

CHAPTER 7 7 CLASS ACTIONS

I. Introduction

This chapter discusses a range of issues related to class action practice.¹ Legal aid lawyers historically have used class actions to obtain relief for large groups of clients in a broad range of substantive areas.² Since 1996, however, organizations funded by the Legal Services Corporation (LSC) have been barred from bringing or participating in class actions and must explore other approaches for systemic relief, such as declaratory judgment actions.³ Nonetheless, for those attorneys able to bring class actions, this Chapter reviews the strategic considerations underlying the decision whether to bring a class action. It then discusses the class certification requirements set forth in Rule 23 of the Federal Rules of Civil Procedure, including the 2003 amendments; how to define and manage the class action; and settlement issues.

¹Excellent materials are available for more in-depth review of the matters covered in this chapter. See ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS – A MANUAL FOR GROUP LITIGATION AND STATE LEVELS* (4th ed. 2002 & Nov. 2005 Supp.); 7-7B CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* (3d ed. 1998 & 2006 Supp.); JAMES WILLIAM MOORE ET AL., *3B MOORE’S FEDERAL PRACTICE* (3d ed. 1997 & 2005); JONATHAN SHELDON, *CONSUMER CLASS ACTIONS: A PRACTICAL LITIGATION GUIDE* (5th ed. 2002); NATIONAL CONSUMER LAW CENTER, *THE CONSUMER CREDIT AND SALES LEGAL PRACTICE SERIES* (useful information for all class actions); *MANUAL FOR COMPLEX LITIGATION* (Fourth) § 21 (2004)(available at <http://www.fjc.gov>). Two useful websites are <http://www.classactionreports.com> and <http://www.lawyersandsettlements.com>.

²See, e.g., *Evans v. Jeff D.*, 475 U.S. 717 (1986).

³See 42 U.S.C. § 2996e(d)(5); 45 C.F.R. § 1617.3. However, LSC program attorneys may represent individual clients “seeking to withdraw from or opt out of a class or obtain the benefit of relief ordered by the court, or non-adversarial activities, including efforts to remain informed about, or to explain, clarify, educate or advise others about the terms of an order granting relief.” *Id.* at § 1617.2(b)(2). See Chapter 9, Section III (declaratory judgments) and Chapter 1, Section IV.C. (impact litigation under the restrictions) of this MANUAL. See also, Ilisabeth Smith Bornstein, *From the Viewpoint of the Poor: An Analysis of the Constitutionality of The Restriction on Class Action Involvement By Legal Services Attorneys*, 2003 U. CHI. LEGAL F. 693 (restriction on class actions unconstitutional).



Amendments to Rule 23 became effective December 1, 2003.⁴ These changes address four areas: the timing of class certification under Rule 23(c)(1); the notice provisions in Rule 23(c)(2); the settlement-review process in Rule 23(e); and the addition of two new subdivisions regarding the appointment of class counsel (Rule 23(g)) and attorney’s fee awards (Rule 23(h)). These changes will also be discussed below. In addition, in February 2005, the “Class Action Fairness Act of 2005” (CAFA) was signed into law.⁵ CAFA was passed in an effort to limit forum shopping for perceived abuses of the class action mechanism in state courts seen as plaintiff-friendly. It also addresses concerns about “coupon settlements” in consumer class actions. The provisions of this Act have little applicability to the poverty law community.

II. Whether to Bring a Class Action

When engaging in strategic litigation planning, counsel must determine whether the case should be brought as a class action. The ramifications of filing a case as a class action must be carefully considered and discussed with the potential class representative(s). Counsel must initially determine whether the case meets the requirements for a class action. If these requirements are likely to be satisfied, several additional considerations are relevant in deciding whether to bring a case as a class action: (1) can the case be won; (2) are there sufficient resources to bring a class action; (3) does having a class facilitate bringing a case to judgment; (4) is a class necessary for relief?

A. PROBABILITY OF SUCCESS ON THE MERITS

Counsel’s assessment of the strength of a case on the merits is always a factor in deciding whether to bring a case, whether framed as a class action or not. However, a judgment in a class action has preclusive effect for the class for all claims actually litigated.⁶ It will decide the law

⁴The amendments were adopted after a 10-year study by the Advisory Committee on Civil Rules. See generally Anthony Rolloe and Gabriel A. Crowson, *Mapping the New Class Action Frontier – A Primer on the Class Action Fairness Act and Amended Federal Rule 23*, 59 CONSUMER FIN. L. Q. Rep. 11, 18-22 (2005).

⁵Class Action Fairness Act of 2005, Pub. L. No. 109-2, 114 Stat. 4 (primarily codified at 28 U.S.C. § 1332 (diversity) and §§ 1441 *et seq.* (removal)). See generally Rolloe and Crowson, *supra* note 4, at 11-18.

⁶The law of claim preclusion generally prohibits litigation of all claims arising from a previously litigated transaction even when the claims were not actually litigated. However, in class actions, a judgment has preclusive effect only for the claims actually litigated. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 880 (1984) (distinguishing between individual and class claims). See also *Reppert v. Marvin Lumber and Cedar Co., Inc.*, 359 F.3d 53 (1st Cir. 2004) (release in class action binding on consumers because of adequate notice of prior class action) and *Wise v. Glickman*, 257 F. Supp. 2d 123 (D.D.C. 2003) (no preclusion of plaintiffs who either opted out or deemed by an arbitrator to be excluded from prior class but prior class members who did not opt out could not pursue claims for injunctive relief). For a thorough discussion of

for all class members. If plaintiffs win, relief will benefit all affected individuals, including people with very small claims who might not otherwise sue. However, if plaintiffs lose, the judgment has claim-preclusive effect on all class members and those in privity with them unless absent class members are subsequently able to establish lack of jurisdiction or inadequate representation. The potential for claim preclusion underlies the fundamental due process issues inherent in class action practice. In essence, Rule 23 reflects a common understanding of the circumstances in which it is fair for absent parties to be bound by judgments resulting from litigation engaged in by others.

Assessing the likelihood of success on the merits is a key factor in deciding both whether to bring a case as a class action and how broadly to define the class geographically. Assessing the likelihood of winning involves not only an analysis of the law, but also a critical look at the way the courts in the plaintiffs' jurisdiction are ruling on the type of issues presented in the case. If the trial and appellate courts in your jurisdiction are not likely to be sympathetic to the issues raised, bringing a case as an individual action and leaving class litigation of those issues to another jurisdiction might be preferable.⁷

B. RESOURCES

Another factor to consider is whether the program has sufficient resources to bring the class action. On the one hand, if the issue is not litigated as a class action, a systemic problem may remain unresolved, and numerous individual cases may have to be brought. This results in duplicative effort. On the other hand, bringing a class action commits program resources to a time-consuming, frequently long-term lawsuit in which zealous representation requires fully litigating the interests of the entire class. This type of litigation often requires substantial out-of-pocket expenses for discovery, class notification, and experts, only some of which may be recoverable after judgment.⁸ As a result, counsel should give consideration to seeking co-counsel from private law firms.⁹

preclusion in class actions, *see* Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717 (2005).

⁷For example, the circuits are split on whether the Americans with Disabilities Act (ADA) is applicable to the content of insurance policies. *Compare Doe and Smith v. Mutual of Omaha*, 179 F.3d 557 (7th Cir. 1999) (permitting insurance companies to create a special cap on AIDS-related medical care), *with Pallozzi v. Allstate Life Insurance Co.*, 198 F.3d 28 (2d Cir. 1999), *amended on denial of reh'g*, 204 F.3d 392 (2d Cir. 2000) (finding insurer was not allowed to refuse to issue joint life insurance policy to applicants on the basis of mental disability). Thus a lawyer in the Seventh Circuit claiming discrimination under the ADA in the content of an insurance policy might seek a way around *Doe and Smith* on an individual basis, while a lawyer in the Second Circuit might bring a class action.

⁸*See generally* 28 U.S.C. §§ 1911 *et seq.* and 42 U.S.C. § 1988.

⁹For example, the American Bar Association's Litigation Section has a Litigation Assistance Partnership Project. *For more information see* <http://www.abanet.org/litigation/lapp/home.html>. *See also* <http://www.tlpj.org> (Trial Lawyers for Public Justice). The Impact Fund also grants up

C. EFFECTS ON THE LITIGATION PROCESS

The third set of considerations relates to how a certified class affects the process of bringing the case to judgment. These considerations include the possibility that claims are or will become moot; the scope of discovery allowed; media exposure, and the likelihood of an appeal. The most important of these considerations is the likelihood that the named plaintiff's legal issue will be resolved, thereby needing a class to avoid mootness.¹⁰ If mootness is the only reason to bring a class action, counsel should assess whether it could be avoided some other way, such as by joining several plaintiffs or by bringing a claim for damages, including nominal damages.¹¹

The second consideration involves discovery issues. In a class action, a plaintiff class may be allowed much broader discovery than an individual party.¹² However, filing a case as a class action may also result in more vigorous discovery of the named plaintiff(s), particularly on issues relating to plaintiff's adequacy of representation, typicality, and knowledge of the meaning of class representation. Thus, the named plaintiff must be fully aware of the implications and potential conflicts involved in serving as a class representative.¹³ Likewise, in Rule 23(b)(3) actions, where class is based on commonality, defendants may seek discovery of absent class members.¹⁴ Such discovery might substantially delay relief.

Third, filing a class action may allow more opportunities for media exposure and public education and awareness about the issues of the case. On occasion, this coverage can be helpful in surfacing witnesses or other useful evidence. In some cases, however, it may create a public backlash that might harm the named plaintiffs' case. Named representatives should be prepared to have the glare of publicity focused on them personally.¹⁵

Finally, counsel should consider the likelihood that defendants will appeal the case. Defendants may be more likely to appeal an adverse judgment in a class action than in an individual case.

to \$25,000 to assist groups in bringing certain kinds of law reform cases. *See* <http://www.impactfund.org>.

¹⁰*See* Chapter 3, Section III, of this MANUAL.

¹¹Bringing a class action lawsuit with a prompt motion to certify the class may resolve the mootness issue, but it will not solve the standing issues of *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). *See* Chapter 3, Section I, of this MANUAL.

¹²*See* SHELDON, *supra* note 1, ch. 7 (Discovery on class certification is most likely to involve typicality and adequacy of representation).

¹³*See generally*, MANUAL FOR COMPLEX LITIGATION (Fourth) at § 21.141. A conflict may arise between the plaintiff and the class in settlement negotiations where defendants attempt to settle the individual claims without providing class relief. **See Section V of this Chapter.**

¹⁴*See* Debra Lyn Bassett, *Pre-Certification Communication Ethics in Class Actions*, 36 GA. L. REV. 353 (2002) (discussing discovery from absent class members).

¹⁵*See* discussion of choosing plaintiffs, Section. IV. A of this Chapter.

Indeed, Rule 26(f) of the Federal Rules of Civil Procedure permits interlocutory appeals of class certification decisions, with a possibility of a stay pending appeal. This issue must be discussed with the named plaintiffs.

D. EFFECTS ON RELIEF.

Several issues relating to relief are critical considerations in deciding whether to bring the case as a class action. These include whether to seek preliminary relief on behalf of named plaintiffs or the class, how tolling of the statute of limitations affects plaintiffs or class claims, and settlement negotiation.

Bringing a class action requires counsel to decide whether to request preliminary relief for the named plaintiffs or for the entire class. In cases where the plaintiff requires an immediate remedy, a class action may not be a viable alternative. If preliminary relief is requested only for the named plaintiffs, filing the case as a class action may delay a ruling on individual preliminary relief or create a disincentive for the defendant to agree to preliminary relief for the named plaintiff. It may also suggest a lack of commonality between the named plaintiffs' claims and those of absent class members. These issues must be resolved with the named plaintiffs before deciding whether to bring a class action suit.

