

CHAPTER 7 CLASS ACTION

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 numerous areas. Now organizations funded by the Legal Services Corporation (LSC) are barred from bringing or participating in class actions and must explore other approaches, such as declaratory judgment actions.²

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, how to define and manage the class action, and settlement issues.³

Advocates should be aware that significant changes in Rule 23 took effect on December 1, 2003. This chapter touches briefly on some of these changes, but any attorney who is or will be involved in class action litigation should review the new rules with great care. Also, Congress is considering the Class Action Fairness Act of 2004. The Act is not discussed here, but attorneys contemplating interstate class actions should become familiar with the proposed legislation and periodically check whether it has been enacted into law.

I. Whether to Bring a Class Action

Besides determining whether a case can be brought, 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 thought through and discussed with the potential class representative. Counsel must determine whether the requirements for a class action can be met.⁴ Then counsel must consider several factors in deciding 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 affect the process of 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 a factor in deciding whether to bring any case, whether it is 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.⁵ It will decide the law for all class members. If plaintiffs win, this is clearly an advantage: relief will benefit all affected individuals, including people with very small claims who might not otherwise sue for one reason or another. However, if plaintiffs lose, the judgment has claim-preclusive effect on all class members and those in privity with them unless the absent class member is subsequently able to establish lack of jurisdiction or inadequate representation. Lack of notice in a Rule 23(b)(1) or 23(b)(2) class (where notice is not required) does not defeat the res judicata effect of the judgment.⁶

Thus 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 (e.g., county, state, regional, or national class). Assessing whether plaintiffs will win 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 issue presented in the case. If the courts in the jurisdiction are not sympathetic to issues

¹ Excellent 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 (3d ed. 1992 & 2004 Supp.); 7-7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE (3d ed. 1998 & 2004 Supp.); JAMES WILLIAM MOORE ET AL., 3B MOORE'S FEDERAL PRACTICE (3d ed. 1997 & 2004); 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); National Consumer Law Center, Consumer Class Action Symposium (Oct. 2002, Atlanta, Ga.) (motions, reports, and other documents available for purchase from consumer law center.); MANUAL FOR COMPLEX LITIGATION (THIRD) §§ 3861 *et seq.* (1995). A very useful website is www.classactionreports.com.

² See Chapter 9, Section III (declaratory judgments), and Chapter 1, Section III.B.1 (impact litigation under the restrictions), of this MANUAL.

³ 42 U.S.C. § 2996e(d)(5).

⁴ These requirements are discussed below.

⁵ The 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. Federal Reserve Bank of Richmond*, 467 U.S. 867, 880 (1984) (distinguishing between individual and class claims).

⁶ Fed. R. Civ. P. 23 (advisory committee's note). Lack of notice in a Rule 23(b)(3) class does deprive the ultimate judgment of preclusive effect.

traditionally raised in legal services practice, bringing a case as an individual action and leaving class litigation on the issue to another jurisdiction might be better.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 cases may be brought on behalf of individuals; this results in duplicative efforts. 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 To add human and economic resources, consideration should be given to seeking cocounsel from private law firms.

C. EFFECTS ON THE LITIGATION PROCESS

The third set of considerations relate to whether having a class certified affects the process of bringing the case to judgment. The most important of these considerations is the likelihood of the named plaintiff's case being resolved, and thereby needing a class to avoid mootness.⁹ However, if possible mootness is the only reason to bring a class action, counsel should assess whether mootness could be avoided some other way, such as by joining several plaintiffs or by bringing a claim for damages.¹⁰

In a class action, a plaintiff class may be allowed much broader discovery than an individual party. This is particularly true in a case challenging a pattern and practice of conduct rather than a written policy.¹¹ However, filing a case as a class action may also result in more vigorous discovery than an individual party against the named plaintiff, 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 totally aware of the implications and potential conflicts involved in serving as a class representative.¹² Likewise, in Rule 23(b)(3) actions, defendants may attempt to direct discovery at the absent class members.¹³ Such discovery can substantially delay relief.

Filing a case as a class action may allow more opportunities for media exposure and public education or 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 could harm the named plaintiff's case. Named representatives need to be prepared to have the glare of publicity focused on them personally.¹⁴

Consideration should be given to the likelihood of appeal should the plaintiff be successful. In many instances, defendants are more likely to appeal an adverse judgment in a class action than a loss in an individual case. This issue needs to be discussed with the named plaintiff(s).

D. EFFECTS ON RELIEF

Several issues relating to relief are critical to the decision about filing a class action. The first consideration relates to requests for preliminary relief. Bringing a class action creates an initial conflict about whether preliminary relief should be requested on named plaintiff's behalf or for the entire class. In cases where the plaintiff requires an immediate reme-

⁷ E.g., 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 *Palozzi v. Allstate Life Insurance Co.*, 198 F.3d 28 (2d Cir. 1999) (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.*

⁹ See Chapter 3, Section II, of this MANUAL.

¹⁰ Bringing 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.

¹¹ See, e.g., *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989).

¹² See SHELDON, *supra* note 1, ch. 7. 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.

¹³ See Note, *Obtaining Discovery from Absent Class Members in Federal Rule of Civil Procedure 23(b)(3) Class Actions*, 30 DRAKE LAW REVIEW 347 (Winter 1980–81), and cases cited therein. See also Debra Lyn Bassett, *Pre-Certification Communication Ethics in Class Actions*, 36 GEORGIA LAW REVIEW 353 (2002) (discussing discovery from absent class members).

¹⁴ See discussion of “choosing plaintiffs” *infra* Section III.A.

dy, a class action may not be a viable alternative. This is an issue that must be resolved with the named plaintiff before deciding whether to file the case as a class action. Even if preliminary relief is requested only for the named plaintiff, 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.

Counsel must also determine whether final relief on behalf of the class is necessary or beneficial. A court may not grant relief to the class without certification. Thus the court may not order that notice be posted and sent to all class members either to inform them of the judgment or to instruct them in procedures to obtain individual relief based on the judgment. Likewise, without certification, class members may not enforce the judgment or decree by contempt.

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.¹⁵ But tolling can be denied if plaintiffs' claims are not stated with enough specificity to put the defendants on notice of potential liability.¹⁶

Potential problems with relief in bringing a class action also arise. As noted, filing as a class action may delay relief for the named plaintiff, both on a preliminary and permanent basis. In most cases it will serve as a deterrent to the defendant settling the individual plaintiff's case.

Litigation strategy and settlement negotiations may create ongoing potential conflicts between the named plaintiff and the class. Once a case is filed as a class action, any settlement or dismissal of the case must be approved by the court even if the case is not certified.¹⁷ If plaintiffs win the action, issues then arise as to representation of class members for individual relief and distribution of benefits or damages.¹⁸ Depending upon the relief obtained in the case, regular and lengthy monitoring of the decree or judgment on behalf of the class may be required.¹⁹

These problems are certainly not insurmountable, but they must be carefully thought through by the named plaintiff and by counsel before a commitment to represent a class. Litigation strategy and settlement negotiations may create ongoing potential conflicts between the named plaintiff and the class. After an in-depth discussion with the named plaintiff to evaluate these factors, a retainer should be signed and should detail the agreements made on settlement, negotiation, attorney fees, commitments regarding appellate representation, and provision for terminating representation.²⁰

E. LIMITATIONS ON SETTLEMENT OF CLAIMS BY CLASS REPRESENTATIVES

Settlements are controlled by the court in order to protect the rights of all class members. However, in determining whether to bring a class action, the limitations on settlements by named plaintiffs must be discussed before the certification of 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.²¹ The court is responsible for seeing that the named plaintiffs do nothing which prejudices the members of the class sought to be represented.²² One court described class actions as "an awkward device, requiring careful judicial supervision, because the fate of the class . . . is to a considerable extent in the hands of a single plaintiff (or handful of plaintiffs . . .) whom the other members . . . may not know and who may not be able or willing to be an adequate fiduciary of their interests."²³ Named representatives accordingly must proceed with caution. However, the circuits are split regarding whether Rule 23(e) specifically applies in the precertification context and whether notice of the settlement must be given to the putative class members.²⁴

¹⁵ *Devlin v. Scardelletti*, 536 U.S. 1 (2002) (Scalia, J. dissenting); *Bowen v. New York*, 476 U.S. 467 (1986); *Crown Cork and Seal Co. v. Parker*, 462 U.S. 345 (1983); *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974).

