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ENVIRONMENTAL CLASS ACTIONS SEEKING DAMAGES

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THE NEED FOR ENVIRONMENTAL CLASS ACTION SUITS

The National Academy of Sciences recently published a book entitled Resources and Man¹ which dramatically forecast the geometric increase in competition for resources, space, recreation, transportation, housing, and public and private facilities of all kinds. It was critical of the lack of resource planning for the future and strongly recommended new institutions and policies to help insure wise resource use and improved resource policies. Other scholars have stressed the necessity for new legal tools in assessing technology, which is today causing a millennium of change every few years.

There is growing concern for whether or not our legal problem-solving machinery has the ability to adequately protect mankind from the dangers of the present and to plan for the future. One necessary legal tool which can be effectively explored is the citizen class action law suit.

New proposals have been introduced in Congress allowing consumer class action lawsuits² and citizen lawsuits for environmental protection.³ The justification for these

¹ National Academy of Sciences, Resources and Man (1969).
proposals is that new systems are needed to act as checks and balances and to insure a proper weighing of the "public interest." This justification has been the basis for the increasing tendency of the federal courts to allow members of the public to challenge the actions of the federal administrative agencies.\(^4\)

There is a definite trend, both in Congress and in the Courts, to broaden the decision-making process of administrative government. Experience has shown that administrative agencies do not always adequately protect the public interest. Then Judge, now Chief Justice, Burger stated in Office of Communications of United Church of Christ v. F.C.C.:\(^5\)

The theory that the Commission can always effectively represent the listener interests in a renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission


Public agencies also have their inadequacies; they also need their system of checks and balances. Some are given inconsistent functions like the A.E.C., which must both police and promote the peaceful use of the atom. Some become captive of the industry they are supposed to regulate, some are lazy, some are ignorant, some are victims of Parkinson's law. Their interest are not always synonymous with the public interest.

can continue to rely on it. The gradual expansion and evolution of concepts of standing in administrative law attests that experience rather than logic or fixed rules has been accepted as the guide.

Citizen lawsuits are increasingly being proposed to act as an independent mechanism to supplement agency action, to monitor and check agency and executive action, to spotlight needed areas of legislation and to insure the inclusion of and the adequate weighing of all relevant factors.

The environmental class action suit is an important citizen action mechanism. It allows the "small stake holder in a large controversy" to come to court and lay more than his individual interest before the court. It allows him to propose to the court that more than his individual rights are at stake; that class or public rights are to be weighed.

The class action is a procedural mechanism which, while it does not create substantive rights in class members, does have considerable value as a strategic device far beyond its ostensible purpose to reduce a "multiplicity of litigation."7

One court perhaps more accurately described the class action as "a way of redressing group wrongs . . ., a semi-public remedy administered by the lawyer in private practice—a cross between administrative action and private action."7 Its increasing use in litigation of all types, and its recent well-publicized use in a number of environmental and resource controversies, dictate a close examination of its component parts.

Class actions are a particularly useful procedural tool.

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8. Id. at 481.
in seeking group redress in important but limited situations, but are not a cornucopia of remedies for all societal ills; they are not devices for the strike-suit, the champertous of the self-promoting litigator. The patent excesses of some of the “class actions” recently filed show that the limitations and dangers of Rule 23 of the Federal Rules of Civil Procedure are not widely understood.

DEFINITION OF THE CLASS

The initial issue in any class action litigation is the definition of the class. The parameters of the size of the class are defined neither by rule nor by case law. On the lower limit, a class which contained twenty-five individuals has been upheld. On the upper parameter, there is language that the size of a class is not an inherent objection to maintenance of a class action. Neither is the maintenance of a class action precluded by the failure to state the exact number of members of the class nor to individually identify every member of the class, if the class is “defined with some precision.”

Examination of some of the recent pleadings in actions purporting to be class actions indicates the need for properly defined classes. In a suit seeking damages for harm to the environment allegedly caused by D.D.T. and for reparations to restore the quality of the environ-

10 Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968). In Eisen, the court stated no objection to a class numbering 3,750,000.
12 Fischer v. Kletz, 41 F.R.D. 377, 384 (S.D.N.Y. 1966); Lopez Tijerina v. Henry, 48 F.R.D. 274 (D.N.M. 1969), is an example of a class that was so vaguely defined that the court found that it would be an “impossible task” to apply the definition of the class to determine which persons were actually members of the class.
ment allegedly degraded by D.D.T., the class which
the plaintiff is allegedly representing is “all the people
of the United States, not only of this generation, but
of those generations, yet unborn, . . . who are entitled
to the full benefit, use and enjoyment of the environment
and natural resources of the several States and the
United States without damage and degradation from
the production, distribution and use . . .” of D.D.T. The
plaintiff in this action is also seeking to represent mu­
nicipal taxpayers, allegedly the equitable owners of
natural resources held in trust for them by their munici­
pal governments, and seeking damages to restore these
natural resources damaged by D.D.T. This action also
is on behalf of, and asserting the rights of, “all the people
of the United States, not only of this generation but of
those generations yet unborn, . . . to freedom from the
involuntary accumulation of D.D.T. and its metabolites
within the lipid tissues of their bodies.”

Cases challenging air pollution by industry are simi­
larly seeking to represent a class composed of a large
number of individuals. In a suit to recover damages
and to enjoin sulfur dioxide pollution by the American
Smelting and Refining Company in El Paso, Texas, the
plaintiffs seek to represent citizens and residents
of Texas, New Mexico, and Mexico, who have suffered
injury, damages, annoyance, and inconvenience from
the alleged pollution of the air by the defendants, and
those who have shown “a special interest” in protecting
the public, their property, and the environment from
damage by air pollution. In an amended complaint,

\[13\] Yannacone v. Montrose Chem. Co., No. 3761-69 (S.D.N.Y., filed
Oct. 14, 1969). Individual damages for each member of this class
is not explicitly requested by the pleadings, however.
\[14\] Fischer v. American Smelting & Refining Co., No. 70-CIU-729
\[15\] 70-CIU-729 (S.D.N.Y., filed May 19, 1970).
new plaintiffs were added, suing on behalf of all those people, both of this generation and of the generations yet unborn, entitled to the protection of their health and welfare and to the protection of their environment from damage from the failure of the defendant to install "state-of-the-art" pollution control equipment.

An examination of the requirements of Rule 23 shows the patent excesses of these defined classes. Rule 23 first requires, in order to maintain a class action, that "the class is so numerous that joinder of all members is impracticable. . . ." This requirement refers not to "impossibility of joinder but only to the difficulty or inconvenience of joinder of the entire class." No one would argue that the classes defined in the previously discussed environmental class actions meet this requirement.

The next Rule 23 requirement, that "there must be questions of law and fact common to the class . . .," has been reiterated by a number of courts without giving real help as to what are questions of law or fact common to the class. A statement by another court, however, provides support to which the presumptuous pleader

16 Fed. R. Civ. P. 23(a) (1).
17 Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 913-914 (9th Cir. 1964).

This requirement is similar to the additional requirement of Rule 23(b)(3) and the courts often "determine the (a)(2) prerequisite of a common question by questioning the predominance of common issues." Note, "Class Actions Under Amended Rule 23: Three Years of Judicial Interpretation," 49 B.U.L. Rev. 682, 695 (1969).
can point to justify inclusion in his class of "all the people in the United States":

The common issues need not be dispositive of the entire litigation. The fact that questions peculiar to each individual member of the class may remain after the common questions have been resolved does not dictate the conclusion that a class action is not permissible.\(^\text{19}\)

The requirements of Rules 23(a)(1) and 23(a)(2) are, however, not the only requirements for definition of a class under Rule 23.\(^\text{20}\) In addition, the requirements of either Rule 23(b)(1)(A), 23(b)(1)(B), 23(b)(2), or 23(b)(3) must be satisfied.

Environmental class actions seeking damages, as in the illustrative purported class actions previously mentioned, will usually fall under Rule 23(b)(3).\(^\text{21}\) Environmental class actions seeking damages will not fall under Rule 23(b)(1)(A), since the threat of incompatible standards can arise only in situations where equitable relief is sought, as in class actions involving the rights and duties of riparian owners, or of the rights and duties of a land owner with respect to a nuisance.\(^\text{22}\)

\(^{19}\) Dolgow, N. 7 supra at 490.


