the agencies aid in obtaining relief.

An administrative agency could also supply relief. For example, if the class of consumers wanted to sue for lower telephone rates, an appeal to the Federal Communications Commission would be superior to a class action. The Commission would have the expertise and the information to determine whether the rates were excessive, and could order the utility to abate them. Whether resort to the administrative agencies would be superior to a class action would depend on the type of relief available from the agency and on the attitude of the agency toward the problem of the class.

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[93] Fed. R. Civ. P. 24.

[94] Black's Law Dictionary 1643 (4th ed. 1968).

[95] Id.

[96] 15 U.S.C. § 16(a) (1964).

[97] See Loevinger, Private Action—The Strongest Pillar of Antitrust, 3 Antitrust Bull. 167, 168 (1958).

A somewhat different alternative to the class action arose in *Berley v. Dreyfus & Co.*[98] The plaintiff brought a class action against a broker for the sale of unregistered securities. Since the broker had sent a letter to all of his customers offering to refund their purchase price with interest without release of any of their rights, the court held that this was a better method of settling the controversy. The motion for a class action was dismissed and the plaintiff was permitted to sue individually for punitive damages.[99]

CONCLUSION

Revised Rule 23 greatly improves upon the former Rule. The three effect-oriented (b) categories establish more realistic bases for the class actions than did the old Rule, and provide relief through the class action device over a broader range of instances.

The (b)(1) category permits a class action where separate suits by or against individual members of the class create a clause (A) risk that inconsistent judgments will impose incompatible standards of conduct upon the party opposing the class or a clause (B) risk that the judgments would adversely affect the interests of unrepresented members. Under clause (A) the possibility of separate actions must be present; under clause (B) it need not be. Each clause supplies a practical test readily administered by the courts.

Where the party opposing the class has acted or failed to act on grounds generally applicable to the class and where final injunctive or corresponding declaratory relief is appropriate for the class, a (b)(2) class action exists. Although (b)(2) was intended to permit class actions in the civil rights area, the language is sufficiently broad to embrace other types of class actions. Furthermore, the fulfillment of the (b)(2) requirements is easily ascertained by the courts.

The (b)(3) category differs from the other two (b) categories in its requirement that the court make explicit findings. It must find that common questions of law or fact predominate over questions involving individual members, and that a class action is superior in efficiency and fairness to any other form of settlement. Here the court is guided in part by the four factors enumerated in (b)(3) and by the purposes of that subsection. The language of the subsection and the nature of the two mandatory findings indicate that (b)(3) is to be a broad, catch-all category. The explicit purpose of (b)(3) is to permit a class action where "economies of time, effort and expense" will be achieved. But sympathy for the small claimant also seems to have motivated the category. In fact, the language of (b)(3) allows class actions for the small claimants where the former Rule failed to do so.

As with the other two (b) categories, application of (b)(3) appears to be a relatively uncomplicated task for the courts. Although some disagreement has arisen, the courts have found predominance of common questions in antitrust cases and in cases of securities fraud. In the latter instance they have fashioned the "common course of conduct" test to determine the pre-

[98] 43 F.R.D. 397 (S.D.N.Y. 1967).
[99] Id. at 398-99.

dominance of common questions. The finding of the superiority of the class action presents no insurmountable difficulty. It involves the weighing of the efficiency and fairness of the class action against the same attributes of other available means of resolution.

A reasonable application of the three (b) categories should provide class actions wherever such actions will protect the class or the party opposing the class. Moreover, the Rule seems to eliminate the problems of the former Rule. However, the efficacy of the new Rule and its three categories remains to be evaluated more conclusively in the light of coming litigation.

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