¹⁶ *Davis v. Bethlehem Steel Corp.*, 600 F. Supp. 1312 (D. Md. 1985), *aff'd*, 769 F.2d 210 (4th Cir. 1985).

¹⁷ Fed. R. Civ. P. 23(e). See discussion of settlement *infra*.

¹⁸ In some cases, representation for individual relief can be spread through a number of legal aid programs (e.g., all programs in the state for a statewide class action), or relief can be framed as a presumptive flat amount for each class member with the right to challenge the amount.

¹⁹ Some of these cases continue for decades. See, e.g., *Wyatt v. Sawyer*, 105 F. Supp. 1234 (M.D. Ala. 2000) (discussing proposed settlement in a mental health case that lasted over thirty years).

²⁰ SHELDON, *supra* note 1, at App. A.

²¹ See, e.g., *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).

²² This is also the basis for Rule 23(d). See also Rule 41(1) ("subject to the provisions of Rule 23(e)").

²³ *Culver v. City of Milwaukee*, 277 F.3d 908, 910 (7th Cir. 2002).

²⁴ The Fourth Circuit held that Rule 23(e) did not apply to precertification settlements, thus giving the class representatives more power over dismissing claims. *Shelton v. Pargo Inc.*, 582 F.2d 1298, 1305 (4th Cir. 1978). The Ninth Circuit disagreed with *Shelton* and held that any settle-

II. Rule 23 Class Certification Requirements

Rule 23(a) sets forth four requirements for class certification, all 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) Rule 23(b)(1) addresses the risk of either inconsistent adjudications or adjudication of individual interests, which would as a practical matter be dispositive of the interests of others; (2) Rule 23(b)(2) focuses on the behavior of defendants who acted or refused to act on grounds generally applicable to the class; and (3) Rule 23(b)(3) requires that the common questions of law or fact predominate over any individual class member's questions and that a class action is superior to other methods of adjudication.

A court's analysis of the requirements of Rule 23(a) and (b) is described as rigorous.²⁵ However, courts are not to consider the merits of the plaintiff's underlying claim in the analysis.²⁶ The plaintiff has the burden of proving that the requirements of Rule 23 are met.²⁷ The standard of review of the district court's decision to certify or fail to certify the class is "abuse of discretion."²⁸ A court abuses its discretion if its certification order is premised on legal error.²⁹ At least one court is less deferential to the denial of certifications than it is to the granting of them.³⁰

Before filing a case as a class action, counsel should think through how the case meets each of the Rule 23(a) requirements and which prong(s) of Rule 23(b) are met. The complaint should then plead specifically how the case meets each of the Rule 23 requirements rather than merely parrot the language of Rule 23 in a rote fashion. 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.³¹

A. RULE 23(a) REQUIREMENTS

The four requirements for class certification 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.³² The courts generally express this principle by applying no strict numerical test for determining impracticality of joinder. The court must examine the specific facts of each case.³³

ment of a class action fell under Rule 23(e) even without certification. *Diaz v. Trust Territory of Pacific Islands*, 876 F.2d 1401, 1407–8 (9th Cir. 1989). This may be the rule in the Third Circuit. See *In Re Nazi Era Cases Against German Defendants Litigation*, 198 F.R.D. 429, 438–39 (D. N.J. 2000) (citing with approval old Third Circuit cases in finding Rule 23(e) applied). This may also be the rule in the Fifth Circuit. See *Larry James Oldsmobile-Pontiac-GMC Truck Co. Inc. v. General Motors Corp.*, 175 F.R.D. 234, 237–38 (D. Miss. 1997). The Eleventh Circuit did not address the issue but specifically set it aside for future review. *Rice v. Ford Motor Co.*, 88 F.3d 914, 919 (11th Cir. 1996). But see *Roper v. Conserve Inc.*, 578 F.2d 1106, 1110 (5th Cir. 1978), where the court held, in the context of postcertification, that named plaintiffs were not allowed to terminate their duties by taking satisfaction; "a cease-fire may not be pressed upon them by paying their claims."

²⁵ *General Telephone Company of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). See also *Baffa v. Donaldson, Lufkin and Jenrette Securities Corp.*, 222 F.3d 52, 58 (2d Cir. 2000).

²⁶ *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177–78 (1974). But see *Coopers and 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."). See also *Kirkpatrick v. Bradford and 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").

²⁷ *Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002).

²⁸ *Paton v. New Mexico Highlands University*, 275 F.3d 1274, 1277 (10th Cir. 2002).

²⁹ *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001).

³⁰ *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 291 (2d Cir. 1999).

³¹ L.R. 23.1 (A)(2) (N.D. Fla.); L.R. 23.1 (b)(2)(A) (E.D. Pa.).

³² "Numerosity" is the term generally used to identify this requirement. However, as seen *infra*, classes of various numbers have been certified. This requirement might be more appropriately termed "impracticality." See, e.g., *Anderson v. Department of Public Welfare*, 1 F. Supp. 2d 456, 461 (E.D. Pa. 1998).

³³ This appears to be the generally accepted formulation of this principle. *Robidoux v. Celani*, 987 F.2d 931, 935–36 (2d Cir. 1993); *Stewart v. Abraham*, 275 F.3d 220, 226–27 (3d Cir. 2001) (quoting JAMES WM. MOORE ET AL., 5 MOORE'S FEDERAL PRACTICE § 23.22[3][a] (3d ed. 1999)); *Mullen v. Treasure Chest Casino LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (quoting NEWBERG ON CLASS ACTIONS § 3.05 at 3-25 (3d ed. 1992)); *In re American Medical System*, 75 F.3d 1069, 1079 (6th Cir. 1996).

Although a large number of putative class members may suffice to prove numerosity, other factors are considered in determining whether joinder is impracticable (not impossible).³⁴ These factors are ease of identification of 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.³⁵

Class size in some cases may be proven by appending to the motion for class certification public documents, census data, or responses to Freedom of Information Act requests. Affidavits at other times can establish the numbers in the class. If opposing parties have information regarding the size of the class, consideration should be given to filing a discovery request at the same time as 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.