\(^{21}\) Class actions under Rule 23(b)(3) are regarded as "not as clearly called for" as under Rules 23(b)(1) and 23(b)(2). Advisory Committee's note supra, 39 F.R.D. at 102. Actions have not been classified as Rule 23(b)(3) class actions if they meet the requirements of Rule 23(b)(1) or 23(b)(2). Van Gemert v. Boeing Co., 259 F. Supp. 125, 130-131 (S.D.N.Y. 1966); Berman v. Narragansett Racing Ass'n, 48 F.R.D. 333, 337 (D.R.I. 1969). This has been done on the grounds that if the action is classified as a 23(b)(3) action, members of the class may elect not to be included within the class and would not be bound by the judgment. Van Gemert, supra at 130. This would result in separate litigation by individual members of the class, placing an undue burden on the judiciary, and would contravene the stated purposes of Rules 23(b)(1)(A) and 23(b)(1)(b).

\(^{22}\) See Note, N. 20 supra at 100.
environmental actions that seek damages, as in the *El Paso* case, adjudications with respect to the claims for damages by individual members of the class would not dispose of nor substantially impair the interests of the other members of the class, so that they would not come within the sphere of Rule 23(b)(1)(b). Claims for damages for injury to health or welfare from air pollution, pesticides or radiation would involve individual, separate, and distinct claims; a resolution of one such claim would not, except for *stare decisis*, impair or dispose of other individual claims arising from the pollution or environmental degradation by the defendant. Neither can environmental class actions seeking damages be brought under Rule 23(b)(2), since this section is inapplicable where the appropriate relief relates “exclusively or predominately to money damages.”

Rule 23(b)(3) requires that the questions of law or fact common to members of the class predominate over questions affecting only individual members. That

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23 *Id.* at 101–102.


25 Rule 23(b)(3) also requires that a class action be superior to other methods “for the fair and efficient adjudication of the controversy . . .” such as consolidation of actions or test cases by some members of the class. See N. 20 *supra* at 103. Rule 23(b)(3) suggests pertinent factors, which are not exhaustive, *Id.* at 104, to aid the courts in finding whether the class action is “superior” to other proceedings. The factors listed in the rule are:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

The interests of individual members of the class in prosecuting
members of the class seek or allege differing amounts of damages does not of itself preclude a class action under Rule 23(b)(3) where there is a preponderance of questions in common.26

In determining predominance, the test is not the total amount of time to be spent on proof of the common issues, as compared to the time to be spent on proof of individual damages, but rather is the time which would be spent in proof of the common issues in the class action as compared to the time which would be spent if no class action was allowed, and a large multitude of suits, each involving proof of the common issues, were brought.27 Individual questions of damages, however, clearly predominate over common issues in large-scale serious injuries. The Advisory Committee stated:

A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant separate lawsuits, however, "may be theoretic rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable." Advisory Committee's Note, supra, at 104. The adverse effects upon the defendant that would result from the maintenance of separate suits should be also considered. Id.

26 Konisberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42, 45 (S.D.N.Y. 1966); Advisory Committee's Note, supra, at 103; see Eisen, N. 10 supra at 566; Dolgow, N. 7 supra at 490.

Though injuries and damages to the members of the class were separately and distinctly caused, if they were the result of a common course of conduct, there is a question common to the class which predominates for purposes of Rule 23(b)(3). Dolgow, N. 7 supra, at 490.

"Potential rivalry between class members after an initial finding of liability can be adequately handled since the rule gives a court the power to divide the class into appropriate subclasses or to require the members to bring individual suits for damages." Eisen, N. 26 supra at 566.

questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple law suits separately tried.28

Environmental class actions seeking damages for injury to health or welfare from pesticides, air pollution, or radiation would clearly be analogous to the “mass accident” example. Damages and liability would depend upon many issues affecting the individual members of the class in different ways.

For example, Yannacone v. Montrose Chemical Co.29 has placed at issue the effects of D.D.T. upon the wild-life resources of the entire United States, as well as upon the biological systems of every American. Because the action seeks damages, to be distributed to local, state, and federal governments to be used to remedy the damage done by D.D.T. to the natural resources and environment of the United States, the application of D.D.T. to every area of the United States and the effect of D.D.T. upon the environment of each particular area will be at issue.

Even if injunctive relief and not damages were requested, proof of the amount of D.D.T. applied in every area of the United States would be required. Even the effects of particular quantities of D.D.T. on particular species would in reality not be a common issue, since these effects would depend upon when the D.D.T. was applied, the concentration of the application, and, possibly, the effects of D.D.T. on each species in a particular geographical area.

Even fewer common issues of law and fact are presented with respect to the class of those whose bodies

28 Advisory Committee’s Note, supra, 39 F.R.D. at 103.
have been allegedly damaged by D.D.T., a class that could be composed of every resident of the United States. The claims of each individual member of this class will vary with respect to the amount of D.D.T. applied in areas where he has resided and the date that the D.D.T. was so applied—factors that bear on the concentration and effects of D.D.T. on each individual citizen. Common issues of law and fact would clearly not predominate in this class; therefore these claims can not be brought as a Rule 23(h)(3) class action. Supporting this conclusion is that notice, because the presently defined classes potentially include all residents of the United States, cannot possibly reach all members of this class. Consequently, this action may forever bar many millions of Americans, without their knowledge, from future claims against the manufacturers of D.D.T. for bodily injury. The fact that D.D.T. concentrations will vary even within a narrow geographical area, with varying concentration of D.D.T. and varying effects from D.D.T. on the residents of the area, indicates that even a reduced form of class action should not be allowed to be maintained for individual damages.

Environmental lawyers must take great care that their claims do not innoculate the courts against all environmental class actions. There are many less grandiose but valid uses of class actions as prophylaxis against environmental or consumer damage. In many cases the amount of individual damages is not important because it is “de minimis” and restoration is impossible. In Bebchick v. Public Utilities Commission and Darr v. Yellow Cab Co., the class action was used

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30 Though claims for individual damages are not explicitly pleaded as relief, N. 13 supra, such claims might be regarded as in issue under liberal rules of pleading.
31 See Philadelphia, N. 9 supra at 461-462.
to rebate overcharges, not to the actual individuals injured, but to the general class by lowering future fares. In environmental protection it is also necessary to be able to use Rule 23 to benefit the class, qua class, and to require a defendant to pay damages for his action despite the impossibility of individual restitution. These rebate cases show the usefulness of both Rule 23 and broad definitions of the class where the common question is the action or unjust gain of the defendant, rather than the damage to the plaintiff. Contemporary law, while stressing individual restitution, also recognizes a very important deterrent and corrective effect in damage actions.

In environmental class actions seeking damages for injury from pesticides, air pollution, or radiation, where the members of an amorphous, anonymous, and unquantifiable class are asserting separate and distinct damage claims, as in the El Paso case, there can be no cohesion between the members of the class. The El Paso pleadings contain internal inconsistencies, since if the health effects allegedly caused by the pollution are as severe as pleaded, the individual claims are large enough to justify maintenance of separate suits. In addition, where the size of the class is in the hundreds of thousands, or even millions, with the individual members of the class having separate and distinct claims, as in the D.D.T. and El Paso cases, there will be extreme difficulty in managing the class action. The logical has been carried to the absurd.

**DETERMINATION OF MAINTENANCE OF CLASS ACTION**

"As soon as practicable after the commencement of an action brought as a class action," the court must determine whether the action may be maintained as a class
action. The rule “calls upon the judges to judge,” and places upon the court the affirmative duty to make this determination even in the absence of a proper motion by the plaintiff or defendant as to the propriety of the maintenance of the class action. This determination must be made even if the defendant offers no resistance to the class action.

“The burden is on the plaintiffs to establish their right to maintain a class action... But this does not mean that plaintiffs must finally establish their entire case before a preliminary determination of the class action question can be made.” The court should exercise its duties with particular care, and should be rigorous in having the plaintiff satisfy this burden of proof, in environmental class actions such as the El Paso and D.D.T. cases, where the dangers of abuse are so great.