Filing a case as a class action tolls the statute of limitations for individual claims during the pendency of the class action even if class certification is ultimately denied.¹⁶ However, tolling can be denied if plaintiffs' claims are not stated with enough specificity to put the defendants on notice of potential liability.¹⁷ To benefit from this rule, the classes must be defined with precision so that the defendants are on notice that the claims will be tolled as to that class.¹⁸

Litigation strategy and settlement negotiations may create potential conflicts between the named plaintiffs and the class. The general rule is that named plaintiffs have a fiduciary duty to absent class members and are not allowed to abandon their representation or settle in such a way that significantly prejudices the class.¹⁹ At the same time, named plaintiffs may be responsible for

¹⁶*Crown Cork and Seal Co. v. Parker*, 462 U.S. 345, 352-54 (1983); *Am. Pipe and Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974). These cases remain good law. *See e.g., Catholic Soc. Serv., Inc. v. I.N.S.*, 232 F.3d 1139, 1141, 1146-47 (9th Cir. 2000) (Clearinghouse No. 53,333).

¹⁷*Davis v. Bethlehem Steel Corp.*, 600 F. Supp. 1312 (D. Md. 1985), *aff'd*, 769 F.2d 210 (4th Cir. 1985). *See also* 2 CONTE & NEWBERG, *supra* note 1 at § 6:3 (discussing tolling rule for subsequent class actions).

¹⁸*Dunn v. City of Chicago*, 231 F.R.D. 367 (N.D. Ill. 2005).

¹⁹*See Blanchard v. Edgemark Financial Corp.*, 175 F.R.D. 293, 298 (N.D. Ill. 1997) (named plaintiff voluntarily accepts a fiduciary obligation toward the class that may not be abandoned at will or by agreement with the defendant if prejudice to the absent class members would inhere or if the class representative exploited the class action procedure for his own personal gain). *See also London v. Wal-Mart Stores*, 340 F.3d 1246, 1254-55 (11th Cir. 2003); *In re W. Union*

regular and lengthy monitoring of the decree or judgment on behalf of the class.²⁰ These problems are certainly not insurmountable, but they must be carefully discussed with the named plaintiffs before filing. Following this discussion, a retainer should be signed which should detail the agreements made on settlement, negotiation, attorney fees, commitments regarding appellate representation, and provisions for terminating representation.²¹

Money Transfer Litig., Civ. No. 01-0335, 2004 U.S. Dist. LEXIS 29377 *50-54 (E.D.N.Y. Oct. 19, 2004).

²⁰Some of these cases continue for decades. *See, e.g., Wyatt v. Sawyer*, 105 F. Supp. 2d 1234 (M.D. Ala. 2000) (discussing proposed settlement in a mental health case that lasted over thirty years). There are numerous other examples of cases where monitoring lasted for many years.

²¹SHELDON, *supra* note 1, at App. C.

III. Rule 23 Class Certification Requirements

Rule 23(a) and (b) of the Federal Rules of Civil Procedure govern class certification. Rule 23(a) sets forth four requirements for class certification, each of which must be met: (1) the class is so numerous that joinder of class members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the class representatives are typical of those of the class (typicality); and (4) the class representatives will fairly and adequately protect the interests of the class (adequacy).

Rule 23(b) sets forth three additional, but alternative, requirements, only one of which must be met: (1) that prosecution of separate actions risks either inconsistent adjudications which would establish incompatible standards of conduct for the defendant or would as a practical matter be dispositive of the interests of others; (2) that defendants have acted or refused to act on grounds generally applicable to the class (b)(2); or (3) that there are common questions of law or fact that predominate over any individual class member's questions and that a class action is superior to other methods of adjudication.

Before filing a case as a class action, counsel should analyze how the case meets each of the Rule 23(a) requirements and which prong(s) of Rule 23(b) are met. The complaint should plead specifically each of the Rule 23 requirements rather than merely parrot the language of Rule 23. Indeed, many local rules require that class action allegations contain specific information regarding the class, such as an estimate of the number of persons in the class.²²

In addition to Rule 23(a) and (b), the courts have added implicit requirements for class certification. The courts require (1) that a definable class exists, (2) the named representatives are members of that class, and (3) the claim of the class is live, not moot. These will be discussed below as well.

In determining whether to grant class certification, a court's analysis of the requirements of Rule 23(a) and (b) is described as rigorous.²³ However, courts are not to consider the merits of the plaintiff's underlying claim in the analysis.²⁴ The plaintiff has the burden of proving that the

²²*E.g.*, L.R. 23.1 (A)(2) (N.D. Fla.) and L.R. 23.1 (b)(2)(A) (E.D. Pa.). Local rules may also have other specific and/or additional requirements regarding class actions.

²³*General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). *See also Baffa v. Donaldson, Lufkin and Jenrette Sec. Corp.*, 222 F.3d 52, 58 (2d Cir. 2000).

²⁴*Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177-78 (1974). *See also Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 723 (11th Cir. 1987) (reversing denial of certification in part because rejection of class "was based upon nothing other than the court's assessment of the plaintiffs' likelihood of success.... This is an improper basis for deciding the propriety of a class action."). *But see Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (class determination generally involves considerations that are "enmeshed in the factual and legal issues comprising the plaintiff's cause of action.").

requirements of Rule 23 are met.²⁵ The standard of review of the district court’s decision to certify or deny certification of the class is “abuse of discretion.”²⁶ A court abuses its discretion if its certification order is premised on legal error.²⁷ At least one court is less deferential to the denial of certifications than it is to the granting of them.²⁸

A. RULE 23(a) REQUIREMENTS

The four preliminary requirements for class certification—numerosity, commonality, typicality and adequacy of representation—must all be met.

1. Numerosity

The numerosity requirement of Rule 23 does not focus exclusively on numbers but on the impracticality of individual joinder.²⁹ The courts generally apply no strict numerical test for determining impracticality of joinder. Rather, courts must examine the specific facts of each case.³⁰

Although a large number of putative class members may suffice to prove numerosity, other factors are considered in determining whether joinder is impracticable.³¹ These factors include the ease of identifying individual class members, geographical disbursement, fluid composition of class population, size of individual claims, individual ability to bring separate actions, and the nature of the claims raised and relief sought.³²

²⁵*Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002).

²⁶*Paton v. N. M. Highlands Univ.*, 275 F.3d 1274, 1277 (10th Cir. 2002); *See also Amchem Prods. v. Windsor*, 521 U.S. 591, 630 (1997) (Breyer, J., dissenting).

²⁷*Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001).

²⁸*Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2d Cir. 1999).

²⁹“Numerosity” is the term generally used to identify this requirement. However, classes of various numbers have been certified. This requirement might be more appropriately termed “impracticality.” *See, e.g., Anderson v. Dep’t of Pub. Welfare*, 1 F. Supp. 2d 456, 461 (E.D. Pa. 1998); 1 CONTE & NEWBERG, *supra* note 1, § 3:3.

³⁰This appears to be the generally accepted formulation of this principle. *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 330 (1980); *Robidoux v. Celani*, 987 F.2d 931, 935-36 (2d Cir. 1993); *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001); *Mullen v. Treasure Chest Casino, L.L.C.*, 186 F.3d 620, 624 (5th Cir. 1999); *In re Am. Med. Sys.*, 75 F.3d 1069, 1079 (6th Cir. 1996); 5 MOORE ET AL., *supra* note 1, at § 23.33[1][a]; 1 CONTE & NEWBERG, *supra* note 1, § 3:6.

³¹7AA WRIGHT ET AL., *supra* note 1, § 1762, at 176; 5 MOORE ET AL., *supra* note 1, ¶23.05[3] at 23-156. *See Robidoux*, 987 F.2d at 935-36.

³²Classes of various sizes have been certified: *Peoples v. Sebring Capital Corp.*, 209 F.R.D. 428 (N.D. Ill. 2002) (certifying a class of eleven individuals); *Grant v. Sullivan*, 131 F.R.D. 436 (M.D. Pa. 1990) (noting that in some cases, particularly where declaratory and injunctive relief is sought classes as small as fourteen may be certified); *Hernandez v. Alexander*, 152 F.R.D. 192 (D. Nev. 1993) (indicating that a class of fifty-two might meet numerosity requirements but declined to certify because of failure to show “impracticability” of individual joinder); *Hash v.*

In some cases, class size may be proven by appending to the motion for class certification public documents, census data, or responses to Freedom of Information Act requests. In other cases, affidavits can establish the numbers in the class. If plaintiffs lack information regarding the size of the class, consideration should be given to filing a discovery request at the same time or soon after the filing of the complaint; this may lead to a stipulation on numerosity. If the exact number of class members cannot be proven, the court can draw inferences about the class size.³³ If the size and impracticality of joinder appear to be a problem in a given case, adjusting the class definition may resolve the issue by, for example, eliminating subclasses (each subclass must independently meet the numerosity requirements) or including persons who will be affected in the future.³⁴

2. Commonality

Plaintiffs' grievances generally must share a common question of law or fact.³⁵ Rule 23 does not require that all questions of law or all questions of fact be common to all class members.³⁶ In fact, several circuits require that only one question of law or fact must be common to the

United States, CV 99-324-S-MHW., 2000 WL 1460801, 2000 U.S. Dist. LEXIS 20061 (D. Ida. July 6, 2000) (certifying a class of 200 landowners), *rev'd and vacated on other grounds*, 403 F.3d 1308 (Fed. Cir. 2005); *Loma Linda Med. Ctr. v. Farmers Groups Inc.*, S-94-0681-WBS/JFM Case No., 1995 WL 363441, 1995 U.S. Dist. LEXIS 9668 (E.D. Cal. May 15, 1995) (certifying a class of 626); *Immigrant Assistance Project v. INS*, 306 F.3d 842 (9th Cir. 2002) (certifying a class of 11,000). For a review of earlier cases where classes of less than 100 were certified, *see Jordan v. County of L. A.*, 669 F.2d 1311 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982).

³³*See Evans v. U.S. Pipe & Foundry*, 696 F.2d 925, 930 (11th Cir. 1983); *Talbott v. GC Servs., Ltd. Pshp.*, 191 F.R.D. 99 (W.D. Va. 2000); *McGlothlin v. Connors*, 142 F.R.D. 626, 632 (W.D. Va. 1992).

³⁴Courts have struggled to produce a rule governing the inclusion of future adversely affected persons within a class. Although those already injured by an unlawful practice can be identified, knowing how many will be injured if the practice is continued is inherently impossible.

Accordingly, some courts routinely include future victims of the challenged conduct within the class definition. *See e.g., Pederson v. La. State Univ.*, 213 F.3d 858, 868 n.11 (5th Cir. 2000).

Such inclusion of future victims does not render the class definition too vague for certification. *Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 780 (9th Cir. 1986).

³⁵Fed. R. Civ. P. 23(a)(2); *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994). *See also Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (Clearinghouse No. 50,904).

³⁶*See, e.g., Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001).

proposed class.³⁷ Other circuits require two.³⁸ Relief requiring individual determinations does not defeat class certification.³⁹

3. Typicality

While the commonality requirement focuses on the common thread among all class members, the typicality requirement focuses on the named plaintiff. In the leading case in this area, *General Telephone Company of the Southwest v. Falcon*, the U.S. Supreme Court held that the class representative had to “possess the same interest and suffer the same injury as the class members.”⁴⁰ The typicality requirement centers on “whether the class representative’s claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality.”⁴¹ Put another way, typicality can be measured by whether there is a sufficient nexus between the claims of the named representatives and those of the class.⁴² As with commonality, factual differences do not defeat typicality if the course of conduct and the claims are based on the same legal theory.⁴³ Typicality can be satisfied only if the named plaintiffs have standing to bring the claim.⁴⁴

4. Adequacy of Representation—Class Representatives and Counsel

Rule 23(a)(4) requires a class representative to represent fairly and adequately the interests of absent class members. As with other aspects of Rule 23, due process governs the determination of adequacy of representation.⁴⁵ By assuring adequacy of representation, Rule 23 permits class

³⁷See, *J.B. v. Valdez*, 186 F.3d 1280, 1288 (10th Cir. 1999) (Clearinghouse No. 52,608); *In re Am. Med. Sys. Inc.*, 75 F.3d at 1080; *Baby Neal*, 43 F.3d at 56.

