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THE CONTENTS AND MECHANICS OF RULE 23 NOTICE

RODMAN WARD, JR.*

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The problems of composition and delivery of the Rule 23 notice are basic to the very utility of the class action device. After discussion of constitutional and interpretational issues, the authors address the mechanical difficulties of fair and effective notice, and suggest practical guidelines for the exercise of discretion by the trial court. Specifically, Messrs. Ward and Elliott are wary of the use of the class action as a vehicle for client solicitation, and favor close judicial supervision of all communication with the class as a particular exercise of the broad discretion conferred on the trial judge by the amended Rule.

I. INTRODUCTION

One professed purpose of amended Rule 23 is to provide a forum for aggrieved persons whose claims are too small to warrant separate adjudication.[1] Indeed, the class action has been referred to as "'a semi-public remedy administered by the lawyer in private practice'[2] —a cross between administrative action and private litigation."[3] The notice requirement of Rule 23 presents the greatest impediment to the fulfillment of this purpose. Subdivision (c)(2) requires *individual* notice to all identifiable members of a (b)(3) class. This provision, plus the fact that the class representative may have to bear the cost of such notice, greatly restricts the class action's role as a semi-public remedy. This article will analyze the Rule 23 notice requirements, with primary focus on the mechanical problems likely to arise in the course of litigation.[4]

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1 See Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 560 (2d Cir. 1968); Ford, Federal Rule 23: A Device for Aiding the Small Claimant, 10 B.C. Ind. & Com. L. Rev. 501 (1969).

2 Kalven and Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684, 717 (1941).

3 Dolgow v. Anderson, 43 F.R.D. 472, 481 (E.D.N.Y. 1968) (footnote added).

4 For a discussion of Rule 23 notice in the securities area, see Comment, Adequate Representation, Notice and the New Class Action Rule: Effectuation of Remedies Provided by the Securities Laws, 116 U. Pa. L. Rev. 889 (1968).

II. Standard of Rule 23 Notice

A. *Requirements Enunciated in Rule 23*

Although there are three categories of class actions under the amended Rule, notice of the maintenance of the action is specifically required only in (b)(3) actions.[5] According to the Rule, notice in (b)(1) and (b)(2) actions is within the discretion of the trial judge.[6] The notice provisions for the (b)(3) class are outlined in subdivision (c)(2).

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

Several questions immediately arise concerning the (c)(2) notice: (1) why is there a mandatory notice provision in (b)(3) cases, and only a discretionary notice provision in (b)(1) and (b)(2) cases? (2) what is the "best notice practicable under the circumstances"? (3) when is "individual notice" required? Addressing its attention to the first question, the Advisory Committee asserts that in (b)(3) cases notice is mandatory in order to give the class members an opportunity to secure exclusion from the class.[7] Thus, the contrary notice requirements merely assure the class member of protection from the new binding effect of (b)(3)-type class actions.[8]

Under the new Rule, the trial judge is granted considerable dis-

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[5] Fed. R. Civ. P. 23(c)(2).

[6] Fed. R. Civ. P. 23(d)(2).

[7] Advisory Committee's Note to Rule 23, 39 F.R.D. 98, 106-07 (1966) [hereinafter cited as Advisory Note].

[8] The (b)(3) category encompasses situations similar to those treated within the spurious category of former Rule 23. The spurious category, however, was but a "permissive joinder device." See Nagler v. Admiral Corp., 248 F.2d 319 (2d Cir. 1957). A class member could benefit from a judgment only if he actually intervened in the action. In order to broaden the scope of spurious type class actions, the Rules draftsmen made the (b)(3) action binding on all class members. Since (b)(3) actions are often prone to separate litigation, the draftsmen included in subdivision (c)(2) an escape clause wherein class members may "opt out" of the class action. For a more complete discussion of the various categories of class actions, see Comment, Rule 23: Categories of Subsection (b), 10 B.C. Ind. & Com. L. Rev. 539 (1969).