The court may allow the class action to proceed on a conditional basis, such as by ordering that “a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type,” and may alter or amend its determination “before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound.”

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34 Rule 23(c)(1). See the section on Res Judicata: Compromise, Settlement and Notice for the relationship between Rule 23(e) and 23(c)(1).
37 Ziegler, N. 36 supra.
38 Philadelphia Elec., N. 9 supra at 457.
39 Ibid.; see Weisman, N. 18 supra at 265; Ziegler, N. 35 supra; cf Richland v. Chetham, 272 F. Supp. 148, 155 (S.D.N.Y. 1967), where the court disapproves of allowing a class action to proceed conditionally, finding it preferable to proceed “by consolidation and intervention without prejudice to subsequent class action treatment if, upon further development of the litigation, it appears appropriate.”
Even if individual questions arise during the course of litigation, which render the action 'unmanageable' the court still has the power at that time to dismiss the class action and permit the plaintiff to proceed only on behalf of himself.  

Any deficiencies in the pleading of a class action are subject to correction by amendment.  

The fact that plaintiffs' definition of the class is not acceptable does not require dismissal of the class allegations. ... (C)ourts should employ the full measure of the discretion granted by the Rule, whenever a fair reading of the complaint permits, to define classes ... in a manner which will permit utilization of the class action procedure.  

In cases such as the D.D.T. and El Paso class actions, the courts should require that the classes be more conservatively defined, rather than allowing the action to proceed conditionally as a class action. The strong likelihood of a multitude of individual issues arising, and the impossibility of providing actual notice to members of the class, combined with the binding effect of the judgment, suggest that redefinition of the class by amendment of the pleadings is the proper solution in the D.D.T and El Paso class actions.

STANDING TO MAINTAIN CLASS ACTIONS

A common issue in environmental litigation arises under Rule 23(a), which states that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all ..." members of the class when the other requirements of Rule 23 are satisfied. The question of who is a member of a class is an important issue

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40 Eisen, N. 10 supra at 566.
41 Ziegler, N. 36 supra at 176.
42 Dolgow, N. 7 supra at 492.
in environmental class actions where nonprofit conservation corporations sue on behalf of a class of individuals to enjoin threatened environmental degradation.\textsuperscript{43} Often, only such corporations are able to muster the scientific evidence, expert witnesses, and the expenses of litigation and to provide the respectability in the eyes of the court and the public necessary for the successful prosecution of environmental litigation. The Supreme Court has stated that the plaintiffs in a class action “cannot represent a class of whom they are not a part.”\textsuperscript{44} However, the language of Rule 23(a) does not define who is a member or a “part” of a class.

Though the Supreme Court generally denies standing to one seeking to assert the rights of another,\textsuperscript{45} this “is only a rule of practice” which may be “outweighed by the need to protect the fundamental rights which would [otherwise] be denied.”\textsuperscript{46} Thus, in \textit{N.A.A.C.P. v. State of Alabama},\textsuperscript{47} the N.A.A.C.P. was held to have standing to assert the First Amendment rights of association of its members that were allegedly violated by Alabama statutes which required the N.A.A.C.P. to give its list of members to the Alabama Attorney General. The “nexus” between the N.A.A.C.P. and its members was held to be sufficient to permit the N.A.A.C.P. to represent the rights of its members.\textsuperscript{48} Standing was also upheld on the grounds that the constitutional rights of the members of the N.A.A.C.P. to withhold their membership


\textsuperscript{44} Bailey v. Patterson, 369 U.S. 31, 32-33 (1962).


\textsuperscript{47} 357 U.S. 449 (1958).

\textsuperscript{48} Id. at 458–459.
in the organization from the knowledge of the State of Alabama would be nullified if they personally sought to enforce their rights in court. The court relaxed the rules of standing since the constitutional rights of the members of the N.A.A.C.P. "could not be effectively vindicated except through an appropriate representative before the Court."49 Through N.A.A.C.P. v. Alabama dealt only with the standing of organizations to assert its members constitutional rights of association with respect to the organization, the Supreme Court has upheld the standing of a trade association to represent the interests of its members with respect to an order of the Interstate Commerce Commission—a matter not related to its members' rights of association. In Norwalk Core v. Norwalk Redevelopment Agency,51 the court stated, though not ruling on the matter, that

We think that the reasons for requiring an individual plaintiff in a class action to be a member of the class do not necessarily preclude an association from representing a class where its raison d'etre is to represent the interests of that class. . . . [H]owever, whether the association plaintiffs have standing . . . depends on whether there is compelling need to grant them standing in order that the constitutional rights of persons not immediately before the court might be vindicated. See N.A.A.C.P. v. State of Alabama ex rel. Patterson . . . (We reject the . . . contention that an association cannot represent the rights of its members unless the interests of the association itself are involved. In N.A.A.C.P. v. State of Alabama ex rel. Patterson, the Supreme Court specifically referred to the likelihood that the association itself would be adversely affected as a 'further factor'


50 National Motor Freight Traffic Ass'n, N. 49 supra.

51 395 F.2d 920 (2d Cir. 1968).
pointing toward the holding of standing. . . .) It appears to us that the individual plaintiffs can adequately represent the interests of all members of the relevant class, but we will not preclude the plaintiffs from trying to show to the District Court's satisfaction that it is only the association plaintiffs which can perform this function. 52

In Smith v. Board of Education, 53 a teacher's association, suing on behalf of a class of Negro teachers to enjoin discriminatory practices in the hiring and assignment of teachers, was held to have standing to represent the class. The court held that the teacher's association should have standing as a real party in interest because the dismissal of teachers might adversely affect it, due to a decrease in membership and financial support, and because the individual members of the class might be deterred, because of fear of reprisals, from bringing suit themselves, or might lose interest in the litigation, if and when they obtained other jobs after discriminatory refusals to hire. 54 Because the plaintiff teacher's association was a real party in interest under Rule 17(a), the court stated that it was also a "member" of the class it sought to represent. 55

52 Id. at 937-938.
53 365 F.2d 770 (8th Cir. 1966).
54 Id. at 776-777.
55 Ibid.; see also N.A.A.C.P. and Harrison, N. 46 supra; W.A.C.O. v. Weaver, 294 F. Supp. 433 (N.D. Cal. 1968); Shelton v. McKinley, 174 F. Supp. 351, 355 (E.D. Ark. 1959), rev'd on other grounds sub nom. Shelton v. Tucker, 364 U.S. 479 (1960); Alabama State Teachers Ass'n v. Lowndes County Bd. of Educ., 289 F. Supp. 300, 302 (M.D. Ala. 1968); Buford v. Morganton City Bd. of Educ., 244 F. Supp. 437, 446 (W.D.N.C. 1965). One case has held that an organization cannot represent the rights of the individual members of the class. C.O.R.E. v. Comm'r. Social Security Administration, 270 F. Supp. 537 (D. Md. 1967). However, in that case there were no allegations that the defendants had acted illegally toward any of the individual members of the class. Therefore, no interest of the class was alleged to have been violated, and there was no evidence indicating that it would be difficult for the members of the class to
Norwalk Core and Smith v. Board of Education have thus extended N.A.A.C.P. v. Alabama to allow organizations to have standing in class actions on behalf of the interests of individual members where the purpose of the organization includes representation of the interests of that class, and where there is a compelling need to grant them standing in order that the rights of the individual members of the class can be effectively vindicated. Among the “compelling reasons” for allowing standing to organizations in environmental class actions would be the fear of reprisal for bringing the law suit, eventual lack of interest in the litigation by an individual class member, the fact that expenses of the suit would be so great “that it could not be prosecuted without outside aid,” or the likelihood that a vigorous prosecution of the suit could not be made without the expertise in litigation and the expert scientific witnesses that the organization could bring to the action.

vindicate their rights themselves. The denial of standing to a non-profit corporation representing a majority of the incorporated municipalities in Nebraska and to an unincorporated labor association in League of Nebraska Municipalities v. Marsh, 209 F. Supp. 189 (D. Neb. 1962), a suit to declare a state legislative apportionment statute unconstitutional, can be distinguished on the grounds that their raison d'être (see Norwalk Core, N. 24 supra) did not include the protection of individual voters, whose rights were infringed by unconstitutional apportionment and who would have standing to maintain the action. 209 F. Supp. 189, 191. The denial of standing to two welfare rights organizations in National Welfare Rights Organization v. Wyman, 304 F. Supp. 1346 (E.D.N.Y. 1969), is distinguishable on the grounds that there was no showing of “lack of effective representation, gross adversarial inequality, or any practical or theoretical obstacle to the individual plaintiffs’ effective assertion of their claims.” Id. at 1348.