³⁸*Applewhite v. Reichhill Chemical Inc.*, 67 F.3d 571, 573 (5th Cir. 1995).

³⁹*Savino v. Consumer Credit Co.*, 173 F.R.D. 346 (E.D.N.Y. 1997), *aff’d in relevant parts*, 164 F.3d 81, 86-87 (2d Cir. 1998) (accepting that individual differences in determination of injuries and damages does not defeat commonality requirement though ultimately not certifying class for other reasons).

⁴⁰*Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (quotation omitted).

⁴¹*Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002).

⁴²*Prado-Steiman v. Bush*, 221 F.3d 1266, 1278-79 (11th Cir. 2000).

⁴³*Stewart v. Abraham*, 275 F.3d 220, 227-28 (3d Cir. 2001) (certifying class challenging city’s re-arrest policy). See also *Piazza v. Ebsco Industries Inc.*, 273 F.3d 1341, 1351 (11th Cir. 2001) (strong similarity of legal theories satisfies typicality despite substantial factual differences).

⁴⁴*Piazza Inc.*, 273 F.3d at 1351.

⁴⁵See generally CONTE & NEWBERG, *supra* note 1, § 1.03 (notice and adequacy of representation are touchstones of due process in class actions). See also *In re Am. Med. Sys. Inc.*, 75 F.3d at 1083 and *Broussard v. Meineke Disc. Muffler Shops Inc.*, 155 F.3d 331, 338 (4th Cir. 1998) (explaining the class action premise that, because “litigation by representative parties adjudicates

judgments to bind absent class members.⁴⁶ The requirement of adequate representation applies to both the plaintiffs and counsel. The 2003 Amendments adding subsection (g) to Rule 23 have changed somewhat the inquiry into adequate representation of counsel.

First, the court asks whether the named plaintiffs will serve as adequate class representatives. By separating the inquiry into adequacy of representation from the issues of commonality and typicality, the rule requires a critical assessment of issues on which the named plaintiffs and any part of the class might disagree.⁴⁷ Class certification is improper when the interests of the representative party and the class conflict. In a leading Supreme Court case in this area, a class was decertified upon a finding that the claims of the named representatives were not aligned with those of the other class members. In that case, putative class members were all exposed to asbestos, but many members suffered injuries completely different than those suffered by other class members.⁴⁸ Defendants often attempt to defeat class certification by making allegations of antagonistic interests between the named representatives and the remainder of the class.⁴⁹

Conflicts can usually be averted by counsel vigilantly assessing all interests involved on a regular basis, informing the court of any potential conflicts when they arise, and asking the court to certify subclasses and appoint independent counsel to represent the varying interests in the conflict.⁵⁰ In addition, a judge may order notice to all class members informing them of the right to intervene to oppose the named plaintiff's position.⁵¹ Or, the court may define the class in a more limited way to avoid conflicts.⁵²

basic due process rights of all class members, named plaintiffs must possess undivided loyalty to absent class members”).

⁴⁶*Hansberry v. Lee*, 311 U.S. 32 (1940). For a good explanation of this case, see *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 486-87 (5th Cir. 1982). See also *Richards v. Jefferson Co.*, 517 U.S. 793, 800-01 (1996).

⁴⁷But see *Gen. Tel. Co. of Sw.*, 457 U.S. at 157 n.13 (1982) (requirements of commonality and typicality tend to merge and so does adequacy-of-representation requirement, although adequacy of representation raises concerns about competency of class counsel and conflicts of interest).

⁴⁸*Amchem Prod. Inc. v. Windsor*, 521 U.S. 591, 626 (1997). See also *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 480 (5th Cir. 2001) (differences between named plaintiffs and class members render named plaintiffs inadequate only when those differences create conflicts.)

⁴⁹See, e.g., *Diaz v. Hillsborough Co. Hosp. Auth.*, 165 F.R.D. 689, 694 (M.D. Fla. 1996) (the court rejected defendant's assertion that named plaintiff's request to review medical records was effort to publicize confidential information).

⁵⁰See, e.g., *Diaz v. Romer*, 961 F.2d 1508 (9th Cir. 1992), and cases cited therein (appropriate to certify subclasses due to conflict between those class members who were HIV-positive and those who were HIV-negative). See also *Marisol A.*, 126 F.3d at 378-79 (affirming class certification but suggesting to district court on remand ways to subdivide the class).

⁵¹*Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 487 (5th Cir. 1982) (explaining options open to a district court).

⁵²See, e.g., *Fabricant v. Sears Roebuck*, 202 F.R.D. 306, 308 (S.D. Fla. 2001) (“So long as the exclusions preserve the objective nature of the class definition, persons may be excluded from the class.”)

In addition to showing a lack of conflict with class members, the named plaintiff must also evidence a willingness to prosecute the class claims actively. Thus, in a case in which the named plaintiff failed to file for class certification for two and a half years, the court found that she failed to protect the interests of the proposed class.⁵³ Adequate representation by the named plaintiff generally should not, however, include an assessment of plaintiff's financial resources, unless lack of financial resources is relevant to the named plaintiff's willingness or ability to fund the litigation or represent the class.⁵⁴

When evaluating adequate representation of counsel, zeal and competency of counsel are important factors. Zeal and competency of counsel for the class are initially determined on the basis of the experience of the lawyer or the legal organization for whom the lawyer works and the quality of initial pleadings.⁵⁵ For example, failing to move promptly for class certification could be viewed as evidence of lack of adequate class representation.⁵⁶

Sometimes the court examines the conduct of counsel in other class actions to determine if the representation is adequate.⁵⁷ Having more than one counsel in class actions is advisable as a rule. If one has not handled a class action before then co-counseling with experienced counsel is necessary. Although an initial determination of counsel's adequacy to represent the class aggressively is necessary to certify the class, the court has flexibility to decertify the class later based on evidence of inadequate representation in discovery.⁵⁸

The 2003 amendments to Rule 23 added subsection (g), which requires the court to appoint class counsel and now explicitly mandates that counsel fairly and adequately represent the class. Rule 23(g)(1)(c) lists the factors that the court must consider in appointing class counsel. They include

⁵³*Harrison v. Chicago Tribune Co.*, 992 F.2d 697, 704 (7th Cir. 1993). For further discussion of delay in moving for class certification, see *infra* note 64.

⁵⁴*Horton*, 690 F.2d at 485 n.26.

⁵⁵*Marisol A.*, 126 F.2d at 378 (inquiry into whether named plaintiffs will represent potential class with necessary vigor most often described as turning on questions of "whether plaintiffs' counsel are qualified, experienced, and generally able to conduct proposed litigation"). See also *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479 (5th Cir. 2001) (adequacy requirement mandates inquiry into the zeal and competence of representatives' counsel). The adequacy of counsel is generally pled in the motion for class certification and resumes of counsel are attached.

⁵⁶*E. Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 405 (1977). But see *In re Arakis Energy Corp. Sec. Litig.*, **INSERT Case No.**, 1999 WL 1021819, 1999 U.S. Dist. LEXIS 22246 (E.D.N.Y. **INSERT Month day**, 1999) (finding small delay insufficient to deny certification and collecting cases discussing issue).

⁵⁷See, e.g., *Armstrong v. Chi. Park Dist.*, 117 F.R.D. 623, 631-34 (N.D. Ill. 1987) (holding inexperience alone may not be sufficient, but examining mistakes in other class actions as well as the one before in denying certification based on mistakes and inexperience).

⁵⁸*E. Tex. Motor Freight Sys.*, 431 U.S. at 405.

pre-filing investigation, experience, knowledge of law, and resources that counsel will commit to representing the class.⁵⁹

B. IMPLICIT REQUIREMENTS

The courts have added some “implicit” requirements for the putative class to meet in order to obtain class certification: (1) a definable class exists, (2) the named representatives are members of that class, and (3) the claim of the class is live, not moot.

1. Existence of a Definable Class

In order to obtain certification, a class must be sufficiently definable. The court must determine that defining the class is both possible and feasible. This means that a court must be able to identify all members of the class by using objective criteria.⁶⁰ If a class is defined in terms of vague or subjective criteria, such as the members’ states of mind, the court has no objective means with which to identify the members of the class and therefore will not certify the class.⁶¹ Even if the class is defined in terms of objective criteria, those criteria may be too difficult for the court to apply to ascertain that class definition is possible but not feasible. If class definition is not feasible, the court may refuse to certify the class.⁶²

⁵⁹*Barrie v. Intervoice-Brite, Inc.*, 3:01-CV-1071-K, 2006 U.S. Dist. LEXIS 69299 (N.D. Tex. Sept. 26, 2006) (holding the court must consider the work counsel has done in identifying or investigating potential claims in the action, counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, counsel's knowledge of the applicable law, and the resources counsel will commit to representing the class.)

⁶⁰*See, e.g., Garrish v. UAW*, 149 F. Supp. 2d 326 (E.D. Mich. 2001) (finding that union membership was an objective criterion sufficient to define a class); *Daniels v. City of N. Y.*, 198 F.R.D. 409, 414 (S.D.N.Y. 2001) (finding that a proposed class of persons stopped and frisked by a street crimes police unit in the absence of reasonable suspicion was sufficiently definable for certification); *Pigford v. Glickman*, 182 F.R.D. 341 (D.D.C. 1998) (Clearinghouse No. 52,961) (finding a sufficiently definable class when farmers suing the U.S. Department of Agriculture defined a class as those African American farmers who farmed between certain dates, applied to participate in department programs between those dates, and filed with the department a written complaint alleging a discriminatory response to their applications).

⁶¹*Oldroyd v. Kugler*, 352 F. Supp. 27, 31 (D.N.J. 1972) (class not certified where putative class members had a “fear of prosecution” for flag desecration because class defined in terms of subjective criterion of state-of-mind). *See also DeBremaecker v. Short*, 433 F.2d 733 (5th Cir. 1970) (class definition “active in peace movement” too vague for objective criteria to identify class).

⁶²*Mueller v. CBS Inc.*, 200 F.R.D. 227 (W.D. Pa. 2001) (declining to certify class where numerous individual determinations were necessary to identify class members). *See generally UAW v. GMC*, Case No. 05 CV 73991-DT, 2006 U.S. Dist. LEXIS 14890 (E.D. Mich. March 31, 2006).

If a class is so broad that it includes members who would not have standing to bring an action individually, the court will not certify the class. For example, in an action by Latino inmates against a prison for not providing Spanish-speaking staff, the court would not certify a class comprised of all of the Latino inmates. This is because some of those Latino inmates speak English and would not have suffered any injury and thus do not have standing to sue. Such a class would be overbroad and would include members without standing to sue.⁶³

Although members of a class must be easily identifiable for the court, a class may be certified even though the court cannot identify every potential member of the class at the moment of certification. Thus, a class may obtain certification even if it is of such a nature that it will inevitably need to add or drop members during the course of the action.⁶⁴

Upon finding that a class is not sufficiently definable, the court may limit or redefine the class using its authority under Rule 23(c)(4),⁶⁵ or it can strike the class allegations and allow the named members to proceed individually.⁶⁶ A precisely defined class is necessary because a court must know the exact identity of the class in order to analyze whether that class meets the other requirements for certification under Rule 23. Further, a court must have a precise class definition in order to be able to determine which individuals are entitled to notice or relief as well as which individuals will be bound by a judgment.