cretion in his treatment of class actions.[9] This discretion is particularly important to an understanding of the meaning of the phrases "best notice practicable," and "reasonable effort" in subdivision (c)(2). It seems that the Advisory Committee intended to leave the essential contents of the notice to the discretion of the trial judge. The Committee did state, however, that the notice requirement adopted by the court "need not comply with the formalities for service of process."[10] At the other extreme, the Committee asserted that the Rule's notice provisions are "designed to fulfill requirements of due process to which the class action procedure is of course subject."[11] Thus, between these two extremes the trial judge is free to accommodate amended Rule 23 to the circumstances of the case.[12]

Finally, when must "individual notice" be utilized? Subsection (c)(2) states, in part, that individual notice must be sent "to all members who can be identified through reasonable effort." Does this mean that if a defendant corporation furnishes every class member's name, each member must be notified individually? It could be argued that under this interpretation, the flexibility built into (c)(2) would be destroyed, and the "best notice practicable" and "reasonable effort" provisions relegated to mere verbiage. But the ultimate answer to this dilemma is not to be found in the Rule itself. To comprehend fully the extent of the trial judge's discretion to order the "best notice practicable," one must consider the due process requirements as established by the Supreme Court. An examination of the minimum due process standard is also needed to determine whether any notice is required in (b)(1) or (b)(2) actions.

B. *Constitutional Requirements*

In what situations does constitutional due process require notice to be sent to the class of a pending class action? One would conclude that while in (b)(3) actions the requirement is an absolute certainty, it most likely exists in (b)(1) and (b)(2) actions as well. In *Eisen v. Carlisle & Jacquelin*[13] the court of appeals stated that "notice is required as a matter of due process in all representative actions, and 23(c)(2) merely requires a particularized form of notice in 23(b)(3) actions."[14]

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[9] See Newberg, Orders in the Conduct of Class Actions: A Consideration of Subdivision (d), 10 B.C. Ind. & Com. L. Rev. 577 (1969). Dissenting from the adoption of amended Rule 23, Justice Black stated: "It seems to me that they place too much power in the hands of the trial judges. . . ." Mr. Justice Black's Statement, 39 F.R.D. 69, 272, 274 (1966).

[10] 39 F.R.D. at 107. See also Z. Chafee, Some Problems of Equity 231 (1950).

[11] 39 F.R.D. at 107.

[12] Id.

[13] 391 F.2d 555. (2d Cir. 1968).

[14] Id. at 564-65. For this proposition, Judge Medina cited the Supreme Court's

Some commentators assert, however, that due process does not require notice in any class actions.[15] One writer argues that according to *Hansberry v. Lee*[16] the class action is a "recognized exception" to the general constitutional rule that individual litigants must be afforded "notice and [an] opportunity to be heard."[17]

We do not agree. In the first place, this reading of *Hansberry* construes dicta; the *Hansberry* holding does not deal with notice, but deals with the adequacy of representation by the named parties. Furthermore, we believe that this view has misconstrued the dicta. The *Hansberry* dicta says not that the class action is an exception to the requirement of notice, but rather that the class action is an exception to the requirement for service of process.[18] But even if *Hansberry* were read as the former view suggests, the later case of *Mullane v. Central Hanover Bank & Trust Co.*[19] would seem to foreclose the question. The *Mullane* court said that *reasonable notice* is essential to acquire jurisdiction in all types of actions.

> "The fundamental requisite of due process of law is the opportunity to be heard."[Citation omitted.] This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.[20]

The class in *Mullane* consisted of numerous beneficiaries of a bank-managed common trust fund. Presumably the questions of law and fact in regard to each beneficiary were identical. Thus, *Mullane* holds that notice is required to bind even those parties whose substantial legal and factual positions are identical. A fortiori, due process requires notice in a 23(b)(3) class action where common legal and factual questions predominate over individual questions and where the parties are less representative. It appears that the courts in *Mullane* and *Eisen* are saying that constitutional due process requires reasonable notice in all actions, class or otherwise, but the *best possible* notice in cases where questions of law and fact may differ between the class members and the representative quality of the named parties may be less than certain.