56 Smith, N. 53 supra at 776–777.
57 N.A.A.C.P., N. 45 supra at 509.
58 See Norwalk, N. 24 supra at 938: “[W]hether the association plaintiffs have standing . . . depends on whether . . . it is only the association plaintiffs which can . . . adequately represent the interests of all members of the relevant class. . . .”
Courts have allowed standing to organizations to bring class actions without requiring a showing that there was a compelling need for granting standing to the organization or that only the organization could adequately prosecute the class action. In *Crowther v. Seaborg*, a suit to enjoin the flaring of radioactive natural gas by the A.E.C. from an underground cavern into the atmosphere, a non-profit public benefit conservation corporation, the Colorado Open Space Coordinating Council, was held to have standing to bring "a class action on behalf of all persons entitled to the protection of their health and the use and enjoyment of the natural resources of Colorado." C.O.S.C. was held to have standing "to assert the interests of its incorporators and the public for whose benefit it was formed."

*Crowther v. Seaborg* would thus grant standing to conservation organizations to bring environmental class actions on behalf of individual members, where their corporate purpose included the protection of the interests of the members of the class, without regard to whether there was a "compelling need" to grant such standing. This would be the better rule, and one consistent with the latest statement of standing by the Supreme Court.

The requirements of standing, as recently stated by the Supreme Court in *Association of Data Processing Service Organizations v. Camp* and *Barlow v. Collins*,

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59 *Crowther*, N. 4 *supra.*


are, first, that the plaintiff satisfy the "case or controversy" requirement of Article III of the Constitution by having the "personal stake and interest that impart the concrete adverseness required by Article III." To satisfy this requirement, the plaintiffs must allege "that the challenged action has caused . . . injury in fact, economic or otherwise." In a suit to enjoin the Secretary of Transportation from approving, granting, or using Federal funds for a state secondary road project that allegedly would destroy the recreational and ecological values of a stream, this requirement was held satisfied by an incorporated non-profit conservation organization whose purposes included protection of the area by individual citizens who used and enjoyed the area in question, and by an unincorporated association whose members used and enjoyed the area in question. Though the opinion did not state whether the suit was a class action, this case would allow standing to conservation organizations whose purposes included protecting areas threatened by environmental degradation, such as that in controversy, or protecting the interests of the members of the class they allegedly represent.

The second requirement of standing is "whether the interest sought to be protected . . . is arguably within the zone of interests to be protected by the statute or constitutional guarantee in question." Groups or individuals concerned with the protection of historic, natural and scenic resources have been held to be within the zone of interests of statutes concerned with the protection of these factors in suits to restrain environmental degradation by federal agencies who allegedly are exceeding their

63 Barlow, N. 62 supra at 164.
64 N. 61 supra at 152.
66 N. 61 supra at 153.
statutory authority or abusing their discretion. Conservation organizations bringing class actions asserting the rights of individual members of the class which allegedly were protected by the constitution or statutes would also be within the "zone of interests," thus satisfying this second requirement.

Thus, under the latest statement of standing by the Supreme Court, conservation organizations would have standing to represent a class of individuals where their purpose included the protection of the area of the environment allegedly threatened or the protection of the interests of the class, without regard to whether there was a "compelling need" to grant this standing.

**ADEQUACY OF REPRESENTATION**

The quality of representation in a class action is crucial in the determination of the fairness and adequacy of representation. In environmental litigation, the adequacy of representation by the plaintiff has an important bearing on the action. The ability of the representative party to present the scientific evidence requisite for success on the merits is an important criterion in environmental litigation. Presentation of proper claims and the raising of the relevant issues by the representative party are also important factors to success. There are numerous remedies which may be sought in an environmental lawsuit. Only a proper choice of the remedy requested will assure the greatest probability of success, as measured by the environmental protection that would be afforded by the relief requested, and the probability of obtaining such relief from the court. These numerous factors which determine

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the success of environmental litigation are directly dependent on the adequacy of representation.

A plaintiff has the burden of showing that he will adequately and fairly protect the interests of the class. The adequacy and fairness of representation is determined by Rules 23(a)(3) and 23(a)(4). Rule 23(a)(3) requires that the claims of the representative party be typical of the claims of the members of the class. Rule 23(a)(4) requires that the representative party "will fairly and adequately protect the interests of the class." These are the only two requirements to be used in determining adequacy of representation.

The requirement that the claim of the representative be typical of those of the entire class is the same as stating that the interests of the representative party must coincide with, and "be compatible with and not antagonistic to those whom he would represent." If there is a conflict, it must be a substantial conflict between members of the class over the very issue in litigation to justify dismissal of a class claim for failure of adequacy of representation. Though disparity in damages sought by members of the class may effect the issue of "predominance" under Rule 23(b)(3), such disparity does not make

69 Weisman, N. 18 supra at 206.
71 Mersay, N. 70 supra.
72 Shulman, N. 68 supra at 207; cf. Eisen, N. 10 supra at 562-563.
73 Mersay, N. 70 supra at 468. A conflict of interest should not be found between the representative party and the members of the class merely because every individual member of the class is not enthusiastic about the maintenance of the litigation. Eisen, N. 10 supra at 563 N. 7; Shulman, N. 68 supra. Thus, the fact that ninety-eight members of a class filed affidavits either indicating that they did not want to be represented by the plaintiff or withdrawing from the suit did not warrant dismissal of the class action where the entire class numbered approximately 1,300. Knuth v. Erie-Crawford Dairy Coop. Ass'n, 896 F.2d 420 (3d Cir. 1990).
the claims of the representative atypical. In asserting his own interests, the representative party must be able to assert the interests of all of the members of the class.

If the claims of the members of the class are too varied, a few members of the class acting as representative parties may not have claims typical of the class so as to be adequate representatives of the class. Where the environmental class action involves separate and distinct claims by each member of the class in order to establish liability, such as in pesticide, air pollution, or radiation cases, the claims may be so disparate and the individual questions and issues so extensive, that no individual can have a typical claim nor fairly and adequately represent the multitude of claims. In some such circumstances, the court may be able to require a larger number of representative parties whose interests, taken together, are typical of the varied interests of the members of the class. In other actions the mere size of the class will make adequate representation impossible.

Adequacy of representation depends on other criteria. Objectively judged, all members of the class, including those who would prefer the status quo, should have their status "helped." At a minimum antagonistic interest should be eliminated "so far as possible." The requirement that the representative party fairly and adequately protect the interests of the class is satisfied where "the representative party . . . [is] interested enough to be a forceful advocate and his chosen attorney . . . [is] qualified, experienced, and generally able to conduct the litiga-
The burden of showing that he will adequately and fairly represent the class does not require the plaintiff to present his attorney's qualifications, for the court may want to reserve judgment pending a later assessment "after a proper appraisal of all the factors enumerated on the face of the rule itself." In class actions, the counsel of a representative party is assumed to be a skilled practitioner, and able to properly conduct the class action, unless the contrary is shown. The representative party and his counsel must make the "vigorous, conscientious, and undivided effort required to 'fairly and adequately protect the interests of the class.' " The representative party must be able to afford due process to the interests of the members of the class, since the judgment in a class action is conclusive as to the rights of absent class members. The size of the individual interest which the representative party is asserting is immaterial where his representation will be fair and adequate.

Adequate representation refers to the quality of representation, not the quantity of representation. The fact that other members of the class have not sought to intervene is not determinative of whether the plaintiff is a proper representative of the class. "Even one member of a large number of claimants can provide the kind of representation for all which might otherwise be unattainable.