If the size and impracticality of joinder appear to be a problem in a given case, adjusting the class definition may resolve the issues by, for example, eliminating subclasses (each subclass must independently meet the numerosity requirements) or including persons who will be affected in the future.³⁶

2. Commonality

Plaintiffs' grievances generally must share a common question of law or fact.³⁷ Rule 23 does not require that all questions of law or all questions of fact be common to all class members.³⁸ Rather, at least one question of law or fact must be common to the proposed class.³⁹ Other circuits require two.⁴⁰ Relief requiring individual determinations does not defeat class certification.⁴¹

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 Co. of the Southeast 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."⁴² 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."⁴³ 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.⁴⁴ As with commonality, factual differences do not defeat typicality if the course of conduct and the claims are based on the same legal theory.⁴⁵ Typicality can be satisfied only if the named plaintiff has the standing to bring the claim.⁴⁶

³⁴7A WRIGHT ET AL., *supra* note 1, §§ 1762, at 159; 3B MOORE'S FEDERAL PRACTICE, *supra* note 1, ¶ 23.05[3] at 23-156. See *Robidoux*, 987 F.2d at 936.

³⁵Classes of various sizes have been certified: *Peoples v. Sebring Capital Corp.*, 2002 WL 406979 (N.D. Ill. 2002) (certifying a class of eleven individuals); *Grant v. Sullivan*, 131 F.R.D. 436 (M.D. Pa. 1990) (certifying a class of 14); *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. United States*, 2000 WL 1460801 (D. Idaho 2000) (certifying a class of 200 landowners); *Loma Linda Medical Center v. Farmers Groups Inc.* 1995 WL 363441 (E.D. Cal. 1995) (certifying a class of 626); *Immigrant Assistance Project v. Immigration and Naturalization Service*, 306 F.3d 842 (9th Cir. 2002) (certifying a class of 11,000). For a review of earlier cases where class of less than 100 were certified; see *Jordan v. County of Los Angeles*, 669 F.2d 1311 (9th Cir.), *vacated on other grounds*, 459 U.S. 810 (1982).

³⁶Courts 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. Louisiana State University*, 213 F.3d 858, 868 n. 11 (5th Cir. 2000).

³⁷*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).

³⁸See, e.g., *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001).

³⁹*Hart v. Valdez*, 186 F.3d 1280, 1288 (10th Cir. 1999); *Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994).

⁴⁰*Applewhite v. Reichhill Chemical Inc.*, 67 F.3d 571, 573 (5th Cir. 1995); *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993).

⁴¹*Savino v. Consumer Credit Co.*, 173 F.R.D. 346 (E.D. N.Y. 1997) (certifying a class which had received similar debt collection letters despite individual differences in determination of injuries and damages).

⁴²*General Telephone Co. of the Southeast v. Falcon*, 457 U.S. 147, 156 (1982) (quotation omitted).

⁴³*Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002).

⁴⁴*Prado-Steiman v. Bush*, 221 F.3d 1266, 1278-79 (11th Cir. 2000).

⁴⁵*Stewart v. Abraham*, 275 F.3d 220, 227-28 (3d Cir. 2001) (certifying class challenging city's rearrest policy). See also *Piazza v. Ebsco Industries Inc.*, 273 F.3d 1341, 1351 (11th Cir. 2002) (strong similarity of legal theories satisfies typicality despite substantial factual differences).

⁴⁶*Piazza Inc.*, 273 F.3d at 1351.

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.⁴⁷ By assuring adequacy of representation, Rule 23 permits class judgments to bind absent class members.⁴⁸

The requirement of adequate representation focuses on both the named plaintiffs and their counsel. 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 plaintiff and any portion of the class might disagree.⁴⁹ Class certification is improper when the interests of the representative party and the class conflict. Thus a class was decertified upon a finding that the claims of the named representatives were not aligned with those of the other class members when many members suffered from completely different injuries due to their asbestos exposure.⁵⁰ Defendants not uncommonly attempt to defeat class certification by making allegations of antagonistic interests between the named representatives and the remainder of the class.⁵¹ Conflicts impairing certification 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 on the conflict.⁵² Similarly a judge may order notice to all class members informing them of the right to intervene to oppose the named plaintiff's position.⁵³ Or the judge may define the class in a more limited way to avoid conflicts.⁵⁴

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.⁵⁵ 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.⁵⁶

Zeal and competency of counsel for the class are initially determined on the basis of the experience of either the lawyer or the legal organization for whom the lawyer works and the quality of initial pleadings.⁵⁷ For example, failing to move promptly for class certification could be viewed as evidence of lack of adequate class representation.⁵⁸ Sometimes the court

⁴⁷ See 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 Ad Med Systems Inc.*, 75 F.3d 1069, 1083 (6th Cir. 1996) and *Broussard v. Meineke Discount Muffler Shops Inc.*, 155 F.3d 331, 338 (4th Cir. 1998) (explaining the class action premise that, because litigation by representative parties adjudicates basic due process rights of all class members, named plaintiffs must possess undivided loyalty to absent class members).

⁴⁸ *Hansberry v. Lee*, 311 U.S. 32 (1940). For a good explanation of this case, see *Horton v. Goose Creek Independent School District*, 690 F.2d 470, 486–87 (5th Cir. 1982). See also *Richards v. Jefferson Co., Alabama*, 517 U.S. 793, 800–801 (1996).

⁴⁹ But see *General Telephone Company of Southwest*, 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).

⁵⁰ *Amchem Products 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.)

⁵¹ See, e.g., *Diaz v. Hillsborough Co. Hospital Authority*, 165 F.R.D. 689, 694 (M.D. Fla. 1996) (where the court rejected defendant's assertion that named plaintiff's request to review medical records was effort to publicize confidential information).

⁵² See, 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).

⁵³ *Horton v. Goose Creek Independent School District*, 690 F.2d 470, 487 (5th Cir. 1982) (explaining options open to a district court).

⁵⁴ See, e.g., *Fabricant v. Sears Roebuck*, 202 F.R.D. 306, 308 (S.D. Fla. 2001).

⁵⁵ *Harrison v. Chicago Tribune Co.*, 992 F.2d 697, 704 (7th Cir. 1993). Neither did this named plaintiff demonstrate that she was a member of the class she purported to represent.

⁵⁶ *Horton*, 690 F.2d at 485 n.26.

⁵⁷ *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).

⁵⁸ *East Texas Motor Freight System v. Rodriguez*, 431 U.S. 395, 405 (1977); *In re Arakis Energy Corp. Securities Litigation*, 1999 WL 1021819 (E.D.N.Y. 1999) (finding small delay insufficient to deny certification and collecting cases discussing issue).

examines the conduct of counsel in other class actions to determine if the representation is adequate.⁵⁹ Having more than one counsel in class actions is advisable as a rule especially if one has never handled a class action before the one at hand. These kinds of cases, like other complex litigation, require mentoring by more experienced counsel. 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 the evidence of inadequate representation in discovery or at trial.⁶⁰

The Supreme Court has made recent significant modifications of Rule 23; they became effective on December 1, 2003, because Congress did not amend or reject them. One such change is a new Federal Rule of Civil Procedure 23(g), which requires the court to appoint class counsel and mandates that counsel fairly and adequately represent the class. Proposed Rule 23(g)(1)(c) lists the factors that the court must consider in appointing class counsel. They include experience, knowledge of law, and resources that counsel will commit to representing the class. Cases dealing with the implied request of adequate class counsel should serve as guidance for the interpretation of the new explicit standard.⁶¹

B. IMPLICIT REQUIREMENTS

The courts added some "implicit" requirements in order to obtain class certification. These are that (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 for a court to be able to identify all members of the class by using objective criteria.⁶² 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 does not certify the class.⁶³ Even if the class is defined in terms of objective criteria, those criteria may be so difficult for the court to ascertain that class definition is possible but not feasible. If class definition is not feasible, the court may refuse to certify the class.⁶⁴

The class may not be too broad either. That is, if a class is so broad that it includes members who would not have standing to bring an action individually, the court does not certify the class. A court, for instance, would not certify a class comprised of all Latino inmates in an action based upon the lack of prison staff capable of communicating with inmates in Spanish because the class would include Latino inmates who could speak English and were therefore not injured by the lack of Spanish-speaking staff members. Such a class would be overbroad and would include members without standing to sue.⁶⁵

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.⁶⁶

⁵⁹See, e.g., *Armstrong v. Chicago Park District*, 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).