2. Class Representatives Must Be Part of the Defined Class

In order to obtain certification, the named representatives must be class members. That is, each named representative must have proper standing and must have the same interest and injury as other members of the class. For example, plaintiffs in an employment discrimination suit would need to be qualified for the job positions at issue in order to act as named representatives of the people against whom an employer has allegedly discriminated.⁶⁷

A problem for courts applying the named representative requirement is whether an association may act as the named representative of a class comprised of the members of the association.

⁶³*Pagan v. Dubois*, 884 F. Supp. 25 (D. Mass. 1995).

⁶⁴*See Santillan v. Ashcroft*, C 04-2686 MHP., 2004 U.S. Dist. LEXIS 20824 (N.D. Cal. Oct. 12, 2004); *Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 780 (9th Cir. 1986). *See also* 7A WRIGHT ET AL., *supra* note 1, § 1760, at 139.

⁶⁵*Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 490 (S.D. Ill. 1999).

⁶⁶*Cf. In re Aiello*, 231 B.R. 693, 708-09 (Bankr. N.D. Ill. 1999), *aff'd sub nom. Aiello v. Providan Fin. Corp.*, 257 B.R. 245 (N.D. Ill. 2000) (striking class allegations because some members of proposed class suffered no actual damages but permitting individual claims on plaintiffs who did suffer damages).

⁶⁷*E. Tex. Motor Freight Syst.*, 431 U.S. at 403-04. *See also Kelley v. Galveston Autoplex*, 196 F.R.D. 471, 474 (S.D. Tex. 2000); *McGlothlin v. Connors*, 142 F.R.D. 626, 632 (W.D. Va. 1992).

Some courts find that, since the association is not requesting any relief for itself, it is not a member of a class comprised of its members.⁶⁸ An exception to this rule, “associational standing,” exists for associations that have the authority to protect their members’ interests, if the case does not require the participation of individual members or consideration of individualized interests to resolve the claim.⁶⁹ The Eighth Circuit took a similar approach in a school desegregation case. There, potential individual class members feared reprisal requiring a “liberal evaluation” approach to associational standing. The court found that if an entity has standing to sue and is a real party in interest under Rule 17(a), that entity should not be dismissed from the action even if it is not an individual member of the class.⁷⁰ Whether a named representative is a member of a class is very fact-specific and courts vary in the strictness of the application of the requirement.⁷¹

3. A Live Claim

In order for the class to obtain certification, courts require a claim to be live, not moot. If it is not a live claim, the court will dismiss the suit unless a new class representative with a live claim steps forward. However, under certain circumstances, an individual with a moot claim may still serve as a class representative. For example, if a class representative’s claim becomes moot after a class is certified, the entire class action does not become moot as a result.⁷² If the court denies class certification and the named representative’s claim later becomes moot, the class representative may still appeal the denial of certification.⁷³

An individual whose claim is moot may also serve as a class representative if the individual’s claim is “capable of repetition yet evading review.” In such cases an individual with a moot claim may serve as a class representative even if the claim became moot before class certification.⁷⁴

C. RULE 23(b) REQUIREMENTS

⁶⁸See, e.g. *Minority Employees v. Tenn. Dep’t of Employment*, 573 F. Supp. 1346, 1348 (M.D. Tenn. 1983).

⁶⁹*UAW v. Brock*, 477 U.S. 274 (1986); *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 128 F.3d 826, 827-28 (5th Cir. 1997); *Sw. Suburban Bd. of Realtors, Inc. v. Beverly Planning Ass’n*, 830 F.2d 1374, 1380 (7th Cir. 1987). See Chapter 3, Section I of this MANUAL.

⁷⁰*Smith v. Bd. of Educ. of Morrilton Sch. Dist. No. 32*, 365 F.2d 770 (8th Cir. 1966).

⁷¹See generally 7A WRIGHT ET AL., *supra* note 1, § 1761, at 157-61.

⁷²*Sosna v. Iowa*, 419 U.S. 393 (1975); see *Roman v. Korson*, 307 F. Supp. 2d 908, 914-15 (W.D. Mich. 2004).

⁷³*U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388 (1980). See Chapter 3, Section III(C) of this MANUAL for further guidance on this point.

⁷⁴*Gerstein v. Pugh*, 420 U.S. 103 (1975); see *Portis v. City of Chi.*, 347 F.Supp.2d 573 (N.D. Ill. 2004).

In addition to meeting all four Rule 23(a) requirements, a class action must meet one of the three requirements of Rule 23(b).

1. Rule 23(b)(1) Classes

A Rule 23(b)(1)(A) action is intended to protect the defendants from inconsistent adjudication that might result from independent actions brought by individual plaintiffs. The Advisory Committee explained:

To illustrate: Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a remedy and fair means of achieving unitary adjudication.⁷⁵

Generally, the prospect of inconsistent injunctive relief satisfies this rule while the possibility of varying monetary awards does not.⁷⁶

By contrast, a Rule 23(b)(1)(B) action is designed to protect absent class members from litigation that could impair "their ability to protect their interests." The Advisory Committee explained that:

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem.⁷⁷

The Supreme Court's most recent word on Federal Rule of Civil Procedure 23(b)(1)(B) class actions in the limited fund context is *Ortiz v. Fibreboard Corporation*.⁷⁸ The Court rejected the (b)(1)(B) class in a manner suggesting added rigor in exploiting this device: "[T]he shared

⁷⁵Fed. R. Civ. P. 23(b)(1)(A) advisory committee's notes, 1966 amends.

⁷⁶*See, e.g., Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180 (9th Cir.), *amended by* 273 F.3d 1266 (9th Cir. 2001). *See also* 7AA WRIGHT ET AL., *supra* note 1, § 1773, at 13.

⁷⁷Fed. R. Civ. P. 23(b)(1)(B) advisory committee's notes, 1966 amends.

⁷⁸*Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

character of rights claimed or relief awarded entails that any individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members.”⁷⁹

2. Rule 23(b)(2) Classes

Class certification under Rule 23(b)(2) is far more common and the traditional class action tool for poverty lawyers. **For an example of a motion to certify a Rule 23(b)(2) class and resulting Opinion, see Documents 6 and 7 in the Documentary Supplement.** Under Rule 23(b)(2), the class must show that the defendant acted in a way “generally applicable” to class members, making classwide declaratory and injunctive relief appropriate. As with the commonality requirement of Rule 23(a), factual differences between the named plaintiffs and class members requiring individualized relief following the classwide injunctive relief do not defeat certification.⁸⁰

In requesting Rule 23(b)(2) certification for injunctive relief, the named plaintiffs must have standing for each type of relief requested.⁸¹ Thus, when a named plaintiff does not have standing to seek injunctive relief, Rule 23(b)(2) class certification is denied.⁸² Although Rule 23(b)(2) specifically refers to declaratory and injunctive relief as its remedy, many courts rule that damages or retroactive relief that is collateral to the requested injunctive relief is also appropriate for (b)(2) classes.⁸³

Rule 23(b)(2) class members require no notice⁸⁴ and have no opt-out rights. Consequently, in a case where compensatory damages as well as injunctive or declaratory relief are sought, it is important to ask whether the injunctive or declaratory relief predominates the monetary relief.

This is particularly significant in employment discrimination cases. Since the 1991 amendments to the Civil Rights Act, Title VII plaintiffs have been permitted to recover compensatory damages.⁸⁵ These damages include relief for a wide range of losses including future pecuniary losses, emotional pain, suffering, nonpecuniary damages (Section 1981a(b)(3)); and punitive damages (Section 1981a(b)(1)(2)). *Allison v. Citgo Petroleum Corp.* was the first case to address

⁷⁹*Id.* at 834.

⁸⁰*Stewart v. Abraham*, 275 F.3d 220, 227-28 (3d Cir. 2001) (affirming certification of (b)(2) class despite factual differences since there was at least one question of fact and law common to each class member). *Jordan v. Commonwealth Fin. Sys.*, 237 F.R.D. 132(E.D. Pa. 2006).

⁸¹*Sosna*, 419 U.S. at 403.

⁸²*James v. City of Dallas*, 254 F.3d 551, 563 (5th Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002)..

⁸³*Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1240 n.3 (9th Cir. 1998). See *Hoffman v. Honda of Am. Mfg., Inc.* 191 F.R.D. 530, 535-37 (S.D. Ohio 1999); *Ass’n for Disabled Am., Inc. v. Amoco Oil Co.*, 211 F.R.D. 457 (S.D. Fl. 2002).

⁸⁴However, the 2003 amendment to Rule 23(c), provides that the court “may” direct appropriate notice to the class.

⁸⁵42 U.S.C. § 1981a(a)(1)

the effect these statutory changes had on the utilization of Rule 23.⁸⁶ The court there held that compensatory relief was not incidental in Title VII cases, and class certification under Rule 23(b)(2) was therefore not appropriate.⁸⁷ Further, according to the court, the individualized nature of determining compensatory and punitive damages “detracts from the superiority of the class action device in resolving these claims.”⁸⁸ Other courts have disagreed with *Allison*.⁸⁹

3. Rule 23(b)(3) Classes

Rule 23 requires certification under subdivision (b)(3) when the primary relief sought is damages. In such a case, Rule 23(b)(3) requires that the common questions of law and fact predominate over any individual questions and that a class action be superior to other methods for fair and efficient resolution of the conflict.⁹⁰ The district court has broad discretion in determining whether common questions predominate and whether a class action is manageable.

Rule 23(b)(3) class actions are expensive and time-consuming, requiring notice to all class members;⁹¹ opportunity for opt-out; more expensive and extensive discovery; and individual representation post-judgment. As such, any office should carefully consider the resources required for litigation before undertaking representation of a Rule 23(b)(3) class. Whenever possible, certification should be sought under subdivision (b)(1) or (b)(2).

IV. Defining and Managing a Class

The process of successfully defining and managing a class includes consideration of many factors. Counsel must carefully select the named plaintiffs and define the class, keeping in mind the Rule 23 (a) and (b) issues discussed above. Next, counsel must address pre-certification issues and the process of moving for class certification. Finally, the possibility of interlocutory

⁸⁶*Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998).

⁸⁷*Id.* at 411-19.

⁸⁸*Id.* at 419. This case also discusses the effect of the Seventh Amendment right to a jury trial on a class action. *Id.* at 422-24. Most circuits have adopted this approach. See Judith E. Harris, *Recent Developments in Discrimination Law: Race Discrimination*, SG047-ALI-ABA 397, 408-16 (2001).

⁸⁹*But see Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001) (disagreeing with *Allison*). For a discussion of class actions post-*Allison*, see Suzette M. Malveaux, *Fighting to Keep Employment Discrimination Class Actions Alive: How Allison v. Citgo's Predomination Requirement Threatens to Undermine Title VII Enforcement*, 26 BERKELEY J. EMP. & LAB. L. 405 (2005).

⁹⁰See generally 7A WRIGHT ET AL., *supra* note 1, § 1777. The relevant considerations for so determining are listed in Rule 23(b)(3)(A)-(D).

⁹¹The 2003 amendments significantly change the notice requirements in (b)(3) cases: courts now may refuse to approve settlements unless they contain post-settlement opt-out notice to all class members. See Fed. R. Civ. P. 23(e)(3).

appeals, notice and opt-out procedures and communication with the class are all important issues that will be discussed below.

A. SELECTION OF NAMED PLAINTIFF(S)

The careful selection of class representatives avoids many procedural problems and presents the case in its best light. If the only available client would not be a good class representative, do not bring the case as a class action.

When evaluating a potential class representative, be alert for conflicts between the interests of the named plaintiff and the putative class; the possibility of mootness of the named plaintiff's claim; and the standing of the named plaintiff to seek each type of relief sought. In addition, counsel must consider the ability of the plaintiff to cooperate with, and withstand successfully anticipated discovery; and determine whether plaintiffs are required to exhaust administrative remedies prior to bringing suit.