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decision in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and the Advisory Committee's Note to Rule 23. In this regard, the Advisory Note states that the (c)(2) notice was designed to fulfill requirements of due process "to which the class action procedure is of course subject." 39 F.R.D. at 107.

15 Hansberry v. Lee, 311 U.S. 32, 40-41 (1940) is often cited for this proposition.

16 Id.

17 Pomerantz, The "Notice to the Class" under the Amended Rule 23, 1968 Practicing L. Inst. 33.

18 Hansberry v. Lee, 311 U.S. 32, 40 (1940).

19 339 U.S. 306 (1950).

20 Id. at 314.

Rule 23, on the other hand, *explicitly requires* notice only in 23(b)(3) cases, presumably because the draftsmen believed that the representative character of the named parties would be sufficient protection in (b)(1) and (2) cases.[21] In view of *Mullane* and *Eisen*, we doubt that it is safe to omit at least some sort of notice even in (b)(1) and (2) cases.[22]

III. Mechanical Problems With Rule 23 Notice

A. *Barratry*

A plaintiff, in communicating with the whole class, may seek to recruit support both in numbers of interested class members and in total potential recovery. Additional numerical strength may give the case more significance. More practically, the greater the monetary recovery by the class, the more aggregate recovery will exist from which attorneys fees, expert fees, court costs and other litigation expenses can be paid. This arrangement is not necessarily evil. The class action is "a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group."[23] Insofar as the notice may encourage aggregation of such claims, that policy is satisfied.

How can this purpose be squared with the time-honored prohibition against barratry? Canon 28 sternly advises that "stirring up strife and litigation is not only unprofessional, but it is indictable at common law."[24] The cure lies in the tenor of the notice. The procedure for notice as well as its contents should lead to "accuracy and impartiality in the substance of statements sent to class members, as well as a general tone which will not lend itself to unseemly solicitation of clients, or imply official approval of claims as yet untried."[25] Thus, the court must consider both party's interests in the preparation and dispatch of the Rule 23 notice.

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21 See Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 379-80 (1967).

22 For a more complete discussion of the constitutional issues in Rule 23, see, Comment, Constitutional and Statutory Requirements of Notice Under Rule 23(c)(2), 10 B.C. Ind. & Com. L. Rev. 571 (1969).

23 Escott v. BarChris Constr. Corp., 340 F.2d 731, 733 (2d Cir. 1965), cert. denied sub nom. Drexel & Co. v. Hall, 382 U.S. 816 (1965); See also, Dolgow v. Anderson, 43 F.R.D. 472, 484-85 (E.D.N.Y. 1968); Frankel, Amended Rule 23 From A Judge's Point of View, 32 Antitrust L.J. 295, 299 (1966); Kalven and Rosenfield, supra note 2, at 686.

24 ABA Canons of Professional Ethics No. 28. See also, Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147, 152 (S.D.N.Y. 1966), rev'd on other grounds, 391 F.2d 555 (2d Cir. 1968); Cherner v. Transitron Electronic Corp., 201 F. Supp. 934, 936 (D. Mass. 1962); Baim & Bland, Inc. v. Warren-Connelly Co., 19 F.R.D. 108, 111 (S.D.N.Y. 1956).

25 Kaplan, supra note 21, at 398. Notice should be "neutral and objective in tone, and should neither promote nor discourage the assertion of claims." Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 462 (E.D. Pa. 1968).