⁶⁰*East Texas Motor Freight System*, 431 U.S. at 405.

⁶¹See, e.g., *In re "Agent Orange" Product Liability Litigation*, 800 F.2d 14 (2d Cir. 1986).

⁶²See, e.g., *Garrish v. United Automobile, Aerospace, and Agricultural Implement Workers of America*, 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 New York*, 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) (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).

⁶³*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 *DeBreaecker v. Short*, 433 F.2d 733 (5th Cir. 1970) (class definition "active in peace movement" too vague for objective criteria to identify class).

⁶⁴*Mueller v. CBS Inc.*, 200 F.R.D. 227 (W.D. Pa. 2001) (declining to certify class where numerous individual determinations necessary to identify class members).

⁶⁵*Pagan v. Dubois*, 884 F. Supp. 25 (D. Mass. 1995).

⁶⁶See *Probe v. State Teachers' Retirement System*, 780 F.2d 776, 780 (9th Cir. 1986); *Mayburg v. Heckler*, 574 F. Supp. 922 (D. Mass. 1984), vacated on other grounds, *Mayberg v. Secretary of Health and Human Services*, 740 F.2d 100 (1st Cir. 1984).

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), or it can strike the class allegations and allow the named members to proceed individually.⁶⁷ Courts do not allow a class action to proceed without a precisely defined class because they must know the precise identity of the class before they can analyze whether that class meets the other requirements for certification under Rule 23. A court must have a precise definition of a class in order to be able to determine which individuals are entitled to notice or relief as well as which individuals are bound by judgment.

2. Representatives Who Are Part of the Defined Class

A class must also have named representatives who are members of that class in order for the class to obtain certification. 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 discriminated.⁶⁸

A problematic issue for courts in 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. 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. Other courts create an exception to this rule for associations that have the authority to protect their members' interests or for associations created for the purpose of protecting their members' interests. The Eighth Circuit takes a different approach: 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.⁶⁹

Overall case law regarding whether a named representative is a member of a class is very fact-specific, and courts vary in how strictly they apply the requirement.

3. A Live Claim

Courts require that a claim be live, not moot, in order for the class to obtain certification. If it is not a live claim, the court dismisses 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.⁷⁰ 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.⁷¹

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.⁷²

C. RULE 23(b) REQUIREMENTS

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 used an example 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, individ-

⁶⁷ *Clay v. American Tobacco Co.*, 188 F.R.D. 483, 490 (S.D. Ill. 1999).

⁶⁸ *East Texas Motor Freight System*, 431 U.S. at 403–4; 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).

⁶⁹ *Smith v. Board of Education of Morrilton School District No. 32*, 365 F.2d 770 (8th Cir. 1966).

⁷⁰ *Sosna v. Iowa*, 419 U.S. 393 (1975).

⁷¹ *U.S. Parole Commission v. Geraghty*, 445 U.S. 388 (1980). See Chapter 3, Section II, of this MANUAL for further guidance on this point.

⁷² *Gerstein v. Pugh*, 420 U.S. 103 (1975).

ual litigation 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.⁷³

Generally the prospect of inconsistent injunctive relief satisfies this rule while the possibility of varying monetary awards does not.⁷⁴ At the same time the courts have not fully explained the apparent difficulty such plaintiffs seeking inconsistent injunctive relief would have to establish commonality and typicality.

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.” Its suggested use by the Advisory Committee is:

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.⁷⁵

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 Corp.*⁷⁶ The Court rejected the (b)(1)(B) class in a manner suggesting added rigor in exploiting this device.

2. Rule 23(b)(2) Classes

Class certification under Rule 23(b)(2) is far more common. Under Rule 23(b)(2), the class must show that the opponent 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.⁷⁷

In requesting Rule 23(b)(2) certification for injunctive relief, remember that the named plaintiff must have standing for each type of relief requested.⁷⁸ Thus, when the plaintiff does not have standing to seek injunctive relief, Rule 23(b)(2) class certification is denied.⁷⁹ 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.⁸⁰

Rule 23(b)(2) class members require no notice and have no opt-out rights.⁸¹ Consequently the question of whether the request for injunctive or declaratory relief predominates over other monetary relief sought is important. Divergent views on this point surfaced in discrimination cases. In *Wetzel v. Liberty Mutual Insurance Co.*, for example, individual equitable back pay was considered incidental to injunctive relief, thereby permitting certification of a (b)(2) class.⁸²

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 must predominate over any individual questions and

⁷³ *Lantz v. New York Central Railroad Co.*, 37 F.R.D. 69, 100 (N.D. Ohio 1966).

⁷⁴ See, e.g., *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180 (9th Cir.), amended by 273 F.3d 1266 (9th Cir. 2001).

⁷⁵ AMENDMENTS TO RULES OF CIVIL PROCEDURE SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS RULES OF CRIMINAL PROCEDURE, 39 F.R.D. 69, 102 (Proposed Official Draft 1966).

⁷⁶ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

⁷⁷ *Stewart v. Abraham*, 220 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).

⁷⁸ *Sosna v. Iowa*, 419 U.S. 393, 403 (1975).

⁷⁹ *James v. City of Dallas*, 254 F.3d 551, 563 (5th Cir. 2001).

⁸⁰ *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1240 n.3 (9th Cir. 1998).

⁸¹ The proposed amendment to Federal Rule of Civil Procedure 23(c), however, provides that the court “may” direct appropriate notice to the class.

⁸² *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.3d 239 (3d Cir.), cert. denied, 421 U.S. 1011 (1975); see also *Richardson v. Byrd*, 709 F.2d 1016 (5th Cir. 1983).

that a class action must be superior to other methods for fair and efficient resolution of the conflict.⁸³ The district court has broad discretion in determining whether common questions predominate and in determining whether a class action is manageable.

- Rule 23(b)(3) class actions are expensive and time-consuming, requiring
- notice to all class members;⁸⁴
 - opportunity for opt-out;
 - frequently more expensive and extensive discovery; and
 - individual representation postjudgment.

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).

If the case is primarily one for damages, legal aid offices may be precluded from bringing it under the LSC regulation prohibiting representation in fee-generating cases.⁸⁵

D. TITLE VII CASES

Courts consistently hold that Rule 23(b)(2) is the appropriate vehicle for class certification in Title VII cases.⁸⁶ In such cases, the courts certify classes under Rule 23(b)(2) pending a determination of liability. If the court determines that defendant is liable, it may later require individualized opt-out notice under Rule 23(b)(3) before determining back pay.⁸⁷

The 1991 amendments to the Civil Rights Act drastically changed this approach. The amendments fundamentally changed both the procedures and remedies to Title VII litigants: plaintiffs are permitted to recover compensatory damages (42 U.S.C. § 1981a(a)(1)); compensatory damages include relief for a wide range of losses including future pecuniary losses, emotional pain, suffering, and the like for nonpecuniary damages (§ 1981a(b)(3)); punitive damages (§ 1981a(b)(1)(2)) and a right to a jury trial on compensatory and punitive damages by either party (§ 1981a(c)) are modified.