Consideration should also be given to the potential media exposure, possible retaliation by defendants, and the plaintiff's ability to cope with such pressures. As in any other situation, weaknesses in the client's case, difficulties in their background and countervailing strengths or poignant facts must be identified.

B. DEFINING THE CLASS

Rule 23(c)(1)(C) provides that the class may be defined or redefined at any time before final judgment. This may occur either following a motion of either party or by the court.⁹² Thus, counsel should reevaluate the initially drafted definition as discovery proceeds and case takes shape. Counsel should request redefinition if appropriate.

When determining the definition of the class, counsel must consider: (1) the time frame, which will determine who may be included; (2) the geographic size of the class; and (3) the common claims and injuries experienced by the class as a whole, all with an eye to the relief requested. The effect on similar ongoing or planned litigation should also be considered.

1. Time Frame.

The applicable statute of limitations determines whether to define the class to include individuals harmed before the filing of the case and the cut-off dates to use in determining eligibility for the class. The failure of all individuals to have rights remaining after the expiration of a statute of limitations is not fatal to their inclusion in the class or the certification of the class.⁹³ The existence of affirmative defenses, such as a statute of limitations, does not preclude class certification.⁹⁴

Other factors to be considered in defining the class include: (1) the date and duration of defendant's challenged action and (2) whether the action is a continuous one. Where the injury is continuous, retroactive and/or prospective relief may be available. In evaluating whether to seek retroactive relief, counsel must determine whether the Eleventh Amendment limits such relief and whether the difficulty in finding class members makes such relief impracticable. The class definition may also include individuals who may be harmed in the future.⁹⁵

⁹²See, e.g., *Conant v. McCaffrey*, 172 F.R.D. 681, 693-94 (N.D. Cal. 1997) (class redefined by court and recognizing that court can redefine the class at any point in the litigation).

⁹³See, e.g., *Hoxworth v. Blinder, Robinson and Co.*, 980 F.2d 912, 924 (3d Cir. 1992); *In Re Energy Sys. Equip. Leasing Sec. Litig.*, 642 F. Supp. 718, 752-53 (E.D.N.Y. 1986) (failure of all class members to fall within applicable statute, given sufficient common nucleus of facts, does not defeat statute of limitations). *Accord Stirman v. Exxon Corp.*, 280 F.3d 554, 559 (5th Cir. 2002).

⁹⁴See, e.g., *Smilow v. Sw. Bell Mobile Sys. Inc.*, 323 F.3d 32, 39-40 (1st Cir. 2003).

⁹⁵Future class members are commonly included, especially when conditions continue to harm individuals coming into the class, if the offending behavior may continue after current class members' claims are resolved. See, e.g., *Reynolds v. Giuliani*, 118 F. Supp. 2d 352, 388-89 (S.D.N.Y. 2000) (Clearinghouse No. 52,229). See also *Armstead v. Coler*, 914 F.2d 1464, 1465 (11th Cir. 1990); *Lightfoot v. District of Columbia*; **Document 7 in the Documentary Supplement**.

2. Geographic Scope.

Counsel must consider whether there is ongoing or planned litigation in the same or an overlapping geographical area. If other attorneys are likely to bring the same or very similar case in a different geographic area soon, limiting the geographic size of the class is probably a good idea. While expanding the geographic scope may help in establishing numerosity, complications can arise with commonality, management of the class, and relief. At the same time, nationwide class actions are certainly permissible.⁹⁶ They may be helpful in avoiding inconsistent applications of policy.

3. Common claims and Injuries.

To assure standing, the class definition should be tied to the injury suffered by class members and to the relief sought. For example, rather than drafting a class definition as “all residents of X public mental institution,” it is better to define the class more specifically as “all residents of X public mental institution who, since [date] have been or will be placed in isolation or restraints without written standards or appeal rights.” The latter definition more precisely shows that the class members suffered an injury, that the injury is caused by the defendants, and that the relief requested by the class will remedy the harm.

The definition of the injury should be factually specific, as opposed to tied to a legal term. This avoids requiring the court to make an individual legal determination regarding each person’s inclusion in the class.⁹⁷ The type of relief requested may have an impact on the class definition. For example, in a case where administrative action is challenged, the class may have to be

⁹⁶For a recent example, see the following definition of “class” in a nationwide class action attacking Nissan’s financing scheme: “[A]ll African American consumers who obtained vehicle financing from NMAC in the United States pursuant to NMAC’s ‘retail plan—without recourse’ between January 1, 1990, and the date of judgment.” *Cason v. Nissan Motor Acceptance Corp.*, 212 F.R.D. 518, 523 (M.D. Tenn. 2002) (Clearinghouse No. 53,037). The classic case for nationwide classes was *Califano v. Yamasaki*, 442 U.S. 682 (1979), which specifically approved the concept. As noted above, however, Congress recently passed legislation significantly affecting the interstate class action.

⁹⁷See *Kline v. Sec. Guards Inc.*, 196 F.R.D. 261, 265-69 (E.D. Pa. 2000), *vacated on other grounds*, 386 F.3d 246 (3d Cir. 2004), for an example of plaintiffs struggling to define a class that does not require the court to reach the merits to determine whether a putative class member is covered in the class definition (plaintiffs’ class definition of “all persons whose communications were intercepted by electronic surveillance” was found unacceptable since definition would require “minihearings” on whether interceptions had occurred and whose communications were actually intercepted).

defined as having exhausted administrative remedies in order to obtain relief⁹⁸ unless plaintiffs can show that exhausting administrative remedies would be futile.⁹⁹

Reviewing the type of injury suffered by class members may reveal that (1) different legal theories support relief for some, but not all; (2) different injuries are experienced by various groups within the class; or (3) the interests of some of the class conflict with the interests of other class members. In such situations, subclasses may be appropriate.¹⁰⁰ In the first two scenarios, subclasses would probably help clarify the issues and ensure that the claims of the named representative are typical of the claims of the class. In the third, when conflicts arise, most courts will require that the subclasses be represented by independent counsel. Remember that subclasses must independently meet all of the Rule 23 requirements.¹⁰¹

C. PRECERTIFICATION DISCOVERY

After counsel has selected and defined the class and filed suit, the next questions are whether pre-certification discovery will be allowed and what the scope is of that discovery. The two main issues are:

(1) whether discovery related to the existence of the class should be permitted before class certification and (2) whether discovery on the merits should be held in abeyance until the motion for class certification is determined.

1. Class Discovery

Earlier editions of the MANUAL FOR COMPLEX LITIGATION suggested that the determination of whether Rule 23's requirements are met should generally be decided on the pleadings. Modifying that view somewhat, the most recent edition indicates that class certification decisions may turn on matters outside the pleadings.¹⁰² Sometimes the pleadings alone permit a

⁹⁸*See Kildare v. Saenz*, 325 F.3d 1078 (9th Cir. 2003) (Clearinghouse No. 55,216) (requiring exhaustion although plaintiffs' complaint alleged that social security determinations suffered from "systemic" deficiencies). *But see Bowen v. City of N.Y.*, 476 U.S. 467 (1986) (establishing three-part test to determine whether exhaustion of administrative remedies may be waived in social security cases). *See also Lemon v. D.C.*, 920 F. Supp. 8, 10 (D.D.C.) (applying exhaustion requirement in an Individuals with Disabilities Education Act case).

⁹⁹*Ass'n of Retarded Citizens v. Teaque*, 830 F.2d 158 (11th Cir. 1987) (brought on behalf of three individuals stating rule that no exhaustion required if exhaustion would be futile).

¹⁰⁰Fed. R. Civ. P. 23(c)(4)(B).

¹⁰¹*In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 202 (3rd Cir. 2005) (discussing potential conflicts of counsel in representing subclasses and difficulties in managing subclasses).

¹⁰²*Compare* MANUAL FOR COMPLEX LITIGATION (THIRD), *supra* note 1, § 30.1 *with* MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, § 21.14. For discussions that emphasize the importance of the pleadings as a basis for certification decisions, *see In re Am. Med. Sys.*, 75 F.3d 1069, 1086 (6th Cir. 1996) (decision on certification should be deferred pending discovery

determination of whether the criteria for class certification in Rule 23(a) and (b) are satisfied.¹⁰³ For example, if the defendant's opposition to the certification motion is based solely on issues of law, the court may make the determination without discovery. However, discovery is often needed.¹⁰⁴ A court may require specific proof that a criterion of class certification is met. For example, counsel may need to demonstrate factually the number of individuals in a putative class in order to establish numerosity.

Occasionally, a court refuses discovery but allows declarations or other evidence to supplement the pleadings in support of or in opposition to the motion for class certification.¹⁰⁵ These may include expert affidavits or other corroborating evidence gathered outside the formal discovery process. At times reasonable inferences and estimates may suffice.¹⁰⁶ Whatever type of evidence is used, the plaintiff bears the burden of making a prima facie showing that the prerequisites of class certification are, or can be, satisfied after discovery.¹⁰⁷

Prior to the 2003 amendments to Rule 23, courts were permitted to conditionally certify a class pursuant to Federal Rule of Civil Procedure 23(c)(1) and reserve the opportunity to reexamine the certification following more extensive discovery.¹⁰⁸ Conditional certification has now been deleted from Rule 23(c)(1)(C).¹⁰⁹ Nonetheless, one circuit court has found that conditional

if existing record inadequate for determination). *See generally* James F. Jordan, *Discovery and Evidentiary Issues in Non-Federal Question Class Actions*, 679 PLI/Lit 439 (recognizing that the same issues apply in class actions under federal substantive claims). The courts balance the promotion of effective case management, the prevention of potential abuses, and the protection of the rights of all parties. *Tracy v. Dean Witter Reynolds Inc.*, 185 F.R.D. 303, 304-05 (D. Colo. 1998) (barring class discovery as there was no demonstration of some factual basis for claim of nationwide class). *See also* *Agan v. Katzman & Korr, P.A.*, 222 F.R.D. 692, 696 (S.D. Fla. 2004) (recognizing that sometimes courts may have to go beyond the pleadings to rule on certification).¹⁰³ *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982); *Roe v. Operation Rescue, Inc.*, 123 F.R.D. 500, 502 (E.D. Pa. 1988) (denying class discovery and certifying class as court need only inquire into facts as presented in pleadings and affidavits if documents sufficiently indicate requirements met).

¹⁰⁴ *See, e.g., Dickson v. Chi. Allied Warehouses Inc.*, No. 90 C 6161, 1993 WL 362450, *11; 1994 U.S. Dist. LEXIS 2849 (N.D. Ill. Sept. 15, 1993). In fact, many jurisdictions hold that a trial court's refusal to allow any discovery is an abuse of discretion. *See Baldwin & Flynn v. Nat'l Safety Assoc.*, 149 F.R.D. 598, 602 (N.D. Cal. 1993).

¹⁰⁵ *See, e.g., Baldwin & Flynn* 149 F.R.D. at 601.

¹⁰⁶ 3 CONTE & NEWBERG, *supra* note 1, § 7.8.

¹⁰⁷ *See, e.g., Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 234 (2d Cir. 2006).

¹⁰⁸ *See, e.g., In re Diet Drugs Prod. Liab. Litig.*, 282 F.3d 220 (3d Cir. 2002); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001) (Clearinghouse No. 54,752). In fact, the determination of class certification is always subject to change at a later date. *See, e.g., Cent. Wesleyan Coll. v. W.R. Grace and Co.*, 6 F.3d 177, 189 (4th Cir. 1997); *Falcon*, 457 U.S. at 160.