79 Shulman, N. 68 supra; see Mersay, N. 70 supra.
81 Dolgow, N. 7 supra at 496.
82 Hohmann v. Packard Instrument Co., 399 F.2d 711, 714 (7th Cir. 1968).
83 Mersay, N. 70 supra at 469.
84 Eisen, N. 10 supra at 562.
85 See Richland, N. 39 supra at 163.
87 Ibid.; Hohmann, N. 82 supra at 714.
it each claimant had to act individually."88 A class action should not be dismissed because members of the class not before the court have not expressed approval of the adequacy of representation. Rather, the court should be more concerned "with those affirmative expressions of disapproval than with the silence of those represented."89

Neither the number of representative parties in a class action nor the percentage of members of the class that are representative parties is determinative of adequacy or inadequacy of representation. Thus, in Eisen,90 the court held that the fact that the representative party was allegedly representing a class of 3,750,000 and had only a small claim was not relevant to the adequacy of representation. In Dolgow,91 the numerical disparity in a class action brought by four members of the class on behalf of 200,000 members of the class was held not to preclude maintenance of the class action.92

In environmental class actions such as the El Paso and D.D.T. cases, however, no matter how vigorous a prosecutor and how competent the plaintiff and his counsel, it is impossible to have fair and adequate representation. The claims of the members of the class are all separate and distinct, and establishment of liability requires proof of these millions of individual claims, which no representative party can do. In such cases, because of the spectre of the binding effect of the judgment, the impossibility that even a small percentage of the class will receive actual notice, and the many separate and distinct claims at issue, no party can provide the quality representation required to satisfy due process. In the El Paso and D.D.T. actions, silence of the class may well be misleading be-

88 Ibid.
89 Weisman, N. 18 supra at 262.
90 N. 10 supra.
91 N. 7 supra.
cause of lack of actual notice and because most members of the class may not realize that they are members of the class.

Another problem of adequacy of representation occurs if the action has become moot as to the plaintiff. Such a situation might arise in class actions seeking damages for continuing air or water pollution that infringes upon rights of private property, where the plaintiff moves outside the area affected by the pollution.

Where a plaintiff was a proper representative of a class at the time the action was filed, the action is not moot because the action has become moot as to the plaintiff.93 Such a result "would be contrary to the expressed purpose of Rule 23(e), which prohibits dismissal or compromise of a class action if the result would be to injure the other members of a purported class."94 The court in Gaddis v. Wyman95 allowed intervention by members of the class who represented the interests of the class, permitting the action to continue, where the action had become moot as to the plaintiff. Though no class determination had been made under Rule 23(c)(1) at the time the motion for intervention was made, "a class action must be presumed to have existed at the time of the filing of the motion for intervention."96

The parties must prepare themselves for inquiry by the court on adequacy of representation. The defendant may want to use discovery to ascertain adequacy of representation. In environmental actions, the adequacy of representation must depend heavily upon the ability of the representative party and his counsel to present the

94 Ibid.
95 Ibid.
96 Ibid.; compare Watkins v. Chicago Housing Authority, 406 F.2d 1234 (7th Cir. 1969), holding that plaintiffs in a class action for whom the case was properly dismissed as moot could not continue to represent members of a class allegedly in a similar situation.
requisite scientific evidence through expert witnesses. Thus, the prior experience of the plaintiff and his counsel in presenting scientific evidence through scientific witnesses in environmental litigation would be a factor relevant to adequacy of representation. The contacts which the plaintiff has with the scientific community, which would be indicative of the plaintiff's access to expert witnesses, and his ability to select the proper and best expert witness required to vigorously prosecute the action, would also be relevant factors. The familiarity of the plaintiff's counsel with the area of science at issue in the litigation may be an important factor in determining adequacy of representation, since this is indicative of the counsel's ability to properly examine and cross-examine the expert witnesses during the trial. A factor in determining whether the plaintiff's claim was typical of those of other members of the class would be the involvement of the plaintiff in administrative proceedings or activities with respect to the controversy in the litigation. Where the representative party in a class action is a public benefit, non-profit corporation, the court might inquire into its purposes and into its prior involvement in environmental litigation to determine its ability to fairly and adequately protect the interests of the individual members of the class.

AGGREGATION OF CLAIMS TO SATISFY JURISDICTIONAL AMOUNT

In order for the federal courts to have jurisdiction of actions under federal question jurisdiction or under

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97 Cf. South Hill Neighborhood Ass'n v. Romney, 421 F.2d 454, 461 (6th Cir. 1969).
diversity of citizenship jurisdiction, the value of the matter in controversy must exceed $10,000.

Subsequent to the passage of amended Rule 23 in 1966, a number of courts held that amended Rule 23 had changed the rules with respect to class actions, permitting aggregation in "spurious" class actions as well as in "true" class actions. However, other courts held that Rule 23, as amended in 1966, had not changed the principle that separate and distinct claims could not be ag-

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101 In "spurious" class actions under old Rule 23, which were "in essence merely a form of permissive joinder in which parties with separate and distinct claims were allowed to litigate those claims in a single suit simply because the different claims involved common questions of law or fact," the claims of the members of the class could not be aggregated to satisfy the jurisdictional amount requirement. Snyder v. Harris, 394 U.S. 332, 335 (1969), rehearing denied 394 U.S. 1026 (1969). Each plaintiff in a "spurious" class action had to demonstrate that his individual claim was in excess of the jurisdictional amount of $10,000. In a "spurious" class action, the right asserted by the plaintiff is peculiar to him. Booth v. General Dynamics Corp., 264 F. Supp. 465, 470 (N.D. Ill. 1967).

102 In class actions under Rule 23, prior to its amendment in 1966, the claims of the different members of the class in "true" class actions, in which "the rights of the different class members were common and undivided," could be aggregated in order to satisfy the jurisdictional amount requirement. Snyder, N. 101 supra at 335. The true class action is one wherein the joinder of all interested persons would be required. Moore's Federal Practice ¶ 23.08. The claims in a true class are aggregated because "the right of each individual claimant depends on establishing the common or collective rights of the class." Moore's Federal Practice ¶ 23.13. A true class action is one based upon a public right, not upon a right peculiar to the plaintiff; the aggregated amount of the public's claim is the value of the amount in controversy for purposes of satisfying the jurisdictional amount. Moore, supra ¶ 23.13 at 23-2959-60. In a "true" class action, the "right asserted and the relief sought were for the welfare of the entire body politic rather than for the individual plaintiffs." Booth, N. 101 supra at 470.

gregated in class actions to satisfy the jurisdictional amount requirement.\textsuperscript{104} The Supreme Court of the United States, in \textit{Snyder v. Harris},\textsuperscript{105} resolved this conflict by holding that Rule 23, as amended in 1966, had not changed the rule that the claims of the members of the class could be aggregated in "true" class actions to satisfy the jurisdictional amount requirement, but could not be aggregated in "spurious" class actions.

\textit{Yannacone v. Montrose Chemical Co.},\textsuperscript{106} with claims on behalf of municipal, state and federal governments, seeking reparations to rehabilitate the environment injured by D.D.T. and on behalf of those who have suffered involuntary accumulation of D.D.T. in their bodies, would be a "spurious" class action, since the claims would be separate and distinct. The right to recover reparations or individual damages would depend upon proof of individual damage, not upon the establishment of a common, public right.

The \textit{El Paso}\textsuperscript{107} air pollution case, with claims based on injury to the health and welfare of the members of the class, is a "spurious" class action, involving separate and distinct claims of individual injury. Environmental class actions seeking damages that are on behalf of those whose health or safety have been injured, as in air pollution or pesticide cases, will be "spurious" class actions asserting separate and distinct claims. The claims of the


\textsuperscript{105} Snyder, N. 101 \textit{supra}.

\textsuperscript{106} Yaconne, N. 13 \textit{supra}.

\textsuperscript{107} Fischer, N. 14 \textit{supra}.
members of the class will not be allowed to be aggregated to satisfy the jurisdictional amount, so that the plaintiff in such environmental class actions will have to have a claim in excess of the jurisdictional amount. This inability to aggregate claims under amended Rule 23 may prove one of the most serious obstacles to environmental class actions for damages, since representative parties in such actions will be either limited or non-existent.