Allison v. Citgo Petroleum Corp. was the first case to address the effect these statutory changes had on the utilization of Rule 23.⁸⁸ The court held that compensatory relief was not incidental in Title VII cases, and class certification under Rule 23(b)(2) was therefore not appropriate.⁸⁹ 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.”⁹⁰

III. Defining and Managing a Class

Select a class representative(s) carefully to avoid adding procedural problems and to present 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.

A. SELECTION OF NAMED PLAINTIFF(S)

Already mentioned are the following factors in evaluating a class representative: potential conflicts between the interests of the named plaintiff and the putative class; the possibility of early mootness of the named plaintiff’s claim; the ability of the plaintiff to cooperate with and withstand successfully anticipated discovery; the standing of the named plaintiff for each type of relief sought; and the exhaustion of administrative remedies if necessary.

Consideration should also be given to the potential media exposure, possible retaliation by defendants, and an assessment of the plaintiff’s ability to withstand such pressures. As in any other situation, the client must be open with counsel about any “skeletons in the closet” to be factored in the class decision and anticipated if there is to be media coverage. The sympathetic nature of the plaintiff should also be assessed.

⁸³See generally 7A WRIGHT ET AL., *supra* note 1, § 1777. The relevant considerations for so determining are listed in Federal Rule of Civil Procedure 23(b)(3)(A)–(D).

⁸⁴The proposed amendments make significant changes in the notice required in (b)(3) class actions.

⁸⁵45 C.F.R. § 1609.3–.4.

⁸⁶See, e.g., *Richardson v. Byrd*, 709 F.2d 1016 (5th Cir. 1983).

⁸⁷*Eubanks v. Billington*, 100 F.3d 87, 96 (D.C. Cir. 1997) (adopting hybrid approach, certifying (b)(2) class for declaratory and injunctive relief and (b)(3) class for monetary claims, effectively granting (b)(3) protections including right to opt out at monetary relief stage).

⁸⁸*Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998).

⁸⁹*Id.* at 411–19.

⁹⁰*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). *But see Robinson v. Metro-North Commuter Railroad Co.*, 267 F.3d 147 (2d Cir. 2001) (disagreeing with Allison).

B. DEFINING THE CLASS

The class may be defined or redefined at any time during the lawsuit either on motion of either party or by the court.⁹¹ Thus the initially carefully drafted definition should be reevaluated as discovery proceeds or as specific claims or relief in the case develop. Redefinition should be requested if appropriate.

Class definition includes consideration of the time frame for inclusion of individuals, the geographic size of the class, the injury experienced by the class as a whole, any exhaustion requirements, and relief requested. The effect on other possible cases of the issues that might be raised, especially with respect to “geographic size,” should be considered. If someone is 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. The relationship to other similar cases should be carefully considered.

The applicable statute of limitations determines whether to define the class to include individuals harmed before the filing of the case and the date to select in seeking such inclusion. However, 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.⁹² The existence of affirmative defenses, such as a statute of limitations, does not bar class certification.⁹³ Other factors to be considered are when defendant’s challenged action took place and, if it continues, whether retroactive relief can be obtained for class members in light of the Eleventh Amendment or difficulties locating them. Class membership may also include individuals who may be harmed in the future.⁹⁴

Geographic definitions also should be carefully considered. While expanding the geographic scope may help in numerosity, complications can arise with similarity of facts and law, management of the class, and relief. Nationwide class actions are certainly permissible.⁹⁵ They might be helpful in avoiding inconsistent applications of policy.

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 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 have been 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. At the same time, if there is a wholesale attack on conditions of confinement throughout the institution, then the broader definition is appropriate.

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.⁹⁶ The type of relief requested may have an impact on the class definition. For example, the class may have to be defined as having exhausted administrative remedies in order to obtain relief.⁹⁷

Reviewing the type of injury inflicted upon class members may make apparent that (1) different legal theories support relief for part, but not all, of them; (2) different injuries are being suffered 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. In the first two scenarios, subclasses would probably help clarify the issues and ensure that the

⁹¹ See, 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).

⁹² See, e.g., *Hoxworth v. Blinder, Robinson, and Co.*, 980 F.2d 912, 924 (3d Cir. 1992) (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).

⁹³ See, e.g., *Smilow v. Southwestern Bell Mobile System Inc.*, 323 F.3d 32, 39–40 (1st Cir. 2003).

⁹⁴ Not uncommonly future class members are 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). See also *Armstead v. Coler*, 914 F.2d 1464, 1465 (11th Cir. 1990).

⁹⁵ For a recent example, see the following definition of “class” in a nationwide class action attacking Nissan’s financing scheme: “All 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). 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 is likely to pass legislation significantly affecting the interstate class action.

⁹⁶ See *Kline v. Security Guards Inc.*, 196 F.R.D. 261, 265–69 (E.D. Pa. 2000), 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.

⁹⁷ See *Kildare v. Saenz*, 325 F.3d 1078 (9th Cir. 2003) (requiring exhaustion where, although plaintiffs’ complaint alleged that social security determinations suffered from “systemic” deficiencies, the court did not agree); *But see Bowen v. City of New York*, 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

claims of the named representative are typical of the claims of the class. When conflicts arise, subclasses represented by independent counsel would be required in most cases. Remember that subclasses must independently meet all of the Rule 23 requirements.⁹⁸

C. PRECERTIFICATION DISCOVERY

The issues of precertification discovery have two aspects: (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

The *Manual for Complex Litigation* suggests that the determination of whether Rule 23's requirements are met should generally be decided on the pleadings.⁹⁹ Sometimes the pleadings alone satisfy the criteria for class certification in Rule 23(a) and (b).¹⁰⁰ If the defendant's opposition to the certification motion is based solely on issues of law, the court makes the determination without discovery. However, discovery is often needed.¹⁰¹ A court may require specific proof that a specific criterion of class certification is fulfilled. 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 or opposition to the motion.¹⁰² These can include expert affidavits or other corroborating evidence gathered outside the formal discovery process. At times reasonable inferences and estimates may suffice.¹⁰³ Alternatively courts may 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.¹⁰⁴ Nonetheless, even for conditional certification, a majority of courts require that a prima facie showing first be made.¹⁰⁵

Precertification discovery, if it is to be had, should be "structured to facilitate an early certification decision while furthering efficient and economical discovery on the merits."¹⁰⁶ 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. Local rules may also address the question of whether precertification discovery is permitted.¹⁰⁷ In determining whether a course of discovery is relevant to establishing class certification, courts generally consider (1) the amount of time discovery would entail, (2) the probability that discovery would be helpful in resolving the issue of class certification, and (3) whether discovery would be overly burdensome.¹⁰⁸

Association for Community Living v. Romer, 992 F.2d 1040 (10th Cir. 1993) (same in cases brought pursuant to the Individuals with Disabilities Education Act); *but see Yaris v. Special School District*, 558 F. Supp. 545 (E.D. Mo. 1983) (on similar facts as Romer finding exhaustion not required).

⁹⁸Rule 23(c)(4)(B). *See, e.g., Newman v. Checkrite California, Inc.*, 1996 WL 1118092 (E.D. Cal.) (certification of an umbrella class and five subclasses).

⁹⁹MANUAL FOR COMPLEX LITIGATION (THIRD), *supra* note 1, § 30.1. *Cf. In re Medical System*, 73 F.3d 1069, 1086 (6th Cir. 1996) (decision on certification should be deferred pending discovery 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). As discussed by one court, there needs to be a balance of 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, 304–5 (D. Colo. 1998) (barring class discovery as there was no demonstration of some factual basis for claim of nationwide class).