¹⁰⁹ Fed. R. Civ. P. 23(c)(1) advisory committee's notes, 2003 amends.

certification still may be appropriate.¹¹⁰ Even for conditional certification, a majority of courts require that plaintiffs first make a prima facie showing that all the elements necessary for certification have been met.¹¹¹ Local rules may also address the question of whether pre-certification discovery is permitted.¹¹²

If precertification discovery is granted, it should aim to give an “informed judicial assessment” of the class certification issue without arbitrarily excluding information relating to the merits of the case.¹¹³ With respect to discovery of defendants, discovery is generally limited to facts relevant to the Federal Rule of Civil Procedure 23(a) and (b) criteria. In determining whether a course of discovery is relevant to establishing class certification, courts generally consider (1) the amount of time discovery would take, (2) the probability that discovery would be helpful in resolving the issue of class certification, and (3) whether discovery would be overly burdensome.¹¹⁴

In an effort both to expedite and to narrow the scope of discovery for class certification, courts commonly employ a number of restrictions.¹¹⁵ First, geographic and time constraints may be used, limiting discovery to a specific region of the country or for a certain duration.¹¹⁶ Second, the number of people from whom information is sought may also be restricted. For example, discovery of the proposed class representatives or class members may be limited to a certain number, group, or percentage of individuals in a particular putative class or subclass.¹¹⁷ If the class defined by the plaintiff is unreasonably broad, a court may also limit discovery relevant to a

¹¹⁰*Denney v. Deutsche Bank Sec., Inc.*, 443 F.3d 253, 270 (2d Cir. 2006). *See also* discussion at note ? *infra*.

¹¹¹*See, e.g., Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985); *Selwood v. Va. Mennonite Ret. Cmty., Inc.*, No. 5:04CV00021, 2004 U.S. Dist. LEXIS 17539 (W.D. Va. Aug. 31, 2004).

¹¹²*See, e.g., L.R. 23.1* (S.D. Ill.) (requiring mandatory scheduling conference to identify length and scope of necessary discovery regarding class certification). *See also L.R. 23.1(b)* (D.D.C.) (ruling may be postponed pending discovery); *L.R. 23.2(f)* (N.D. Tex.) (requiring motion for certification to address discovery necessary and time required).

¹¹³MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, § 21.14. *See also*, Fed. R. Civ. P. 23(c)(1), advisory committee’s notes, 2003 amends.

¹¹⁴*See, e.g., Trevino v. Celanese Corp.*, 701 F.2d 397, 405 (5th Cir. 1983); *Duval v. Gleason*, No. C-90-0242-CAL, 1991 U.S. Dist. LEXIS 9016 (N.D. Cal. June 12, 1991).

¹¹⁵*See generally Note, Requests for Information in Class Actions*, 83 YALE L. J. 602 (1974), especially for potential solutions with regard to discovery of absent class members.

¹¹⁶MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, § 21.14.

¹¹⁷*See West v. Circle K Stores, Inc.*, No. CIV. S-04-0438, 2006 U.S. Dist. LEXIS 25164, at *2; 2006 WL 1652598 (E.D. Cal. Feb. 14, 2006) (pre-certification discovery may be limited to a particular subclass); *Transamerican Ref. Corp. v. Dravo Corp.*, 139 F.R.D. 619, 621-22 (S.D. Tex. 1991) (limiting discovery to fifty of 6,000 absent class members).

similar but more practicable class.¹¹⁸ Third, although depositions are usually acceptable methods for pre-certification discovery, some courts first require a demonstration of good cause for using a deposition. The number and length of requests for production, interrogatories, and depositions are often limited as well.¹¹⁹ Fourth, representative plaintiffs must be capable of fully financing litigation on behalf of their class, but discovery of financial information is strictly limited. As a result, sworn statements or affidavits often suffice to prove financial adequacy.¹²⁰

Generally the courts are hesitant to allow discovery of absent class members.¹²¹ Here the courts balance the defendant's need for information against the privacy interests of uninvolved parties who did not initiate the suit.¹²² Initial discovery is confined to what is necessary for determining whether a proper class action exists. In some instances, courts allow discovery of absent class members.¹²³ For example, some courts are willing to subject absent class members to discovery where the proponent shows that (1) the discovery is not designed to take undue advantage of class members or to reduce the size of the class; (2) the discovery is necessary; (3) responding to the discovery requests would not require the assistance of counsel or other technical advice; and (4) the discovery seeks information not already known by the proponent.¹²⁴ Other courts allow discovery of absent class members only "where a strong showing is made that the information sought: (1) is not sought for the purpose of harassment or altering membership of the class; (2) is directly relevant to common questions and unavailable from the representative parties; and (3) is necessary at trial for issues common to the class."¹²⁵

¹¹⁸See, e.g., *Wash. v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1571 (11th Cir. 1992) (district court correctly ended plaintiffs' discovery when, after three years, plaintiffs could identify no class more specific than "all blacks").

¹¹⁹MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, § 21.14.

¹²⁰7A WRIGHT ET AL., *supra* note 1, § 1767, at 381-88; *Waldman v. Electrospace Corp.*, 68 F.R.D. 281 (S.D.N.Y. 1975).

¹²¹See, e.g., *Dellums v. Powell*, 566 F.2d 167, 187 (D.C. Cir. 1977); *Bell v. Woodward Governor Co.*, No. 03 CIV. S-04-0438, 2005 U.S. Dist. LEXIS 26757; 2005 WL 3299179 (N.D. Ill. Nov. 7, 2005).

¹²²7B WRIGHT ET AL., *supra* note 1, § 1796.1, at 57; *In re Carbon Dioxide Industry Antitrust Litig.*, 155 F.R.D. 209 (M.D. Fla. 1993).

¹²³See, e.g., *Schwartz v. Celestial Seasonings Inc.*, 185 F.R.D. 313 (D. Colo. 1999) (allowing discovery of the absent class members in the form of a clear, good-faith questionnaire relating to damages and alleged reliance); *Transamerican Refining Corp. v. Dravo Corp.*, 139 F.R.D. 619 (S. D. Tex. 1991) (discovery by interrogatories and request for documents generally allowed when relevant to common questions, posed in good faith, not unduly burdensome, and information not available to class representatives).

¹²⁴See *Collins v. Int'l Dairy Queen*, 190 F.R.D. 629, 630-31 (M.D. Ga. 1999), *citing Clark v. Universal Builders*, 501 F.2d 324 (7th Cir. 1974).

¹²⁵*McCarthy v. Paine Webber Group Inc.*, 164 F.R.D. 309, 313 (D. Conn. 1995); *Morgan v. UPS of America*, No. 4:94-CV-1184 (CEJ), 1998 U.S. Dist. LEXIS 20197; 1998 WL 785322 (E.D. Mo. Oct 16, 1998). See also *Cox v. Am. Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1986) (requiring special circumstances and good cause be shown).

Rule 23(d) authorizes district courts to order defendants to aid in determining the identity of absent class members.¹²⁶ If the identification can be done with less difficulty and expense by the defendant, a court normally compels assistance. Otherwise, the plaintiffs bear the costs and efforts of such investigatory work.

2. Bifurcation Of Class and Merits Discovery

The MANUAL FOR COMPLEX LITIGATION suggests that bifurcation of discovery may be useful when the merits discovery is not related to the certification issues.¹²⁷ Where discovery is bifurcated, pre-certification discovery proceeds while merits discovery is stayed. If merits discovery is stayed, the discovery plan should make clear when the stay will be lifted. Nonetheless, often no bright line distinguishes class and merits discovery.¹²⁸ Consequently, courts must balance the interest in gathering a complete record from which to decide class certification and the risk of potentially burdensome or unnecessary discovery if the class certification motion is denied. If the case would likely continue even if class certification is denied, the downside of discovery is less and the court more likely to be permissive with pre-certification discovery.¹²⁹

¹²⁶*Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 340 (1978). See also *Sollenbarger v. Mountain State Tel. and Tel. Co.*, 121 F.R.D. 417 (D.N.M. 1988) (where cost of alternative method “drastic,” plaintiffs could notify potential class members via insert in monthly bills sent by defendant.)

¹²⁷MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, § 21.141.

¹²⁸This issue was discussed in *In re Hamilton Bancorp Inc. Sec. Litig.*, No. 01CV0156, 2002 WL 463314, *1 (S.D. Fla. Jan. 14, 2002) (directing the development of a discovery plan that prioritizes class-related discovery but does not deprive parties of merits discovery).

¹²⁹*Id.*

D. MOVING FOR CLASS CERTIFICATION

Rule 23(c)(1) now requires that the court rule on class certification “at an early practicable time.”¹³⁰ Many local rules set specific time limits, generally ninety days from the filing of the complaint, for the filing of the motion.¹³¹ Other local rules have shorter¹³² or longer¹³³ time frames. Whatever the local rule provides, counsel should consider filing the motion for class certification at the time of filing the complaint.¹³⁴ This is because, for a number of reasons, failure to file a timely motion for class certification can result in the striking of the class claims or the denial of the motion. If there is a need for a clear deadline for filing and discovery, plaintiffs should seek a stipulation or file a motion to be allowed to file the class certification motion after completion of class discovery.

If plaintiffs, pursuant to Rule 65, move for preliminary relief on behalf of the class, filing the motion for class certification with or before the motion is appropriate. If mootness is a potential problem, a motion for class certification should be filed quickly.¹³⁵ Generally, once a class is certified, certification “relates back” to the date of filing of the complaint; post-filing mootness is immaterial so long as mootness occurred after certification. An exception to the “relates-back” rule is made, however, if class certification cannot reasonably be decided before the class representatives’ claims become moot because of the transitory nature of the claims.¹³⁶ Plaintiffs should nevertheless file for certification quickly and urge expedited action on the motion if necessary.¹³⁷

¹³⁰This is a change from the language pre-2003 amendments requiring a ruling “as soon as practicable.” The Advisory Committee notes that “[t]he ‘as soon as practicable’ language neither reflected prevailing practice nor captured the many valid reasons that may justify deferring the initial certification decision.” Fed. R. Civ. P. 23(c)(1)(A) advisory committee’s notes, 2003 amends.

¹³¹See, e.g., L.R. 23-3 (C.D. Cal.); L.R. 23.1(c) (N.D. Ohio); L.R. 23.2 (N.D. Tex.); L.R. 23.1(3) (S.D. Fla.). *But see* L.R. 23.1(c) (S.D. Ill.) (timing of motion established during mandatory scheduling and discovery conference).

¹³²See, e.g., L.R. D. Conn. App., Standing Order on Scheduling in Civil Cases, 2(b) at p. 99 (60 days)

¹³³L.R. 23(d) (W.D.N.Y.) (120 days).

¹³⁴Generally there is no reason to delay the filing of the motion for class certification. However, there may be reasons to await developments. See *McCarthy v. Kleindienst*, 741 F.2d 1406, 1412 n.5 (D.C. Cir. 1984) (plaintiffs waited to file certification motion pending resolution of summary judgment but this reason was found “woefully unconvincing” by the appellate court).

¹³⁵*Gratz v. Bollinger*, 539 U.S. 244, 261-68 (2003) (reiterating the general importance of class certification and its usefulness in avoiding mootness).

¹³⁶For a recent case discussing these issues, see *Bowers v. City of Philadelphia*, No. 06-CV-3229, 2006 U.S. Dist. LEXIS 71914 (E.D. Pa. Sept. 28, 2006).

¹³⁷See, e.g., *Murray v. Auslander*, 244 F.3d 807, 810 (11th Cir. 2001) (at least one named plaintiff must have standing at the time of class certification). *But see* *Weiss v. Regal Collections*,

The motion for class certification should set forth briefly how the named representative or class or both meet each requirement of Rule 23 and the specific class definition requested by plaintiffs.¹³⁸ Merely reciting Rule 23 boilerplate language without relating each requirement to the particular class action is not useful. Any documents necessary to prove the Rule 23 requirements should be filed with the motion.¹³⁹ These may include documents collected during discovery if class discovery is completed. If discovery is not completed, the motion should discuss the discovery requested. Consideration should also be given to filing motions to shorten discovery in order to move the class certification issue forward.