1. *Preparation of Notice.*—The first question is, who shall prepare the notice? The court in *School Dist. v. Harper & Row Publishers, Inc.*[26] stated that the preparation of notice must be done by the court.[27] The decision rested on the ground that the court's function of preserving its impartiality demanded that it not delegate this administrative task to an interested party.[28] Agreeing with the *Harper & Row* position, Professor Wright asserted that

> [I]f I were drawing such notice as a judge I would include explicit language that this notice in no way indicates any view of the court as to the merits of the action but is merely to advise you of the pendency of the suit and of your rights under it.[29]

The conclusions of the court in *Harper & Row* have met with considerable criticism.[30] Generally, the courts have indicated that the mechanics of notice preparation should be performed by the plaintiffs.[31] The court in *Brennan v. Midwestern United Life Ins. Co.*[32] directed that the plaintiff prepare a form of notice to comply with (c)(2) and present the form for the approval of the court.[33] It is submitted that the *Brennan* approach is the wiser. The representative's attorneys should be responsible for the preparation of the notice, while the court should reserve the right of inspection and approval, and thereby limit the possibility of client solicitation by the representative's attorneys.

In addition, a class opponent may wish the notice to contain a warning to the class members that they are subject to the burdens ordinarily falling on parties, such as answering interrogatories,[34] furnishing documents for discovery,[35] answering requests for admissions,[36] and, if unsuccessful, paying costs.[37] Are the class members subject to

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[26] 267 F. Supp. 1001, (E.D. Pa. 1967).

[27] Id. at 1005.

[28] For this proposition the court cited Rapp v. Van Dusen, 350 F.2d 806, 812 (3d Cir. 1965).

[29] Proceedings of the Twenty-ninth Annual Judicial Conference—Third Judicial Circuit of the United States, 42 F.R.D. 437, 557, 566 (1966) (remarks of Professor Wright).

[30] See Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 568 n.23 (2d Cir. 1968); Kaplan, supra note 21, at 398 n.157.

[31] See, e.g., Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 568 (2d Cir. 1968); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 462 (E.D. Pa. 1968); Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673, 684 (N.D. Ind. 1966).

[32] 259 F. Supp. 673 (N.D. Ind. 1966).

[33] Id. at 684.

[34] Fed. R. Civ. P. 33.

[35] Fed. R. Civ. P. 34.

[36] Fed. R. Civ. P. 36.

[37] Fed. R. Civ. P. 56(d). The class representative's attorney is probably obliged ethically to inform the class which he seeks to represent of such costs. No notice that we

all of these obligations? In the *Brennan* case,[38] the class action was dismissed with prejudice as to "alleged class members" who failed both to answer the defendant's interrogatories and to respond to a show cause order as to why they should not be so dismissed.[39] Basically, however, Rule 23 is unclear as to what extent the parties are bound by the above mentioned obligations.[40]

2. *Sending of Notice.*—Subdivision (c)(2) provides that the "*court* shall direct" the notice to the class. (Emphasis added.) It could be argued that, according to (c)(2), the court must actually send the notice. Such an interpretation would place an extraordinarily severe burden on the courts, and necessarily diminish the attractiveness of the class action as a means of adjudicating multiple claims. But it could also be argued that the (c)(2) provisions merely requires the court to *direct* the class representative—who prepares the notice—to send it.

It is obvious that any notice which informs an individual of his right of action will stir up litigation. Should the representative's attorney send the notice, however, the possibility arises that he might solicit clients, contrary to the Canons of Professional Ethics.[41] In *Kronenberg v. Hotel Governor Clinton, Inc.*,[42] the plaintiff's attorney sent a letter along with the prescribed notice. The court criticized the action of counsel but did not dismiss the class action because the statute of limitations had run and "what the court is primarily concerned with here is not the interests of the named plaintiffs and their attorneys but the interests of the members of the class."[43] Thus, in light of possible

have seen has dealt with the matter directly. The notice in Harris v. Jones, 41 F.R.D. 70 (D. Utah 1966), read:

> If you are not excluded as a member of the class by filing of notice you will be entitled to participate in any judgment in favor of any class or subclass of which you may be finally held to be a member, if the suit is successful for the plaintiff, subject to costs; and whether successful or not, if not excluded, you will be subject to the orders or notices with reference to the furnishing of statements or testimony and other matters.