¹⁰⁰*See General Telephone Company of Southwest v. Falcon*, 457 U.S. 147, 160 (1982); *Bradford v. Sears, Roebuck and Co.*, 673 F.2d 792 (5th Cir. 1982).

¹⁰¹In fact, many jurisdictions hold that a trial court's refusal to allow any discovery is an abuse of discretion. *See, e.g., Dickinson v. Chicago Allied Warehouses Inc.*, 1993 WL 362450, *11 (N.D. Ill. Sept. 15, 1993).

¹⁰²*See, e.g., Baldwin and Flynn v. National Safety Associates*, 149 F.R.D. 598, 602 (N.D. Cal. 1993).

¹⁰³2 NEWBERG ON CLASS ACTIONS, *supra* note 1, § 7.22A.

¹⁰⁴*See, e.g., In re Diet Drugs Products Liability Litigation*, 282 F.3d 220 (3d Cir. 2002); *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001). In fact, the determination of class certification is always subject to change at a later date. *See, e.g., Central Wesleyan College v. W.R. Grace and Co.*, 6 F.3d 177, 189 (4th Cir. 1997); *Falcon*, 457 U.S. at 160.

¹⁰⁵*See, e.g., Mantoletto v. Bolger*, 767 F.2d 1416 (9th Cir. 1985).

¹⁰⁶MANUAL FOR COMPLEX LITIGATION (THIRD), *supra* note 1, § 30.1.

¹⁰⁷*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).

¹⁰⁸*See, e.g., Trevino v. Celanese Corp.*, 701 F.2d 397, 405 (5th Cir. 1983).

In an effort both to expedite and to narrow the scope of discovery for class certification, courts commonly employ a number of restrictions.¹⁰⁹ First, geographic and time constraints may be used, limiting discovery to a specific region of the country or for a certain duration.¹¹⁰ The number of people from whom information is sought may also be restricted. For example, discovery of plaintiffs may be limited to a certain number, group, or percentage of individuals in a particular putative class.¹¹¹ If the class defined by the plaintiff is unreasonably broad, a court may also limit discovery to a similar but more practicable class.¹¹² Courts are also typically wary of allowing outright disclosure of a plaintiff's finances. Representative plaintiffs must be capable of fully financing a complete prosecution on behalf of their class, but this type of information is strictly limited. As a result, sworn statements or affidavits often suffice to prove financial adequacy.¹¹³ Although depositions are usually acceptable methods for precertification discovery, some courts first require a demonstration of good cause for using a deposition. The number and length of requests, interrogatories, and depositions that can be made is often limited as well.¹¹⁴

Generally the courts are hesitant to allow discovery of absent class members.¹¹⁵ Here the courts must balance the defendant's need for information against the privacy interests of uninvolved parties that did not initiate the suit.¹¹⁶ Again this means that 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.¹¹⁷ For example, some courts are willing to subject absent class members to discovery where the proponent sufficiently 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.¹¹⁸ Other courts allow discovery of absent class members only "where a strong showing is made that the information sought (1) is not for the purpose of harassment or altering membership of the class; (2) is relevant to common questions and unavailable from the representative parties; and (3) is necessary at trial for issues common to the class."¹¹⁹

Rule 23(d) authorizes district courts to order defendants to aid in determining the identity of absent class members.¹²⁰ If the identification task can be done with less difficulty and expense by the defendant, for example, a court normally compels assistance. Otherwise the plaintiffs bear the costs and efforts of such investigatory work.

2. Bifurcation Class and Merits Discovery

The *Manual for Complex Litigation* suggests that bifurcation may be useful when the merits discovery is not related to the certification issues. If merits discovery is stayed, the discovery plan should make clear when the stay will be lifted. Sometimes there is no "bright line" between class and merits discovery.¹²¹

¹⁰⁹See generally *Note, Requests for Information in Class Actions*, 83 YALE LAW JOURNAL 602 (1974), especially for potential solutions with regard to discovery of absent class members.

¹¹⁰MANUAL FOR COMPLEX LITIGATION (THIRD), *supra* note 1, § 30.12.

¹¹¹*Trevino*, 701 F.2d at 405.

¹¹²See, e.g., *Washington v. Brown and Williamson Tobacco Corp.*, 959 F.2d 1566, 1571 (11th Cir. 1992).

¹¹³WRIGHT ET AL., *supra* note 1, Civil 2d § 1796.1, at 338; *Waldman v. Electrospace Corp.*, 68 F.R.D. 281 (D.C.N.Y.1975).

¹¹⁴MANUAL FOR COMPLEX LITIGATION (THIRD), *supra* note 1, § 30.12.

¹¹⁵See, e.g., *In re Worlds of Wonder Securities Litigation*, 1992 U.S. Dist. Lexis 10503 (N.D. Cal. July 9, 1992); *Kline v. First Western Government Securities*, 1996 U.S. Dist. Lexis 3329 (E.D. Pa. Mar. 11, 1996).

¹¹⁶WRIGHT ET AL., *supra* note 1, Civil 2d § 1796.1, at 336.

¹¹⁷See, 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 relation to damages and alleged reliance); *Transamerican Refining Corp. v. Dravo Corp.*, 139 F.R.D. 619 (D.C. Tex 1991).

¹¹⁸See *Collins v. International 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).

¹¹⁹*McCarthy v. Paine Webber Group Inc.*, 164 F.R.D. 309, 313 (D. Conn. 1995); *Morgan v. UPS of America*, 1998 U.S. Dist. LEXIS 20197 (E.D. Mo. Oct 16, 1998). See also *Cox v. American Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1986) (requiring special circumstances and good cause be shown).

¹²⁰*Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 340 (1978). See also *Sollenbarger v. Mountain State Telephone and Telegraph Co.*, 121 F.R.D. 417 (D. N.M. 1988).

¹²¹This issue was discussed in *In re Hamilton Bancorp Inc. Securities Litigation*, 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).

D. MOVING FOR CLASS CERTIFICATION

Rule 23(c)(1) requires that the court rule on class certification “as soon as practicable after the commencement of an action brought as a class action.”¹²² Many local rules set specific time limits, generally ninety days, for the filing of the motion.¹²³ Other courts require that the motion be filed earlier.¹²⁴ Others require the filing even later.¹²⁵ If no local rule applies, counsel should file a motion for certification, along with any supporting evidence, with the class action complaint or shortly thereafter.¹²⁶ 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 discovery.

If plaintiffs are moving for preliminary relief on behalf of the class, filing the motion for class certification with or before the Rule 65 motion is appropriate. If mootness is a potential problem, file a motion for class certification quickly.¹²⁷ Although some courts rule that, once a class is certified, certification “relates back” to the date of filing of the complaint, this interpretation of the *Sosna* or *Gerstein* line of cases is not uniformly accepted. Thus other courts look at whether the named plaintiffs’ claim became moot before class certification. Plaintiffs must file for certification quickly and urge expedited action on the motion if necessary.¹²⁸

The motion for class certification can be relatively simple but 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.¹²⁹ Merely reciting Rule 23 boilerplate language without relating each requirement to the particular class action is not useful. However, if local rules permit a reply memorandum, defendant’s arguments should not be anticipated lest defendants get ideas. Filed with the motion should be any documents necessary to prove the Rule 23 requirements.¹³⁰ 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 regarding whether plaintiff meets the Rule 23 requirements, the court may hold an evidentiary hearing on the class certification issues. However, where clearly Rule 23 requirements are not met, the court is not committing an abuse of discretion to deny certification without holding an evidentiary hearing.¹³¹

When questions such as numerosity or adequacy of representation (e.g., conflicts of interest within the class) are outstanding, the court may conditionally certify the class to allow additional time to resolve the issues.¹³²

¹²²The proposed amendment to Federal Rule of Civil Procedure 23(c)(1) modifies that language to provide that the court must determine whether to certify the class “at an early practicable time.”