RES JUDICATA: COMPROMISE, SETTLEMENT, AND NOTICE

The Advisory Committee, in adopting new Rule 23 in 1966, expressed dissatisfaction with the old “spurious” class action, which allowed members of such classes to have “one-way” intervention—“being allowed to intervene after a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision.”108 Under old Rule 23, members of the class in a “spurious” class action (a form of permissive joinder where parties with separate and distinct claims litigated those claims in a single suit because there were more common questions of law and fact than individual questions),109 were bound by the judgment only if they intervened and became parties to the proceeding.110 In true class actions, in which members of the class are asserting common and undivided rights,111 the judgment was binding on all members of the class, whether they intervened in the action or not.112

108 N. 20 supra at 105.
109 Snyder, N. 101 supra at 335.
111 N. 109 supra. See the discussion of true class actions in the section on “Aggregation of Claims for Jurisdictional Amount,” text accompanying notes 102–103, supra.
112 N. 110 supra.
As discussed in the section on Aggregation of Claims to Satisfy Jurisdictional Amounts, most environmental class actions seeking damages for injury to man or his environment from air pollution, pesticides, or radiation would be classified as “spurious” class actions under old Rule 23. Under old Rule 23, judgments in such class actions would have bound only the members of the “spurious” class action who sought to intervene in the action. Thus, if an environmental class action, classified as “spurious,” resulted in an adverse judgment to the plaintiff, either because improperly brought or because it was a collusive or strike suit, only the rights of the plaintiffs and intervening class members would have been prejudiced.

However, under new Rule 23, as amended in 1966, members of a class in an action maintained under Rule 23(b)(1) or Rule 23(b)(2) cannot exclude themselves from the judgment:113 a judgment in these class actions binds all members of the class, whether they appear in the action or not.114 In a class action maintained under Rule 23(b)(3), the “best notice practicable under the circumstances” must advise the members of the class that the court will exclude them from the class if they so request, and that if the member does not request exclusion, the judgment, whether favorable or not, will be binding upon him.115

The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested

113 Rule 23(c)(3).
114 Rule 23(c)(3); Green v. Wolf Corp., 406 F.2d 291, 298 (2d Cir. 1969); Wren v. Smith, 410 F.2d 390 (5th Cir. 1969); Siegel, N. 92 supra at 727.
115 Rule 23(c)(2); Green, N. 114 supra at 298.
Exclusion, and whom the court finds to be members of the class.116

Environmental class actions seeking damages, which would have been classified as "spurious" class actions under old Rule 23, could be classified as Rule 23(b)(3) class actions under Rule 23, as amended in 1966.117

The new Rule 23 consequently, has considerably changed the binding effect of judgments in environmental class actions seeking damages that would be classified as "spurious" class actions under old Rule 23. Under old Rule 23, only members of the class who intervened in such "spurious" class actions would be bound by the judgment, whereas under new Rule 23, all members of the class would be bound by the judgment in such suits, unless they excluded themselves from the action under Rule 23(b)(3). This is a significant difference, since under old Rule 23 members of "spurious" class actions would be bound by a judgment only if they affirmatively intervened. Under new Rule 23, members of Rule 23(b)(3) class actions are bound by the judgment unless they affirmatively act to exclude themselves,118 though not all members of the class have actual notice of the class action.

By attempting to balance the burden of litigation and by requiring other class members to be bound after "the best notice practicable under the circumstances," the rule has opened up a Pandora's box for the environmental litigator. He must beware of both friend and foe.

The rights of members of the class may be bound by judgments in poorly prosecuted actions which are brought with little attendant publicity, and then settled, compromised, or brought to judgment without members

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116 Rule 23(c)(3).
117 See text accompanying Ns. 106-107, supra.
of the class receiving notice (either because the class was too broadly defined or the notice was inadequate for providing actual notice). A similar danger arises from collusive and “strike” suits. An environmental tortfeasor might bar all future actions against itself for environmental degradation by arranging a collusive suit, with little publicity and inadequate notice, that results in a judgment that bars all future suits for injunctive relief or damages. A plaintiff might file suit against an environmental polluter, and settle or compromise the suit for monetary compensation that is well below the potential liability of the defendant for environmental degradation or pollution. Such results are particularly harmful where the result bars future claims for environmental degradation where future knowledge establishes that the claim is far greater than presently thought, or makes it possible to establish the defendant’s liability, which could not be done with present knowledge.

One means of guarding against such abuse of the class action procedure in environmental class actions would be to require that a Rule 23(c)(1) hearing to define the class and examine the adequacy of representation be held before an action filed as a class action would be allowed to be compromised or settled under Rule 23(e). By doing this, the court would allow an environmental class action to be settled or compromised only by one who was an adequate and fair representative of the class. With respect to the fairness of representation where a settlement or compromise is proposed, a court can carefully scrutinize the motives of the representative and the fairness of the settlement to all members of the class.119 If

119 Berger v. Purculator Prods., Inc., 41 F.R.D. 542, 543 (S.D. N.Y. 1966); Polakoff v. Delaware Steeplechase and Race Ass'n, 264 F. Supp. 915, 917 (D. Del. 1966); cf. Philadelphia, N. 9 supra at 326; and Berger, supra at 543, which hold that a Rule 23(c)(1) hearing did not have to be held if the notice required by Rule 23(e) was given.
the court can determine that an action was collusive it should dismiss it without entering judgment on the merits, for failure to state a case or controversy as required by Article III of the Constitution.\textsuperscript{120} Determination of whether an action was collusive could be based upon the relationship of the plaintiff and his counsel to the defendant. If an action was determined to be a “strike” suit, the court should dismiss the action with prejudice only to the plaintiff, and award costs to the defendant. However, motivation is usually unascertainable. Courts have stated that there are other ways to guard against abuse of the binding effect of judgments in class actions. One court has urged the use of such protective measures as ordering notice to be directed to members of the class, asking them whether they consider the representation to be fair and adequate, or requiring that the pleadings be amended to eliminate allegations which include absent persons in the defined class.\textsuperscript{121} Another court has indicated that members of a class not parties to the litigation may avoid the binding effect of an adverse judgment by attacking the adequacy of the representation, or by excluding themselves from membership in the defined class.\textsuperscript{122}

The greatest danger from the binding effect of judgments in environmental class actions will result from such suits as the D.D.T. case, which attempt to represent the separate and distinct claims of all Americans.\textsuperscript{123} In such a case, because of the millions of separate and distinct claims by individual members of the class, it is as impossible to obtain fair and adequate representation

\textsuperscript{120} See U.S. v. Johnson, 319 U.S. 302 (1943).
\textsuperscript{121} Siegel, N. 114 supra; see Green, N. 114 supra at 298.
\textsuperscript{122} Eisen, N. 10 supra at 563. A member of a class in a Rule 23(b)(3) class action must exclude himself from the class action “within a short time of commencement of the suit, and surely never, after a decision on the merits.” Minnesota, N. 74 supra at 575.
\textsuperscript{123} See the text accompanying Nos. 10–12 on “Definition of a Class.”
as it is to obtain a representative with claims typical of the class. Leaving members of the public to future collateral attacks or to seek exclusion in such an action to avoid the binding effects of a judgment is onerous, particularly where future scientific knowledge may change the scope of the defendant's liability. The courts should prevent the binding effects of such presumptuous class actions as the D.D.T. case by finding that the claims of the representative are not typical of the class or that because of the size of the class and the disparity of the claims of the members, the representative cannot fairly and adequately represent the class, no matter how skilled his counsel and how vigorous the prosecution. The members of the proposed class should not have the affirmative duty to exclude themselves from nor to collaterally attack an action which the plaintiff has no right to bring as a class action.

In environmental class actions where the class is properly defined and the representation proper, the binding effects of the judgment in a Rule 23(b)(3) class action should be controlled by the requirement for notice. This requirement becomes more important and thus more stringent as the right sued upon becomes more important to absent members of the class. A small rebate to commuters is far less important to them than health effects of various toxic insults to the environment. Rule 23(c)(2), which refers to the "best notice practicable under the circumstances," has the flexibility to increase the requirements of notice with the seriousness of the rights involved. It is desirable that courts thus correlate the notice required to the relief sought.