The notice in the *Anaconda Brass* case simply stated:

> You will be deemed to be a party to this action, and will be included in, and bound by, the judgment in this action, whether favorable or unfavorable, unless, on or before November 1, 1968, you file a written election to be excluded from the class of plaintiffs.

38 259 F. Supp. 673 (N.D. Ind. 1966).

39 Order, August 17, 1967, furnished courtesy of G. Reddin, Esquire of the Indiana Bar, attorney for the defendants in the *Brennan* case.

40 By analogy to the cases involving intervenors, an argument can be made that all the class members who do not opt out are ipso facto parties. See Public Serv. Comm'n v. Federal Power Comm'n, 284 F.2d 200, 203-04 (D.C. Cir. 1960); cf. Brown v. Wright, 137 F.2d 484 (4th Cir. 1943).

41 ABA Canons of Professional Ethics No. 28.

42 281 F. Supp. 622 (S.D.N.Y. 1967).

43 Id. at 625-26.

abuse, the question is whether to allow the representative's attorney to send out the notice.

The court in *Harper & Row*[44] would insist that a notice be sent by the court. The other decisions surveyed under the amended Rule are not explicit in the designation of who will send the notice, although the action of the *Brennan* court, demanding that the plaintiff supply it with the names and addresses of the alleged class members, raises a strong implication that the court will sent out the notice.[45]

It is submitted that having the notice emanate from the court—and on the court's stationery—is the preferable procedure. "Rule 23 should not be used as a device to enable client solicitation."[46] Requiring or allowing the representative to send the notice may be an invitation to such abuse. In any event, champerty and charges of champerty should be avoided as much as possible, and a cautionary paragraph should be included in all notices. Such has been a common practice. In *Harris v. Jones*[47] the notice said:

> This notice should not be interpreted as a representation that the class actions are or are not meritorious or that the plaintiff or any member of the class he represents will or will not be successful.

The notice in *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*[48] said:

> This notice is not to be understood as an expression of any opinion by this Court as to the defenses asserted by either side in this litigation.

Some such comment seems essential to overcome the implicit dangers of client solicitation.

B. *Payment for Notice*

Neither the Rule nor the Advisory Note gives any indication of who should pay for the notice. If the plaintiff is to bear the initial cost, a requirement for certified mailing to each member of a very large class may have a chilling, if not prohibitive, effect on his prosecution of the class suit. Judge Weinstein, in *Dolgow v. Anderson*,[49] found that to require the plaintiffs to provide notice in that case would "for all practical purposes, spell the immediate end of [the] litigation."[50]

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44 267 F. Supp. 1001 (E.D. Pa. 1967).

45 Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673, 684 (N.D. Ind. 1966).

46 Cherner v. Transitron Electronic Corp., 201 F. Supp. 934, 936 (D. Mass. 1962).

47 41 F.R.D. 70 (D. Utah 1966).

48 43 F.R.D. 452 (E.D. Pa. 1968).

49 43 F.R.D. 472 (E.D.N.Y. 1968).

50 Id. at 498.

Most authorities believe that the plaintiff should, at least initially,[51] pay for the notice.[52] This duty would apply whether the plaintiff was the class representative or the opponent of the class. *Eisen v. Carlisle & Jacquelin*[53] presents the equities of the payment issue. In this case the plaintiff's claim was 70 dollars, while the estimated cost of individual notice to the class of 3,750,000 members was 400,000 dollars. It is highly unlikely that a plaintiff would continue with a class suit when faced with such a cost.[54] The Second Circuit interpreted the Rule to require individual notice to members of the class who could be identified through reasonable effort and concluded that if "financial considerations prevent the plaintiff from furnishing individual notice to these members, there may prove to be no alternative other than the dismissal of the class suit."[55] Thus, *Eisen* clearly asserts that the plaintiff must pay for the notice.