¹²³See, 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).

¹²⁴See, e.g., L.R. 23.1 (D. Miss.); L.R. 30(c) (D.R.I.) (60 days).

¹²⁵L.R. 23(d) (W.D.N.Y.) (120 days).

¹²⁶Generally there is no reason to delay the filing of the motion for class certification, and it should be filed with the complaint. However, there may be reasons to await developments.

¹²⁷Justice Rehnquist recently reiterated the general importance of class certification and its usefulness in avoiding mootness. *Gratz v. Bollinger*, 123 S. Ct. 2411, 2423–26 (2003).

¹²⁸See, 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* *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 of this MANUAL for a full discussion of mootness and the *Sosna* or *Gerstein* line of cases.

¹²⁹Local rules not uncommonly require these specifics in the complaint. See, e.g., L.R. 23.1 (S.D. Fla.) (Pleading these elements even in the absence of a rule is good practice).

¹³⁰*General Telephone Company of Southwest*, 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).

¹³¹*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 NEWBERG ON CLASS ACTIONS, *supra* note 1, § 7:9. *See also* *Jordan*, *supra* note 99, at 455–60; MANUAL FOR COMPLEX LITIGATION (THIRD), *supra* note 1, § 30.13.

¹³²Rule 23(c)(1) (“An order . . . may be conditional, and may be altered or amended before the decision on the merits.”); *General Telephone Company of Southwest*, 457 U.S. at 160 (conditional certification offers the “flexibility” which “enhances the usefulness of the class action device” so as to assure the trial court that “actual, not presumed, conformity with Rule 23(a)” exists). *See also* MANUAL FOR COMPLEX LITIGATION (THIRD), *supra* note 1, § 30.18.

E. APPELLATE REVIEW OF DENIAL 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. Courts describe the relevant considerations in generally similar fashion. One appellate court lists the following guidelines: (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; and (4) whether the court should consider the nature and status of the litigation before the district court.¹³³

F. NOTICE OF CLASS CERTIFICATION AND OPT-OUT RIGHTS

In class actions brought under Federal Rule of Civil Procedure 23(b)(1) or (b)(2), notice to all class members of the pendency of the action before certification or judgment is not required.¹³⁴ However, such notice is frequently helpful in order to develop witnesses or obtain other evidence from class members. Potential conflicts among class members may become apparent if plaintiff sends notice to a (b)(1) or (b)(2) class early. Locating and notifying as many class members as possible as quickly as possible preserves plaintiffs' ability ultimately to locate the class and administer relief after judgment. 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. However, there are costs to this approach. In (b)(1) or (b)(2) actions where notice to the class would be helpful for any of these reasons, the court should be requested to order such notice even though it is not required and that it be paid for by defendants. The court has discretion under Federal Rule of Civil Procedure 23(d)(2) to order notice at any time in the lawsuit for the protection of the class members or the fair conduct of the lawsuit.¹³⁵

Class actions brought under Federal Rule of Civil Procedure 23(b)(3), however, require precertification notice to all class members. Such notice must inform the class members that they can choose to opt out of the class, be party to the case but be represented by their own attorney, or be bound by the judgment in the case.¹³⁶

A court has some discretion to order the defendant to cover the expense of developing the list of class members in certain circumstances.¹³⁷ Also, a court may order defendants to give the notice where they may do so with less difficulty or expense than the representative plaintiff.¹³⁸ Notice may also be ordered after the class is certified and before judgment.¹³⁹

Regardless of whether the class action is certified under subdivision (b)(1), (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 entitlement to, for example, apply or reapply for benefits. Without notice, class members obviously 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 the ruling both prospectively and retroactively, 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.¹⁴⁰

¹³³*Prado-Steiman v. Bush*, 221 F.3d 1266, 1272–77 (11th Cir. 2001), and cases cited therein. See also *In re Delta Airlines*, 310 F.3d 953, 958–60 (8th Cir. 2002); *Lienhart v. Dryvit System, Inc.*, 255 F.3d 138, 141 (4th Cir. 2001); *Sumitomo Copper Litigation v. Credit Lyonnais Rouse Ltd.*, 262 F.3d 134 (2d Cir. 2000); *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).

¹³⁴*Sosna v. Iowa*, 419 U.S. 393, 397 n.4 (1975); *In re Integra Realty Resources Inc.*, 262 F.3d 1089, 1109 (10th Cir. 2001) (within bounds of due process whether notice is required within discretion of court). But see *In Re Temple*, 851 F.2d 1269, 1272 (11th Cir. 1988) (requiring notification): The proposed amendment to Rule 23(c) permits the court to direct appropriate notice to the class.

¹³⁵*Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir. 2003).

¹³⁶*Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 173–74 (1974). See also *Molski*, 318 F.3d at 947, requiring notice in injunctive relief case where substantial money damages also at issue).

¹³⁷*Eisen*, 417 U.S. at 178 (usual rule is that plaintiffs must bear the cost of notice).

¹³⁸*Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 340, 355–56 (1978); *Southern Ute Indian Tribe v. Amoco Products Co.*, 2 F.3d 1023, 1029–31 (10th Cir. 1993). See also 7B WRIGHT ET AL., *supra* note 1, § 1788.

¹³⁹*German v. Federal Home Loan Mortgage Co.*, 168 F.R.D. 145, 160–61 (S.D.N.Y. 1996).

¹⁴⁰See *Quern v. Jordan* 449 U.S. 332 (1979); *Edelman v. Jordan*, 415 U.S. 651 (1974).

Unlike the cost of precertification notice, the cost of postjudgment 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 portion of the cost of the lawsuit that is recoverable by the plaintiffs.¹⁴¹

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 notice relief. Likewise, at the time of judgment or settlement, plaintiffs should include notice relief in the proposed order or settlement document (e.g., consent decree, stipulation of dismissal), attach a copy of the actual proposed notice, and spell out the proposed or agreed-upon method of distribution.

Notices sent to class members should be carefully drafted in plain English and translated if appropriate. 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.¹⁴²

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. Even when using the most creative efforts at locating class members and explaining the potential class relief to them, a response rate as low as 10 percent is not uncommon. That plaintiffs cannot reach every class member, however, should not be a deterrent from making 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 respond, is frequently a major commitment of time and resources by an office and must be carefully orchestrated.

G. COMMUNICATION WITH CLASS MEMBERS

Class counsel frequently want 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.¹⁴³ Even in those circumstances justifying a limitation, the Court stated that any court intervention should be carefully and narrowly drawn to interfere with First Amendment rights to the least extent possible.

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, intervened when defendants were secretly urging class members to "opt out" of the class action or were making factual misrepresentations to the plaintiff class members.¹⁴⁴

IV. Resolution of Class Actions

As in other aspects of class action litigation, ultimately the negotiation process between the parties undergoes the court's scrutiny during any fairness hearing.