Where the rights sought to be vindicated are more important collectively than individually, courts have held that the notice requirements may be satisfied by publica-

124 See Rule 23(c)(2), 23(c)(3), 23(d)(2), discussed supra.
or even by extensive publicity given to an action in the newspapers. However, if a large number of individual members of the class can be identified with reasonable effort, but "financial considerations prevent the plaintiffs from furnishing individual notice to these members, there may prove to be no alternative other than the dismissal of the class suit." 

From a plaintiff's view, the cost of notice is one of the major hurdles to overcome in environmental litigation. There is not an environmental or conservation organization that is not financially overextended. Despite the excessive nature of some of the claims and the size of the class alleged in some environmental actions, we must remember that one of the major values of Rule 23 is to allow small stakeholders to make their collective claims without prohibitive costs. To require strict notice where the class is a broad public interest class suing to vindicate public or group rights can unjustly terminate litigation at the notice stage. Notice should not be allowed to become a defensive weapon but should be, ultimately, a solution correlating fairness, practicability, possibility, and the type of relief sought.

In broad litigation purporting to represent public rights, some alternative is required which will be less expensive and time-consuming than individual notice, but more effective than publication. The idea that newspaper publicity may satisfy the notice requirement would seem to run the risk of encouraging outrageous prayers for the purpose of advertising the plaintiff's counsel and solving notice problems all in one effort.

125 Booth, N. 101 supra at 472. "[S]ome sort of ritualistic notice in small print on the back pages of a newspaper would in no event suffice." Eisen, N. 10 supra at 569.


127 Eisen, N. 125 supra.
An alternative form of notice in environmental class actions would be sending individual notice to representative organizations and individuals concerned with the protection and quality of the environment. It could be assumed that they have the experience, funds, and contacts to benefit from the notice. Individual notice would be sent to organizations often involved in environmental litigation, such as the Sierra Club and the Environmental Defense Fund, which might wish to intervene in the action to improve the quality of representation or to raise additional claims or issues. Individual notice would be sent to organizations involved in educational programs and political activities to protect the environment, such as the National Audubon Society, the Wilderness Society, Friends of the Earth, and Defenders of Wildlife, who might be requested to inform their members, many of whom might be members of the class, of their rights to intervene or raise objections as to the representation. Individual citizens who are active in the protection of the environment who might wish to appear in the action, or might inform members of the class of their right to appear, would similarly be notified. Notice should also be sent to industries and governmental agencies with possible interest in the litigation. Affording notice to organizations and individuals which represented all possible interests held by the individual members of the class would best protect the rights of due process of the individual members of the class where individual notice would be impracticable. Such notice to responsible and representative organizations and individuals could be expected to mitigate due process questions, afford the best possible protection of the interests of the members of the class, and insure vigorous and responsible prosecution of the action.

The notice requirement is clearly for the benefit of both parties to an action, and for the protection of those ab-
sent, but who may be bound by litigation. Rule 23 does not by its language put the burden of notice on the plaintiff.\textsuperscript{128} It may be that the defendant has the resources, and access to the class, which would dictate placing the duty on him.\textsuperscript{129} In environmental litigation such as air pollution litigation against a local public service electric utility, where the defendant would regularly bill most members of the class each month, the reasoning of \textit{Dolgow v. Anderson}\textsuperscript{130} would seem to apply and dictate that burden of notice be placed on the defendant.

\textbf{STATUTE OF LIMITATIONS}

In environmental actions, problems with the statute of limitations will arise where the adverse effects of a non-continuing instance of environmental degradation or pollution does not become known until a future date, as in the case of radioactive contamination. The statute of limitations may also present a problem in the case of continuing environmental pollution or degradation, such as with air pollution or pesticides with long half-lives (whose effects continue for a number of years subsequent to application). In such cases, the limitation period may bar claims based upon the effects of environmental pollution prior to the limitation period. In both instances, the limitation period may run before the filing of claims by members of the class. Another problem that the members of the class face is the effect of a determination under Rule 23(c)(1), made after the limitation period, that an action may not be maintained as a class action.

The Advisory Committee has stated that though an action has been determined to be a non-class action under Rule 23(c)(1):

\textsuperscript{128} "Subdivision (c)(2) does not state that the plaintiffs shall provide notice." \textit{Dolgow, N. 7 supra} at 498.
\textsuperscript{129} Compare \textit{Dolgow, N. 7 supra}, with \textit{Minnesota, N. 74 supra}.
\textsuperscript{130} \textit{Dolgow, N. 129 supra}. 
[T]he court may still be receptive to interventions before the decision on the merits so that the litigation may cover as many interests as can be conveniently handled; the questions whether the intervenors in the non-class action shall be permitted to claim 'ancillary' jurisdiction or the benefit of the date of the commencement of the action for purposes of the statute of limitations are to be decided by reference to the laws governing jurisdiction and limitations as they apply in particular contexts.131

Where an action has been held to be properly maintained as a Rule 23(b)(3) class action, the filing of the class action tolls the statute of limitations for absent members of the class. Those members of the class who remained in the class may date themselves back for the purposes of the statute of limitations to the date of the filing of the class action.132 These holdings apply to members of the class of Rule 23(b)(1) and 23(b)(2) class actions, who may not exclude themselves from the class action.

By permitting intervention in class actions by members of the class for whom the limitations period has run at the date of intervention, a court “does not necessarily enlarge the period of limitations since the class action relates back to the date of the complaint.”133

However, where the determination under Rule 23(c)(1) is that an action may not be maintained as a class action, problems of the statute of limitations arise as to the individual members of the class for whom the limitations period has run at the date of this determination. One court, though not resolving this problem, has indicated

131 Note, N. 20 supra at 104.
132 Minnesota, N. 74 supra at 565; Philadelphia, N. 9 supra at 460.
133 Green, N. 114 supra at 301, footnote 14. However, if the limitation period has run at the time of the filing of the class action, the proposed intervenor would, of course, be barred from intervention, or recovery as a member of the class. See, e.g., Slack v. Stiner, 358 F.2d 65, 70 (6th Cir. 1966); Escott v. Barchis Constr. Corp., 340, F.2d 731, 732-33 (2d Cir. 1966).
that this negative determination should bar individual actions by members of the class for whom the limitations period has run. This is done by having the negative determination relate back to the filing of the complaint, where "the reason for the negative determination is failure to meet the prerequisites of 23(a) or even if the reason is that the common questions do not predominate over individual questions under 23(b)(3)..." However, this court indicated that if the negative determination was based upon "a weighing of various considerations of judicial housekeeping, it should not relate back to the filing of the complaint, particularly if the member of the class could show reliance upon the pendency of the purported class action, sufficient to toll the statute of limitations."

To hold otherwise in this latter situation would require every member of the class, out of caution, to file a separate, individual action within the limitation period. If a class was very large in size, relating back a "housekeeping" decision would either exclude most of the members of the class from recovery or would result in a large number of the members of the class filing individual actions or seeking to intervene, which would be inconsistent with the purposes of Rule 23. "Considerations of judicial housekeeping" is a "painfully vague" standard for determining which negative determinations under Rule 23(c)(1) should relate back to the filing of the complaint for purposes of the statute of limitations. A better standard would be to have a showing of "reliance" by a member of the class on the filing of the class action, as a reason for not filing an individual action within the period of limitations, be grounds for not relating the negative determination back to the filing of the claim.

134 Philadelphia, N. 9 supra at 461.
135 Ibid.
136 Ibid.
137 Note, N. 18 supra at 702.
A standard that would not relate the negative determination back to the filing of the claim, where the individual could show lack of notice of the class action, would be more inconsistent with Rule 23, since all members of the class are not required to have actual notice under Rule 23.