In *Richland v. Cheatham*[56] the court dismissed a class action in which the proposed class numbered approximately 50,000 persons. In this case the representatives were unwilling to pay for the distribution of notice. The court remarked that this unwillingness reflected upon the adequacy of representation and that "plaintiffs would have all the benefits of Rule 23 without assuming any of the burdens. It is not what the defendants insist on, but what the rule and due process require."[57] The problem emerging from the decision to compel the plaintiff to pay for notice is that in many cases where the representatives are of limited financial means, the inevitable result will be a dismissal of the claim as a class action. This result undercuts what is presumed to be a basic justification for allowing the class action device, the "historic mission of taking care of the smaller guy."[58]

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[51] The eventual disposition of the payment question depends on the outcome of the litigation and the discretion of the Court. See Fed. R. Civ. P. 54(d); 6 J. Moore, Federal Practice ¶ 54.77[1] at 1346 (2d ed. 1966). Cf. Hansen v. Bradley, 114 F. Supp. 382 (D. Md. 1953), where the registered mail fee for substituted service was allowed as a cost to the prevailing plaintiff.

[52] See Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 568 (2d Cir. 1968); Richland v. Cheatham, 272 F. Supp. 148, 156 (S.D.N.Y. 1967); Kaplan, supra note 21, at 398 n.157; Proceedings of the Twenty-ninth Annual Judicial Conference—Third Judicial Circuit of the United States, 42 F.R.D. 437, 565 (1966) (remarks of Professor Wright). But see Dolgow v. Anderson, 43 F.R.D. 472, 498 (E.D.N.Y. 1968); School Dist. of Phil. v. Harper & Row Publishers, Inc., 267 F. Supp. 1001, 1004-05 (E.D. Pa. 1967). The court in Harris v. Jones, 41 F.R.D. 70, 74 (D. Utah 1966), was unclear as to who will pay for notice. The plaintiff prepared the notice and the court mailed it.

[53] 391 F.2d 555 (2d Cir. 1968).

[54] If the class suit failed, the representative would, in effect, lose the cost of the notice because of the practical impossibility of his collecting the pro rata cost of the notice from the class members.

[55] 391 F.2d 555, 570 (2d Cir. 1968).

[56] 272 F. Supp. 148 (S.D.N.Y. 1967).

[57] Id. at 156.

[58] Statement of Benjamin Kaplan, quoted in Frankel, Amended Rule 23 from a Judge's Point of View, 32 Antitrust L.J. 295, 299 (1966).

The court in *Dolgow v. Anderson*[59] made no final determination regarding form or payment for the notice. The court did, however, present three arguments as to why the *defendant*, the party opposing the class, should be compelled to promulgate and pay for the notice. These were: "the fiduciary obligations of the corporation, the advantage to the corporation of a judgment with res judicata effects against a class, and the ability to bear the cost."[60] Regarding the fiduciary duty argument, the court concluded that in conjunction with the two other factors it would not *always* be unreasonable to require the defendant corporation to provide the notice after a prima facie case of breach of fiduciary duty had been established. It is apparent that the court places little weight on this argument. As for the res judicata effect, it spoke of the defendant's interest in having all the members of the class bound by the judgment and of the amended Rule's abolition of "one-way intervention." This emphasis seems a bit misplaced. The court's second argument seems to be grounded upon the probability that the plaintiff class will prevail. The defendants certainly prefer to avoid the class suit entirely rather than to have "all the members of the plaintiff class bound by a judgment which is likely to be in favor of the plaintiffs." The third argument points out that, as a practical matter, often the burden on the defendant would not be so onerous because the corporation has the means for addressing and mailing the notice at hand and would require only an additional enclosure in the next communication to shareholders. This last reason is the most substantial one, but even it is not weighty enough to counteract the fundamental unfairness of compelling a party to act contrary to his best interests.