If there are any factual disputes about whether plaintiff meets the Rule 23 requirements, the court may hold an evidentiary hearing on the class certification issues. However, where Rule 23 requirements are clearly not met, the court does not commit an abuse of discretion by denying certification without holding a evidentiary hearing.¹⁴⁰

Before the 2003 amendments, courts had discretion to conditionally certify a class to allow additional time for the resolution of such issues as numerosity or adequacy of representation. As noted above, although the current text of the rule no longer contains the clause permitting conditional certification, at least one circuit has held that conditional certification survives the rule's amendment.¹⁴¹

385 F.3d 337, 348 (3d Cir. 2004) (when defendant makes an offer on individual claim that effectively moots class relief, it is appropriate to relate class certification back to filing of class complaint). *See Comer v. Cisneros*, 37 F.3d 775, 795-801 (2d Cir. 1994), and cases cited therein for a more extensive discussion of mootness in the class action context. *See* Chapter 3, Section III of this MANUAL for a full discussion of mootness and the *Sosna* or *Gerstein* line of cases.

¹³⁸Local rules not uncommonly require these specifics in the complaint. *See, e.g.*, L.R. 23.1(2) (S.D. Fla.). Pleading these elements even in the absence of a rule is good practice.

¹³⁹*Gen. Tel. Co. of Sw.*, 457 U.S. at 160 (courts are not restricted to pleadings when making certification decisions to determine if rule's requirements are met). *See also Fox v. Cheminova Inc.*, 213 F.R.D. 113, 122 (E.D.N.Y. 2003).

¹⁴⁰*Grayson v. Kmart Corp.*, 79 F.3d 1086, 1099 (11th Cir. 1996) (hearing permissible, but failure to hold hearing does not require reversal unless parties can show that if hearing had been held it would have substantially affected their rights). For an example of when a hearing was found to be required, see *Access Now Inc., v. Walt Disney World Co.*, 203 F.R.D. 529 (M.D. Fla. 2001) (hearing on standing of named representatives to resolve discrepancies between allegations of complaint and deposition testimony). For a general discussion, see 3 CONTE & NEWBERG, *supra* note 1, § 7:9. *See also* MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, § 21.21 (evidentiary hearing “may be” but not “is” necessary in challenge to factual basis for class certification); Jordan, *supra* note 108, at 455-60.

¹⁴¹*Denney*, 443 F.3d at 270 (2d Cir. 2006). This case refers to the district court's review of ten district courts which have continued to employ this practice.

E. INTERLOCUTORY APPELLATE REVIEW OF DENIAL OR GRANT OF CERTIFICATION

Rule 23(f) now permits a circuit court, in its discretion, to permit an interlocutory appeal of an order granting or denying class certification. The courts caution, however, that granting these types of appeals should not become routine.¹⁴² Courts describe the relevant considerations as: (1) whether the district court's ruling is likely to be dispositive of the litigation by creating a "death knell" for either party; (2) whether the party seeking review shows a substantial weakness in the certification decision such that the decision would likely constitute an abuse of discretion; (3) whether the appeal would permit the resolution of an unsettled legal issue important to the case and important in and of itself, particularly if it involves Rule 23 jurisprudence; (4) whether the court should consider the nature and status of the litigation before the district court; and (5) whether future events may make interlocutory appeal more or less appropriate¹⁴³

F. NOTICE OF CLASS CERTIFICATION

Once the class has been certified, counsel must decide whether notice of class certification is required, what kind of notice is required and whether notice of opt-out rights is required for their particular class action. Rule 23(c)(2) sets forth the notice requirements in class action suits. Notice requirements for class actions brought under 23(b)(1) and (2) are flexible and do not require individual notice while individual notice is required in Rule 23(b)(3) suits. Notice of opt-out rights is required in Rule 23(b)(3) cases. The court has discretion under Rule 23(d)(2) to order notice at any time in any Rule 23 lawsuit for the protection of the class members or the fair conduct of the lawsuit.¹⁴⁴ We will discuss the requirements, including timing and form of notice below.

Rule 23(c)(2)(A) simply provides that in class actions brought under Rule 23(b)(1) or (b)(2), "the court may direct appropriate notice to the class." Unlike suits brought under Rule 23(b)(3), the notice need not be individual.¹⁴⁵ Notice is not required either before or after certification, or,

¹⁴²See *In re Delta Air Lines*, 310 F.3d 953 (6th Cir. 2002).

¹⁴³*Prado-Steiman v. Bush*, 221 F.3d 1266, 1272-77 (11th Cir. 2001) (Clearinghouse No. 53, 363), and cases cited therein. See also *In re Delta Airlines*, 310 F.3d at 958-60; *Sumitomo Copper Litig. v. Credit Lyonnais Rouse Ltd.*, 262 F.3d 134 (2d Cir. 2001); *Lienhart v. Dryvit System, Inc.*, 255 F.3d 138, 141 (4th Cir. 2001); *Bolin v. Sears, Roebuck and Co.*, 231 F.3d 970, 972-74 (5th Cir. 2000) (upholding constitutionality of U.S. Supreme Court's adoption of Rule 23(f)).

¹⁴⁴*Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir. 2003) (discussing notice in cases where money damages are sought).

¹⁴⁵*Id.*

indeed, at all.¹⁴⁶ This flexible approach recognizes that the cost of notice may “prove crippling and the benefits may be relatively small.”¹⁴⁷

However, notice to all class members of the pendency of the action before certification or judgment is frequently helpful, for a number of reasons. It may be helpful in locating additional witnesses or obtaining other evidence from class members. Early notice may expose potential conflicts among class members. Locating and notifying as many class members as possible also preserves plaintiffs’ ability to locate the class and administer relief after judgment. If the court is not inclined to order individualized notice, use discovery to obtain lists of class members and consider hiring an outside firm to find last known addresses. This approach may avoid the problem of some class members not receiving the relief to which they are entitled because they cannot be located after many years of litigation.

The 2003 Amendments continue the requirement that individual notice to class members in Rule 23(b)(3) cases must be provided after the class is certified and before judgment. However, it added a requirement that the notice “must concisely and clearly state in plain, easily understood language” information about the nature of the action, the class definition, the claims, issues or defenses, the right to enter an appearance through counsel, the right to opt-out, and the binding effect of the judgment.

A court has discretion to order the defendant to cover the expense of developing the list of class members in certain circumstances.¹⁴⁸ Also, a court may order defendants to give the notice where they may do so with less difficulty or expense than the representative plaintiffs.¹⁴⁹ Notice may also be ordered after the class is certified and before judgment.¹⁵⁰

Regardless of whether the class action is certified under subdivision (b)(1) or (b)(2), or (b)(3) notice after a judgment in favor of the plaintiffs or after settlement may be very helpful depending on the type of case. If the relief requires the defendant to do something retroactively the class members need to know of their entitlement. Further, even in prospective relief cases the class members may need to know of their right to, for example, apply or reapply for benefits. Without notice, class members are unaware of either the prospective change in their legal status or their right to relief. Notice should inform the class members of the legal ruling, the effect of

¹⁴⁶*Sosna v. Iowa*, 419 U.S. at 397 n.4 (1975); *In re Integra Realty Res. Inc.*, 262 F.3d 1089, 1109 (10th Cir. 2001) (whether notice is required within discretion of court). *But see In Re Temple*, 851 F.2d 1269, 1272 (11th Cir. 1988) (requiring notification):

¹⁴⁷MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, § 21.311

¹⁴⁸*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (usual rule is that plaintiffs must bear the cost of notice).

¹⁴⁹*Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 340, 355-56 (1978); *S. Ute Indian Tribe v. Amoco Prod. Co.*, 2 F.3d 1023, 1029-31 (10th Cir. 1993); *Kan. Hosp. Ass’n v. Whiteman*, 167 F.R.D. 144, 146-47 (D. Kan. 1996). *See also* 7AA WRIGHT ET AL., *supra* note 1, § 1788, at 536-46.

¹⁵⁰*German v. Fed. Home Loan Mortgage Co.*, 168 F.R.D. 145, 160-61 (S.D.N.Y. 1996).

the ruling both prospectively and retrospectively, the mechanism for obtaining retroactive monetary relief if available (with a form to begin the process, if appropriate), the names and addresses of counsel for the plaintiffs, and a phone contact to ask questions or to report problems in obtaining relief. In public benefit cases where the Eleventh Amendment precludes a federal court from ordering retroactive benefits as monetary damages, a *Quern* notice should be sent.¹⁵¹

Unlike the cost of pre-certification notice, the cost of post-judgment notice is properly borne by the defendant. At that point, the court has ruled against the defendant on the merits, and the cost of informing the class can be viewed as a cost that plaintiffs may recover.¹⁵² Whether class notice is required under Rule 23(c)(2) or is requested under Rule 23(d)(2), the prayer for relief in the complaint should include a request for notice of the relief. Likewise, at the time of judgment or settlement, plaintiffs should include a request for notice in the proposed order or settlement document, attach a copy of the actual proposed notice, and detail the proposed or agreed-upon method of distribution.

Notices sent to class members should be drafted in plain English and translated if appropriate.¹⁵³ Individual notification of class members may not be required. Other forms of notice may be utilized such as publication in newspapers, posting on bulletin boards where class members are likely to see the notice (unemployment offices, public housing offices, nurses' stations), inclusion in regular newsletters, and the like—depending on the circumstances of the case.¹⁵⁴

Plaintiffs' counsel should try to obtain the most current addresses possible for all class members. Sometimes this can be done through the defendant's files, for example, welfare department or housing authority records of ongoing recipients. Posting of notices in places where class members are likely to see them or placement of notices in newspapers commonly read by class members may assist counsel in identifying additional class members. Plaintiffs cannot reach every class member, however, but should nevertheless make every effort to locate members and to obtain full relief for each of them. Responding to questions from class members and assisting them in obtaining relief, even when only a small percentage responds, is frequently a major commitment of time and resources by an office and must be carefully orchestrated.

G. COMMUNICATION WITH CLASS MEMBERS

¹⁵¹See *Quern v. Jordan*, 440 U.S. 332 (1979); *Edelman v. Jordan*, 415 U.S. 651 (1974).

¹⁵²*Marcarz v. Transworld Sys. Inc.*, 201 F.R.D. 54, 59 (D. Conn. 2001), and cases cited therein.

¹⁵³For an example of a notice that is translated, see *Smith v. Daimler Chrysler Fin.*, Civ. No. 00-6003 (D.N.J.) found at

http://www.consumerlaw.org/action_agenda/cocounseling/examples_litigation.shtml.

¹⁵⁴See generally Fed. R. Civ. P. 23(c)(2) advisory committee's notes, 2003 amends; 7AA WRIGHT ET AL., *supra* note 1, § 1788 (discussing the mechanics of giving notice, including "unanswered" questions presented by Rule 23(c)(2), such as timing of notice, identity of sender, and allocation of notice costs).

Class counsel frequently wants to communicate informally with potential class members. The question of whether plaintiffs' counsel or defendant's counsel can have access to information identifying class members or communicate with them during litigation arises regularly.

In *Gulf Oil v. Bernard*, the Supreme Court prohibited limits on communications without a clear record and specific findings reflecting that the need for limits outweighed the interference with the rights of the parties.¹⁵⁵ Even in those circumstances justifying a limitation, the Court stated that any court intervention should be carefully and narrowly drawn to minimize interference with First Amendment rights.