**APPORTIONMENT AND DISTRIBUTION OF DAMAGES**

Probably the first question in considering apportionment of damages is whether the nature of the claims requires individual restitution. The various transportation overcharge cases mentioned previously\(^{138}\) show that in many cases individual class members could not care less about small refunds; yet, it is important to the deterrent theory of law that the wrongdoer not receive a windfall merely because "exact justice" cannot be done. Consequently, in these instances damages should be measured by the defendant’s unjust gain, rather than by the individual damages of the members of the class. A common solution to the rate overcharge situation is to reduce future fares on the assumption that those overcharged will continue to use the defendant’s transportation. It would be hoped that these logical approaches would be carried over to the environmental field. Where individual apportionment of damages would be difficult in environmental class actions, a court might require the defendant to install pollution control equipment in air and water pollution cases, or to rehabilitate the environment in pesticide and radiation cases, rather than to award individual damages.

If individual restitution is needed, there are several ways that damages may be apportioned and distributed

\(^{138}\) See Nos. 32–33, *supra*. 
to members of a class. One method would be to have the representative party establish the defendant's liability for damages to each member of the class, and then have the individual members of the class come forward, after receiving notice, to obtain their share of damages. The court might distribute the damages to the individual members of the class, or might require that the plaintiff or defendant supervise the distribution, as a trustee, to the individual members of the class.  

Another method of distributing damages in environmental class actions would be to have the individual members of the class establish their individual claims, either before the court or an appointed master after the representative party has established the general liability of the defendant.

However, it may often be necessary for individual members of the class to establish both the defendant's liability to them and their claim for damages, where the defendant's general liability to the class cannot be established. This latter situation is the more likely in environmental class actions seeking damages, since the claims of individual members of the class for injury will usually be separate and distinct, requiring individual proof of liability and injury. In such cases, the court should, by notice, direct the individual members of the class to file claims for damages and provide methods for them to prove their claims.

The court may provide that these individual claims may be handled through a master. However, class actions that require such procedures because separate and distinct claims or the individual members of the class raise individual issues of liability and injury may,

140 Id. at 693-695.
141 Ibid.
on closer examination, be found not to be properly maintained class actions.

One solution to the problem would be, through notice, to require members of the class to file within a reasonable period of time "a brief statement of their intent to prove damages; if they failed to do so, their claims would be barred." This solution "would reveal the true scope of the litigation, and would greatly reduce the trouble and expense of any subsequent notices which might be required, or provide a basis for informed reappraisal of the class action question under Rule 23(c)(1)." Thus, rather than barring the claims of those members of the class who do not present claims for individual damages, the court might reconsider whether the class had been properly defined, since lack of affirmative response might indicate that those individuals had not suffered damages and were not members of the class.

However, if a court chooses to place such an affirmative requirement on the members of the class, it should make sure that those members of the class who are barred for failure to file claims have probably received notice of this requirement. The notice in this situation, which occurs before the trial on the merits, should be more likely to achieve actual notice than notice that would be required subsequent to judgment of general liability, since the penalty for failure to file a proof of claim at this time precludes a member of the class from participating in the trial on its merits. This requirement of an affirmative response by members of the class in order to share in the judgment might not be required.

143 Philadelphia, N. 142 supra.
however, where it would be tedious and would not “expedite or clarify the action.”

ATTORNEY FEES

In actions seeking damages for injury to health or welfare or for environmental degradation or pollution, many individual claims could not be litigated in separate actions because the claims would be so small that no attorney would prosecute the claim. Because of this fact, attorneys may attempt to join these small claims in class actions. Substantial recovery by the class would then provide a source of fees for the attorney.

Attorneys might thus bring suit on behalf of clients with small individual claims as class actions, hoping to prosecute the claims of all members of the class and to receive fees on a contingent basis from all members for whom recovery is made.

Problems of unethical solicitation may thus be presented. However, solicitation is a problem only until a Rule 23(c)(1) hearing determines that an action may or may not be maintained as a class action, since subsequent to that determination the court can control solicitation by regulating the use of notice.

Rule 23 recognizes that notice may be used for solicitation, rather than to protect the members of the class or to insure the fair conduct of the action. Courts can control such solicitation by requiring the form of notice to be approved by the court before it can be

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145 Eisen, N. 10 supra at 566-567, Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), Dolgow, N. 7 supra at 494-495.
147 Note, N. 39 supra at 107.
directed to the members of the class.\[^{146}\] It is proper to inform members of the class in individual notices that their interests in the class action will be represented by the plaintiff's counsel unless they enter an appearance through counsel of their own choosing.\[^{149}\] However, courts have not allowed the names or addresses of plaintiff's counsel to appear in published or individual notice, using the office of the clerk of the court as a return address.\[^{150}\] Such a procedure, though adding some administrative burdens to the courts, does control the problem of solicitation.

The amount of attorney's fees to be paid by non-party members of the class for whom plaintiff's counsel has collected damages may be determined and the payment ordered by the court.\[^{151}\] This would be the preferable method of determination and payment of attorney's fees in class actions, since it would avoid the solicitation problems where the plaintiff's counsel personally arranges attorney's fees on a contingent basis with each member of the class, and would insure, through judicial supervision, that the plaintiff's counsel was not the only person to benefit from the class action.\[^{152}\] The court could insure that the attorney's fees were fair, taking into account the diminished paper work and increased efficiency in handling individual claims in a class action, while insuring that the non-party members of the class did pay attorney's fees to plaintiff's counsel. The fees in environmental class actions should be determined on a quantum meruit basis by the court, not by individual fee contracts.\[^{153}\]

\[^{146}\] See Berman, N. 144 supra at 339.
\[^{149}\] Ibid.
\[^{150}\] Ibid.
\[^{151}\] See N. 146 supra.
\[^{152}\] See, e.g., Eisen, N. 10 supra at 567.
\[^{153}\] Kalven & Rosenfield, N. 140 supra at 717.
CONCLUSION

There is an obvious, real, and immediate need to pull back even further from our laissez-faire approach to resource management. To an increasing number of us it is more than esthetics, more than amenities, more than a question of our standard of living. It is a question of survival. The fact of a need however, does not suggest that we should grasp every remedy no matter how inappropriate.

Rule 23 offers a procedural device for certain group relief and a deterrent against the commission of certain group injuries. It can be useful in manageable situations, i.e., to the stockholder, the employee, the taxpayer, the ratepayer or the minority member suing for specific equitable relief against a certain defendant. Class actions allow a plaintiff to lay on the scales not only his interests, but also the interests of other dispersed, isolated, and anonymous members of the same class. Use of the class action is being threatened from a number of sources. Plaintiffs' lawyers use the class action as a public relations device to warn of apocalyptic disaster or as a self-promotional gimmick. It is threatened by defendants' lawyers who use the "notice" requirement as a defensive weapon to force unnecessary and expensive notice. Intrinsically, it is threatened by the very requirements of amended Rule 23. Rule 23, in attempting to allocate the burdens of litigation, has seriously restricted the use of class actions by requiring the judgment to apply to all absent members of the class. Serious restrictions on the use of environmental class actions for damages are imposed by the inability to aggregate the claims of the class to satisfy the jurisdictional amount.

Our legal system is undergoing a rethinking of many of its basic concepts. "Fault" is being questioned in our divorce and tort law, and the concept of "mutuality" is
undergoing the same re-examination. We are getting away from the concept of mutuality in collateral estoppel and we should remove it from class actions. Mutuality puts symmetry into the law of class actions, and allows us to say that if the plaintiff can take advantage of the judgment, so should he be bound by an adverse judgment. However, we pay a price in logic for this symmetry. The equities are not balanced between the parties. The defendant has been afforded his day in court and if he loses he at least had the opportunity to fully present his case in his own behalf by his own attorney. The absentee plaintiff, however has not had his day in court. He has been “represented,” often without his knowledge, by a stranger and a lawyer not of his choosing.

The present amended Rule 23 substantially restricts the use of class actions, for res judicata hanging over the proceedings like the sword of Damocles and the economic realities of notice require unnecessarily restricted classes.

Rule 23 often impairs the ability of absent members of the class to assert their rights, and yet superficially tempts the champerous lawyer and the strike suiter to obtain a large fee through use of the class action.

The old class action rule had adequate protection against litigation such as the D.D.T. and El Paso cases, and also implemented the policy considerations which originated class action litigation. The environmental litigator would be served better by the “spurious” class action of old Rule 23 than by amended Rule 23.