One the other hand, it has been suggested that the expense of notice could be borne initially by the court.[61] This suggestion has little merit, however, since it would involve a misappropriation of public funds and would tend to give the court a stake in the outcome of the litigation. By initially bearing the cost of notice, the court would be making it possible for one party to proceed, when it could not have done so before. Such an action is unprecedented and inconsistent with any pretense of judicial impartiality.

The party desiring the notice, the plaintiff, is disturbing the status quo, and therefore should pay for the notice. The cost of notice should not be lessened by compromising the form of the notice in light of the clear demands of subdivision (c)(2). The emotional reaction against cutting off the meritorious claim of the "small guy" must be tempered

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59 43 F.R.D. 472 (E.D.N.Y. 1968).

60 Id. at 498.

61 Comment, Recovery of Damages in Class Actions, 32 U. Chi. L. Rev. 768, 781 n.69 (1965).

by consideration of the interests of the thousands of non-party members of the class whose interests must be protected. Thus, experience may ultimately prove the wisdom of Chief Judge Lumbard's dissent in *Eisen.* After discussing the practical problems involved in drafting what would be sufficient notice and in paying for the original notice, he concluded that the claim was totally unmanageable as a class action.[62] He went on to state that "[c]lass actions were not meant to cover situations where almost everybody is a potential member of the class."[63] Concluding, he suggested that it is the proper function of public agencies to deal with defendants who have caused wrongs of such magnitude.[64]

IV. STATEMENT OF CLAIMS

One of the most perplexing problems with Rule 23 is that of defining and limiting the class. To make appropriate orders, the court must have some conception of the size of the class with which it is dealing. The representative-plaintiff, especially, must know the magnitude of the class in order to determine whether the ultimate recovery will support the attorney's fees, cost of notice and costs of appeal. To alleviate the difficulty, some courts have required class members to file a statement of their claims in order to preserve their right of recovery.[65] Such was the procedure in the *Anaconda Brass* case, where the court stated that

> [i]n addition to meeting the requirements of 23(c)(2), the notice should . . . include a notice that members of the class not electing to be excluded therefrom will be required to file proofs of claim on or before a specified date, or be forever barred.[66]

One commentator believes that by requiring the filing of a proof of claim, a court is in effect rewriting the Rule to require "opting in."[67] This procedure would transform the (b)(3) action into a permissive joinder device, and thereby resurrect the numerous problems of the defective spurious class which the Rule's draftsmen sought to avoid. However, as Judge Fullam points out in the *Anaconda Brass* case,

> it is fair to state that the Rule allows for great flexibility

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[62] 391 F.2d 555, 571 (2d Cir. 1968).

[63] Id.

[64] Id. at 572.

[65] See, e.g., Minnesota v. United States Steel Corp., 44 F.R.D. 559, 577 (D. Minn. 1968); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 403-04 (S.D. Iowa 1968); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 459-60 (E.D. Pa. 1968); Harris v. Jones, 41 F.R.D. 70, 74-75 (D. Utah 1966).

[66] 43 F.R.D. 452, 462 (E.D. Pa. 1968).

[67] Pomerantz, supra note 17.

> and that the courts are just beginning to deal with its problems . . . . For these reasons, controlling precedents are lacking, and each case requires its own exercise of judgment.[68]

If it is assumed that notice itself satisfies due process, no constitutional prohibition works against placement of the additional burden of filing a proof of claim by a certain date, upon members who choose to remain in the class.

Perhaps a procedure similar to that required of bankruptcy creditors could be utilized.[69] Such a procedure is relatively simple, and the forms are readily available at any federal court house.

It is important to distinguish the proof of claim requirement from the initial notice requirement. The latter must satisfy the requirements of due process, while the former raises a question of statutory construction and judicial power. We do not agree that requiring a proof of claim imposes judicially an "additional condition." Rule 23(d) grants the trial judge broad powers to make appropriate orders. The court may make orders "for the protection of the members of the class or *otherwise for the fair conduct of the action* . . . ." (Emphasis added.)