A. NEGOTIATIONS

Ethical considerations are different in some respects from those in negotiations between parties in individual suits. One commentator points out that class action negotiations are at risk of greater collusion between counsel—there is less client control than in individual suits because the client to which counsel is accountable may be "amorphous and widespread."¹⁴⁵

Not infrequently defendants seek to negotiate plaintiffs' attorney fees as part of the overall settlement. This issue was addressed by the Supreme Court in *Evans v. Jeff D.*, which held that this behavior on the part of defense counsel was not

¹⁴¹ *Marcarz v. Transworld System Inc.*, 201 F.R.D. 54, 59 (D. Conn. 2001), and cases cited therein.

¹⁴² See generally 7B WRIGHT ET AL., *supra* note 1, § 1788.

¹⁴³ *Gulf Oil v. Bernard*, 452 U.S. 89, 101–2 (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, HIV-positive inmates).

¹⁴⁴ See, e.g., *Kleiner v. First National 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).

¹⁴⁵ Graham C. Lilly, *Modeling Class Actions: The Representative Suit As an Analytic Tool*, 81 NEBRASKA LAW REVIEW 1008, 1032 (2003). See also MANUAL FOR COMPLEX LITIGATION (THIRD), *supra* note 1, § 30.42.

unethical.¹⁴⁶ However, the *Manual for Complex Litigation*, while acknowledging this ruling, suggests that courts reviewing such settlements should “review the fairness of the allocation between damages and attorneys’ fees [and suggests that] [t]he ethical problem will be eased if the parties agree to have court make the allocation.”¹⁴⁷

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, whose case was not filed, about negotiations, entered into a secret agreement in which he was to receive \$225,000 in fees, and agreed not to represent anyone with related claims and to keep the agreement confidential. The District of Columbia Court of Appeals found this conduct to have violated eight different ethical rules.¹⁴⁸ In another case, the court cautioned against the abuses of the inadequacy of lawyer representation and the temptation that lawyers might face, particularly where the individual claims were small, to sell out the class.¹⁴⁹

B. NOTICE, SETTLEMENT, AND FAIRNESS PROCEEDINGS

As with many other aspects of class actions, the court is the protector of the class or putative class. Some courts describe the role of the court at this state of the proceedings as a fiduciary one.¹⁵⁰ 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, and this specific exception is indicated in Rule 41(a).

Pursuant to Federal Rule of Civil Procedure 23(e), class actions may not be dismissed or settled without notice to the class; this includes information regarding the opportunity to object and court approval. The proposed amendments to the rule are substantial and are designed to enhance judicial oversight of settlements. 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.¹⁵¹ Once a case is certified as a class action, all settlements are subject to the court’s approval.¹⁵² This is based on the settlement being binding on class members.¹⁵³

Authority is split on the issue of whether precertification class actions are subject to Rule 23(e). A majority of courts hold that this subsection of the rule does apply.¹⁵⁴ Even when the application of Rule 23(e) is not required, the holding is that, where there is some indication that the proposed settlement is not proper, a court should review it.¹⁵⁵ In an abundance of caution to avoid any doubt as to the propriety of settlement, the court’s approval should be sought even in the precertification context, particularly if the motion for certification has been filed.

Rule 23(e) requires notice of any proposed settlement or dismissal to all class members.¹⁵⁶ 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.¹⁵⁷ The form of such a notice should be submitted to the court for approval either as part of the settle-

¹⁴⁶*Evans v. Jeff D.*, 475 U.S. 717 (1986).

¹⁴⁷MANUAL FOR COMPLEX LITIGATION (THIRD), *supra* note 1, §§ 23.24, 30.42.

¹⁴⁸*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 JOURNAL OF LEGAL ETHICS 352 (2003).

¹⁴⁹*Greisz v. Household Bank*, 176 F.2d 1012, 1013 (7th Cir. 1999).

¹⁵⁰*See, e.g., Reynolds v. Beneficial National Bank*, 288 F.3d 277, 279 (7th Cir. 2002).

¹⁵¹MANUAL FOR COMPLEX LITIGATION (THIRD), *supra* note 1, § 30.41.

¹⁵²*Id.* A class is not uncommonly certified for purposes of settlement. *See, e.g., D’Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001) (approving certification of settlement class and settlement and utilizing general standards for approving class settlements).

¹⁵³*Devlin v. Scardelletti*, 536 U.S. 1, 6 (2002) (class members bound by judgment).

¹⁵⁴*See* R. Ritch Roberts, *Judicial Oversight in Precertification Class Action Suits: What is the Court’s Role in Texas?*, 55 BAYLOR LAW REVIEW 423, 428–43 (2003), for a thorough discussion of this issue.

¹⁵⁵*Shelton v. Pargo Inc.*, 582 F.2d 1298, 1303 (4th Cir. 1978).

¹⁵⁶Notice is not necessarily required in the precertification context. *Shelton*, 582 F.2d at 1314–15. *See also Chichilnisky v. Trustees of Columbia University*, 1993 WL 452526 (S.D.N.Y. Nov. 3, 1993).

¹⁵⁷*Carlough v. Amchern Products*, 158 F.R.D. 314, 329–31 (E.D. Pa. 1993) (describing the contents of the notice). For an example of a notice found insufficient, *see White v. State of Alabama*, 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).

ment agreement itself or by separate motion. As with pre- or postjudgment notices, class members' current addresses must be located to the maximum extent 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."¹⁵⁸ This notice need not be individualized.

The court is required to ensure that the settlement is fair, adequate, reasonable, and not based on collusion. 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.¹⁵⁹ Of course, the balancing of these factors should be presented to the court in accordance with each particular circuit's formulation. Also of paramount concern is whether there is collusion in arriving at the agreement. Fee arrangements should be examined.¹⁶⁰ The court may only approve or disapprove the agreement; the court may not rewrite it.¹⁶¹

Although most of the literature discusses fairness proceedings in terms of hearings, hearings are not always required. 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.¹⁶² The extent to which a full evidentiary hearing is necessary and, if so, the extent of necessary testimony depend on the circumstances of each case. If there is a sufficient evidentiary basis for a determination without a hearing, the agreement may be approved without one.¹⁶³

The standard of review for decisions regarding settlements is "abuse of discretion."¹⁶⁴ There was a split in the circuit courts before the Supreme Court's decision in *Devlin v. Scardelletti*.¹⁶⁵ The circuit courts were split as to whether one needed to seek intervention status in order to appeal the approval, as an objector, of a settlement.¹⁶⁶ *Devlin* dramatically changed this landscape when it held that because the objector was a member of the class bound by the agreement he had standing to appeal.¹⁶⁷

¹⁵⁸ *Burns v. Elrod*, 757 F.2d 15, 154 (7th Cir. 1975); *Handschu v. Special Services Division*, 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).

¹⁵⁹ *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*, 236 F.2d at 86 ((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 (THIRD), *supra* note 1, § 30.4.

¹⁶⁰ MANUAL FOR COMPLEX LITIGATION (THIRD), *supra* note 1, § 30.4.

¹⁶¹ *Id.* § 30.42.

¹⁶² As indicated, the reaction of class members may be considered as a factor in the approval process. See *supra* note 142. In one instance, the opposition by 70 percent of a subclass led the Old Fifth Circuit to reject a settlement. *Pettaway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1217 (5th Cir. 1978).

¹⁶³ *Heit v. Van Ochten*, 126 F. Supp. 487, 493 n.3 (W.D. Mich. 2001).

¹⁶⁴ *Joel A. v. Giuliani*, 218 F.3d 132, 139 (2d Cir. 2000).

¹⁶⁵ *Devlin v. Scardelletti*, 535 U.S. 1 (2002).

¹⁶⁶ *Id.* at 6.

¹⁶⁷ For 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 HARVARD LAW REVIEW 332 (2002).