Since *Gulf Oil*, courts generally have not imposed case-specific limitations on communications between plaintiffs' counsel and class members. Absent a record of coercive or misleading communications, there would seem to be no basis for restraining communications. Courts, however, have intervened when defendants secretly urged class members to "opt out" of the class action or were making factual misrepresentations to the plaintiff class members.¹⁵⁶

V. Resolution of Class Actions

Class counsel may determine that settlement of the case is appropriate. If a settlement is reached the court will hold a fairness hearing on the settlement and counsel must give notice of the settlement to class members. As in other aspects of class action litigation, the negotiation between the parties will be scrutinized by the court during the fairness hearing. The court will consider any conflicts between named plaintiffs and the class and issues such as attorney fees. Negotiation, notice of settlement and fairness proceedings are discussed below.

A. NEGOTIATIONS

Ethical considerations are somewhat different in class action lawsuits. One commentator pointed out that class action negotiations are at risk of greater collusion between counsel because there is less client control than in individual suits and because the client to whom counsel is accountable may be "amorphous and widespread."¹⁵⁷ Defendants often seek to negotiate plaintiffs' attorney fees as part of the overall settlement. The Supreme Court addressed this issue in *Evans v. Jeff D.*,

¹⁵⁵*Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-02 (1981). See also *Hoffman-LaRoche Inc. v. Sperling*, 493 U.S. 165 (1989) (application of *Gulf Oil* in Age Discrimination in Employment Act case); *Gates v. Cook*, 234 F.3d 221, 227 (5th Cir. 2000) (reversing no-contact order between plaintiffs' substitute counsel and class members).

¹⁵⁶See, e.g., *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1988) (affirming sanctions on defense counsel who engaged in *ex parte* communications with class members seeking their agreement to opt out).

¹⁵⁷Graham C. Lilly, *Modeling Class Actions: The Representative Suit As an Analytic Tool*, 81 NEB. L. REV. 1008, 1032 (2003). See also MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, § 21.61.

which held that this behavior on the part of defense counsel was not unethical.¹⁵⁸ However, the MANUAL FOR COMPLEX LITIGATION suggests that courts reviewing such settlements should examine them for the “fairness of the allocation between damages and attorney fees, noting that “[t]he ethical problem will be eased if the parties agree to have the court make the allocation.”¹⁵⁹

Persons initiating the class action are to be kept apprised of negotiations as they develop. In one disciplinary action, an attorney was suspended and required to pay a fine when he failed to inform his clients about negotiations, entered into a secret agreement in which he was to receive \$225,000 in fees, agreed not to represent anyone with related claims and agreed to keep the agreement confidential. The District of Columbia Court of Appeals found this conduct to have violated eight different ethical rules.¹⁶⁰ In another case, the court cautioned against the inadequacy of lawyer representation and the temptation that lawyers might face, particularly where the individual claims were small, to sell out the class.¹⁶¹

B. NOTICE, SETTLEMENT, AND FAIRNESS PROCEEDINGS

As with many other aspects of class actions, during notice, settlement and fairness proceedings, the court is the protector of the class or putative class. Some courts describe the role of the court at this stage of the proceedings as a fiduciary one.¹⁶² Individual litigants are generally free to compromise their claims and plaintiffs are free to dismiss them voluntarily or, if the complaint has been answered, with the agreement of the defendant under Rule 41(a). Cases filed as class actions generally require more, as detailed in Rule 23(e), and this specific exception is indicated in Rule 41(a).

The 2003 amendments to Rule 23(e) are substantial and are designed to enhance judicial oversight of settlements. Rule 23(e)(1)(A) now provides that court approval is required for “any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a **certified** class.” [Emphasis supplied.] This language was added to “resolve any ambiguity” of the previous language and to make clear that 23(e) applies only to a “certified class” and not to settlements with proposed class representatives that resolve only individual claims.¹⁶³ This

¹⁵⁸*Evans v. Jeff D.*, 475 U.S. 717 (1986). See Chapter 9, Section IV of this MANUAL.

¹⁵⁹MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, §§ 13.24 and 21.7.

¹⁶⁰*In re Hager*, 812 A.2d 904 (D.C. 2002). For a discussion of the ethical challenges in class action representation, see generally Julie Klaus, *Saving the Class Action: Developing and Implementing a Model Rule of Professional Conduct for Class Action Litigation*, 16 GEORGETOWN J. OF LEGAL ETHICS 352 (2003).

¹⁶¹*Greisz v. Household Bank*, 176 F.3d 1012, 1013 (7th Cir. 1999).

¹⁶²See, e.g., *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 279 (7th Cir. 2002) (citing *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3rd Cir. 2001)).

¹⁶³Fed. R. Civ. P. 23(e)(1)(A) advisory committee’s notes, 2003 amends.

amendment reverses the rule in most circuits requiring approval of the settlement of pre-certification class actions.¹⁶⁴

The approval by the court is a two-step process: the settlement is presented to the court, which makes a preliminary fairness evaluation. If the preliminary evaluation does not cast doubt on its fairness, the court directs that notice be given for a formal fairness hearing.¹⁶⁵

Similar to the settlement approval revision, Rule 23(e)(1)(B) requires notice only where the settlement binds the class through claim or issue preclusion and is not required when the settlement only binds the individual class members. This notice must explain the proposed settlement or dismissal to the class members, specify a means for them to file objections to the proposed terms, set forth any deadline for filing such objections, and inform them of the date of the hearing where their objections will be considered.¹⁶⁶ The form of such a notice should be submitted to the court for approval either as part of the settlement agreement itself or by separate motion. As with pre- or postjudgment notices, class members' current addresses must be located if possible and/or notification through some other mechanism must be ensured. However, Rule 23 does not necessarily require the party sending the notice to "exhaust every conceivable method of identification."¹⁶⁷ This notice need not be individualized.

¹⁶⁴Gregory P. Joseph, *2003 Class Action Rules*, in 2 CIVIL PRACTICE AND LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS 1 (A.L.I.-A.B.A. Course of Study 2003). *See also Daniels v. Bursey*, No. 03 C 1550, 2004 WL 2358291, 2004 U.S. Dist. LEXIS 20950, (N.D. Ill. Oct. 19, 2004), *appeal dismissed* 430 F.3d 424 (7th Cir. 2005), *cert. denied sub nom. Koresko v. Bursey*, 126 S. Ct. 2969 (2006) (rejected claim that putative class action cannot be settled on an individual basis without court approval). *But see Shick v. Berg*, Case No., 2004 U.S. Dist. LEXIS 6842 (S.D.N.Y. Apr. 20, 2004), *aff'd* 430 F.3d 112 (2d Cir. 2005) (discussing policy protecting putative class member rights pre-certification). *See also* MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, § 21.61 (after describing potential abuses in pre-certification settlements states: "Use of the court's supervisory authority to police the conduct of proposed class actions under Rule 23(d) may be appropriate in such circumstances").

¹⁶⁵MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, § 21.632-.633.

¹⁶⁶*See In re Diet Drugs Prods. Liab. Litig.*, 226 F.R.D. 498, 517-18 (E.D. Pa. 2005). For an example of a notice found insufficient, see *White v. State of Ala.*, 74 F.3d 1058, 1066 (11th Cir. 1996) (emphasizing that notice must be understandable and rejected one written in legalese so dense even lawyers would have trouble understanding it).

¹⁶⁷*Burns v. Elrod*, 757 F.2d 151, 154 (7th Cir. 1975); *Handschu v. Special Serv. Div.*, 787 F.2d 828, 832-33 (2d Cir. 1986) (publication over period of weeks in several newspapers was sufficient); *Wyatt v. Sawyer*, 105 F. Supp. 2d 1234, 1240 (M.D. Ala. 2000) (posting prominently in living areas of all facilities of mental institution, hand-delivered to residents and to advocates for whom hand-delivered deemed clinically inappropriate, mailed to legal guardians, mailed to consumer and advocacy organizations with statewide constituencies, and published in newspapers).

The court is required to ensure that the settlement is fair, adequate, reasonable, and not based on collusion. The court has a “heavy, independent duty” in making the approval as the settlement process is more susceptible to abuse than the “adversarial process.”¹⁶⁸ As described by the MANUAL FOR COMPLEX Litigation, the role of the court is to be a “skeptical client” as there is “typically no client with motivation, knowledge, and resources to protect its own interests.”¹⁶⁹ The court must balance a variety of factors in reaching this determination. These standards are expressed in various ways by the courts but are fundamentally the same inquiries.¹⁷⁰

The 2003 Amendments added Rule 23(e)(2) requiring the parties to disclose any side agreements to the settlement. This rule seeks disclosure of “related undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. Doubts should be resolved in favor of identification.”¹⁷¹ The court may only approve or disapprove the agreement; the court may not rewrite it.¹⁷²

As indicated above, notice of the proposed settlement should indicate the date and time of a hearing on the motion and invite any objectors to be present.¹⁷³ Rule 23(e)(1)(C) now requires that a court may approve a settlement only after a hearing. Further, Rule 23(e)(3) now requires that in (b)(3) actions, the court may refuse to approve the settlement without giving class

¹⁶⁸*Laube v. Campbell*, 333 F. Supp. 2d 1234, 1238 (M.D. Ala. 2004).

¹⁶⁹MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* at note 1, § 21.61

¹⁷⁰*Compare Rutter and Willbanks Corp. v. Shell Oil Corp.*, 314 F.3d 1180, 1188 (10th Cir. 2002) ((1) whether fairly and honestly negotiated; (2) whether serious questions of law and fact exist and place ultimate outcome in doubt; (3) whether value of immediate recovery outweighs mere possibility of future relief after protracted and expensive litigation; and (4) whether parties judge settlement as fair and reasonable), *with D’Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001) ((1) complexity, expense, and likely duration of litigation; (2) reaction of class to settlement; (3) stage of proceedings and amount of discovery completed; (4) risks of establishing liability; (5) risks of establishing damages; (6) risk of maintaining class action through trial; (and in damage actions), (7) ability of defendants to withstand a greater judgment; (8) range of reasonableness of settlement fund in light of best possible recovery; and (9) range of reasonableness of settlement fund to possible recovery in light of all litigation risks). *See also* MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, § 21.62 (setting forth nonexhaustive list of fifteen potentially relevant factors, along with a list of criteria courts have utilized in weighing those factors).

¹⁷¹Fed. R. Civ. P. 23(3)(2) advisory committee’s notes 2003 amends.

¹⁷²MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* at note 1, § 21.61

¹⁷³As indicated, the reaction of class members may be considered as a factor in the approval process. *See supra* note 181___ and accompanying text. In one instance, the opposition by 70 percent of a subclass led the Fifth Circuit to reject a settlement. *Pettaway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157, 1217 (5th Cir. 1978). The 2003 Amendments now require that any objections to the settlement may only be withdrawn with the court’s approval. Fed. R. Civ. P. 23(e)(4)(B).

members another opportunity to opt-out. Another important 2003 amendment was the addition of Rule 23(h) setting forth in detail the requirements necessary for a court to award attorney fees in class actions.

The standard of review for decisions regarding settlements is “abuse of discretion.”¹⁷⁴ However, a review of an interpretation of the agreement is *de novo*.¹⁷⁵ There was a split in the circuit courts as to whether one who objected to the settlement needed to seek intervention status in order to appeal an approval. The Supreme Court’s decision in *Devlin v. Scardelletti*¹⁷⁶ resolved the matter. *Devlin* held that because the objector was a member of the class bound by the agreement, he had standing to appeal.¹⁷⁷

¹⁷⁴*Joel A. v. Giuliani*, 218 F.3d 132, 139 (2d Cir. 2000).

¹⁷⁵*Waters v. Int’l Precious Metals Corp.*, 237 F.3d 1273, 1277 (11th Cir. 2001)

¹⁷⁶*Devlin v. Scardelletti*, 535 U.S. 1 (2002).

¹⁷⁷For an examination of the import of this holding, which is outside the scope of this chapter, see *Leading Cases, II. Federal Jurisdiction and Procedure*, 116 HARV. L. REV. 332 (2002).