Thus, Rule 23(d)(2) grants a judge power to make orders to: (1) give notice of any step in the action, or (2) give notice of the proposed extent of the judgment, or (3) give notice of the opportunity of members to contest adequacy of representation, to intervene and present claims or defenses, or (4) give notice otherwise to come into the action. It is this fourth power that may be interpreted to allow the court, if it deems it necessary "for the fair conduct of the action," to require class members affirmatively to "opt in" by filing a proof of claim.

The difficulty with this approach is that requiring a judge to determine when the "fair conduct of the action" requires opting in imposes a test which may be nothing more than a paraphrase of the due process requirement. After the constitutional requirement is postulated away by assumption of due process notice to the class, resort is had once more to a test suspiciously similar to due process to determine when a judge can impose additional affirmative burdens on class members who do not opt out.

Rather than to postulate a specific rule for every possible situation, it is better to pursue Judge Fullam's pragmatic case-by-case approach in the *Anaconda Brass* case. A procedure as helpful as that requiring the class members to state their claims prior to a specific date certainly should not be condemned until some class member demonstrates that this procedure has indeed prejudiced his rights.

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[68] 43 F.R.D. 452, 458 (E.D. Pa. 1968).
[69] 11 U.S.C. § 93 (1964).

V. Conclusion

It is apparent that the problems surrounding the contents and mechanics of the Rule 23 notice bear heavily on the usefulness of the class action device. The requirement of individual notice in all (b)(3) class actions may actually undermine the utility of that subsection. In light of the *Mullane* and *Eisen* cases, however, the conclusion emerges that constitutional due process requires some notice in all class actions, and the best notice possible where questions of law or fact differ among the class members. Thus, even if the common questions predominate in a (b)(3) instance, individual notice may be required if some of the questions of law or fact differ.

In the preparation and dispatch of the required notices, courts must act in order to curtail client solicitation. To limit the occurrence of champerty, all notices to the class should be inspected and approved by the court and should be sent on court stationery. Although the notice is forwarded by the court, the plaintiff should bear the costs of preparation and mailing. He is the party benefiting from the notice—the one disturbing the status quo—and he should therefore be required to bear the concomitant burdens.

Finally, in the administration of Rule 23 notice requirements, trial judges must utilize the discretion given them by the Rule's draftsmen. The trial judge is ideally positioned to determine the "best notice practicable under the circumstances." Within the very broad suggestions above, the courts must evolve more specific and sophisticated guidelines in inevitable case-by-case efforts.

APPENDIX: A SAMPLE RULE 23 NOTICE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JOHN DOE on behalf of himself and others similarly situated, Plaintiffs,	:	
v.	:	Civil Action No. 1000
GENERAL INDUSTRIES, INC., et al., Defendants.	:	

NOTICE OF PENDENCY OF CLASS ACTION

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, PLEASE TAKE NOTICE:

(a) John Doe (Doe) has brought an action in this Court against General Industries Inc. (General) and others alleging that (*brief description of cause of action*)

(b) Doe alleges that he brought his action not only on behalf of himself but also on behalf of others similarly situated, to wit: (*brief description of class*)

(c) The Court will exclude you from this class if you so request by mailing the attached form before (*date*) to:

Clerk
United States District Court
11th and Market Streets
Wilmington, Delaware 19801

(d) If you do not so request exclusion, you will be bound by the judgment in this action.

(e) If you do not so request exclusion, you may enter an appearance in this action through your counsel.

(f) If you do not so request exclusion, you may be subject to the obligations of parties to a law suit such as pre-trial discovery, and if the case is lost, your pro-rata share of court costs.

(g) If you do not so request exclusion, you will be entitled to your pro-rata share of any recovery after the deduction of attorneys' fees and disbursements.

(h) The Court expresses no opinion as to the merits of this case.

BY ORDER OF THE HONORABLE RICHARD ROE
DISTRICT JUDGE

____
Clerk

Dated: