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Reopening the Debate Postjudgment Certification in Rule 23(b)(3) Class Actions

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REOPENING THE DEBATE: POSTJUDGMENT CERTIFICATION IN RULE 23(b)(3) CLASS ACTIONS

The rule 23(b)(3) class action[1] stands alone among federal class actions[2] in the "storm center of Rule 23."[3] Despite two complete revisions of the rule,[4] commentators have initiated a call for yet a third.[5] Rule reform, however, has been unsuccessful to date,[6] so

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[1] The requirements of a 23(b)(3) class action are as follows:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied [requiring that class be so numerous that joinder is impracticable, common questions of law or fact exist, the representative's claim is typical of class claims, and that representative fairly and adequately protect class interests], and in addition:
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> . . . .
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> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (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.

FED. R. CIV. P. 23(b).

[2] Subdivisions (b)(1) and (b)(2) of rule 23 describe the other two types of federal class actions. *See* note 12 and accompanying text *infra*.

[3] Schuck, *An Overview of Class Actions,* 70 F.R.D. 289, 297 (1976).

[4] Following adoption of the modern federal class action rule in 1938, *see* Fed. R. Civ. P. 23, 308 U.S. 689 (1940), rule 23 was revised substantially in 1966. *See generally Notes of the Advisory Committee on Rules Relating to 1966 Amendments of Federal Rule of Civil Procedure 23,* 39 F.R.D. 98-107 (1966) [hereinafter cited as *Advisory Committee Notes*].

[5] The following is typical of recent criticism: "Rule 23(b)(3) . . . was designed to improve the [class] action's efficiency and protect the interests of defendants and absent parties. These goals, however, have yet to be realized after thirteen years of experience with the rule." Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action,* 80 COLUM. L. REV. 299, 299-300 (1980) (footnote omitted).

In 1978, Senators DeConcini and Kennedy introduced a bill that would completely revamp (b)(3) class action law. *See* S. 3475, 95th Cong., 2d Sess. (1978). The Bill divides class damage actions into two categories. First, a "public action" would enable the federal government, or an individual on its behalf, to sue the class opponent for claims that are too small to litigate individually. Instead of class plaintiffs sharing directly in the recovery, the government would institute its own procedures for distributing the money award. This innovation would make the public action procedurally simpler than current law. Second, the "private compensatory action" would allow individual plaintiffs with claims over $300 to sue under detailed procedures set out in the Bill. *Id. See generally* Berry, *supra,* at 321-43; Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979) (criticizing S. 3475); *see also* Kennedy, *Federal Class Actions: A Need for Legislative Reform,* 32 SW. L.J. 1209 (1979); Note, *Reforming Federal Class Action Procedure: An Analysis of the Justice*

courts may be expected to continue their efforts to refine the common law of class action procedure. One area deserving of such refinement pertains to the question whether courts may wait until after judgment to certify a suit[7] as a 23(b)(3) class action.

Although champions of rule reform have not pointed to the postjudgment certification issue as a reason supporting amendment of rule 23,[8] judicial confusion in this area is evident. Some courts have suggested that postjudgment certification in 23(b)(3) actions is impermissible,[9] while others have allowed it under certain ill-defined "equitable exceptions."[10] Consequently, both judicial efficiency in class management and substantive party rights have suffered. This Note argues that neither rule 23 nor judicial precedent precludes postjudgment certification in all circumstances. Instead of imposing a per se prohibition against postjudgment certification or applying an equitable exceptions approach to it, courts should adopt a discretionary test that draws on principles of modern res judicata law. Such an approach would promote more effectively judicial efficiency and substantive class interests while protecting the class defendant from prejudice.

Department Proposal, 16 HARV. J. LEGIS. 543 (1979); Note, *Manageability of Class Actions under S. 3475: Congress Confronts the Policy Choices Revealed in Rule 23(b)(3) Litigation,* 68 KY. L.J. 216 (1980).

[6] Senate Bill 3475 did not receive final consideration and has not yet been reintroduced in the Senate. In 1979, Representative Neal Smith introduced H.R. 5103, which generally addresses some of the same concerns outlined in earlier proposals. H.R. 5103, 96th Cong., 1st Sess. (1979). The Bill was referred to the Small Business Committee and the Judiciary Committee, but only the Small Business Committee held hearings and mark-up. On January 5, 1981, Representative Smith reintroduced the Bill in the 97th Congress, *see* H.R. 13, 97th Cong., 1st Sess. (1981), but no action had been taken on it as of the time this Note went to press.

[7] *See* FED. R. CIV. P. 23(c)(1).

[8] Recent criticism of rule 23(b)(3) may be divided into four categories. The first is that the requirements of subdivisions 23(a) & 23(b)(3) that the class action be superior to available alternatives and that the named plaintiff adequately represent the class, are drawn inefficiently. Second, the rule poorly articulates when the court should decide the merits, which can thereby delay the consideration of the plaintiff's claim. Third, practical difficulties in communicating with class members make individual recovery inefficient. Berry, *supra* note 5, at 302-20. The fourth and broadest criticism is that the (b)(3) action should not be permitted in any form because of its negative effect on the administration of justice. *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I),* 81 HARV. L. REV. 356, 394 (1967); Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?,* 70 F.R.D. 199, 203 (1976); Simon, *Class Actions—Useful Tool or Engine of Destruction,* 55 F.R.D. 375 (1973).

[9] *See* note 39 and accompanying text *infra.*

[10] *See* notes 43-71 and accompanying text *infra.* Commentators also disagree about whether (b)(3) certification must precede the merits decision. *Compare, e.g.,* C. WRIGHT, FEDERAL COURTS 351 & n.52 (3d ed. 1976) (certification required before judgment) *with* 3B MOORE'S FEDERAL PRACTICE ¶ 23.02-2, at 101 & n.45 (2d ed. 1981) (motions to dismiss and summary judgment motions permissible before certification).

I

RULE 23 AND ONE-WAY INTERVENTION

A. *The 1966 Amendment*

In response to the "[d]espondency over the inadequacies of [the 1938 class action rule],"[11] the 1966 Rules Advisory Committee formulated rule 23(b) into a tripartite scheme. Subdivision (b)(1) permits a class action if individual actions otherwise would require "incompatible standards of conduct" by the class opponent or threaten the interests of nonparties. Subdivision (b)(2) allows a class action if injunctive or declaratory relief is "generally applicable to the class."[12] Subdivision (b)(3), like the 1938 rule,[13] requires that the court find "questions of law or fact common to the members of the class" and that the common questions predominate over individual questions. In addition, the court must determine that a class action is superior to other means of adjudicating the particular claims.[14] Unlike the plaintiff in the old spurious class action,[15] the (b)(3) named

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[11] Kaplan, *supra* note 8, at 386. The former rule 23 divided class actions into three categories according to the nature of the rights involved. The "true" class action involved a right that was "joint, or common, or secondary." The "hybrid" action pertained to rights that were "several," with claims that affected specific property. The third category, the "spurious" action, was for adjudication of rights that were "several, and [where] there [was] a common question of law or fact affecting the several rights and a common relief [was] sought." Fed. R. Civ. P. 23(a), 308 U.S. 689 (1940). For a summary of the criticisms of the former rule, see Kaplan, *supra* note 8, at 380-86.

[12] An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
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> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
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> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
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> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . .

FED. R. CIV. P. 23(b)(1)-(2).

[13] *See* note 11 *supra.*

[14] FED. R. CIV. P. 23(b)(3).

[15] The spurious class action, *see* note 11 *supra,* was "simply a form of 'permissive joinder' device," Frankel, *Some Preliminary Observations Concerning Civil Rule 23,* 43 F.R.D. 39, 43 (1968) (footnote omitted), in that the potential class member had to seek affirmatively to join the action. "When a suit was brought by or against such a class, it was merely an invitation to joinder—an invitation to become a fellow traveler in the litigation, which might or might not

plaintiff[16] acts in a representative capacity on behalf of all class members who fail to "opt out," or remove themselves from the action.[17]

In spurious class actions, courts allowed or suggested "one-way intervention," a practice that permitted class members to intervene in an action after the original named plaintiff had obtained a favorable judgment.[18] Some criticized this practice as violating the doctrine of

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be accepted." 3B MOORE'S FEDERAL PRACTICE ¶ 23.10[1], at 2603 (2d ed. 1981). Under modern rule 23(c)(2), if the putative class member fails to opt out after receiving notice, he automatically becomes part of the class, and res judicata prevents him from subsequently suing the class opponent. *See* American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 550 (1974) ("A federal class action is no longer an 'invitation to joinder' but [is] a truly representative suit. . . ."). *But cf. Advisory Committee Notes, supra* note 4, at 106 (court can only decide "extent or coverage" of judgment; res judicata effect determined in subsequent action).

[16] This Note assumes that all (b)(3) class actions involve a plaintiff class and defendant class opponent. Commentators have, however, noted a rise in defendant class actions, in which a single plaintiff sues a class of defendants. According to one observer, "most defendant class actions for money damages will be brought [under subdivision (b)(3) of rule 23]." Wolfson, *Defendant Class Actions,* 38 OHIO ST. L.J. 459, 493 (1977). *See also* Note, *Defendant Class Actions,* 91 HARV. L. REV. 630 (1978).

For purposes of postjudgment certification, it would be advantageous to the plaintiff in a defendant class action to seek early certification in order to prevent the class defendants from opting out after judgment, *see* FED. R. CIV. P. 23(c)(2), and avoiding liability; thus, separate consideration in this Note of defendant class actions should not be necessary. Moreover, certification following a plaintiff's judgment in a defendant class action would raise substantial due process questions, *see generally* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1786 (1972), just as would certification following a defendant's judgment in a plaintiff class action. In both cases, the judgment may bind parties not represented in court. Certification following a plaintiff's judgment in a plaintiff class action, however, normally should not offend traditional due process considerations. This is in part because such certification would not be attempted in the absence of a plaintiff's verdict; hence no absent party would face the possibility of being bound by an adverse judgment.

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

FED. R. CIV. P. 23(c)(2). *See also id.* 23(c)(3).

[18] *See, e.g.,* Foster v. City of Detroit, 405 F.2d 138 (6th Cir. 1968) (applying 1938 rule); DePinto v. Provident Security Life Ins. Co., 323 F.2d 826 (9th Cir. 1963), *cert. denied,* 376 U.S. 950 (1964); Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 589 (10th Cir. 1961), *cert. dismissed,* 371 U.S. 801 (1962); Pentland v. Dravo Corp., 152 F.2d 851, 856 (3d Cir. 1945); York v. Guaranty Trust Co., 143 F.2d 503, 529 (2d Cir. 1944), *rev'd on other grounds,* 326 U.S. 99 (1945); State Wholesale Grocers v. Great Atl. & Pac. Tea Co., 24 F.R.D. 510 (N.D. Ill. 1959); Speed v. Transamerica Corp., 100 F. Supp. 461, 463 (D. Del. 1951); Tolliver v. Cudahy Packing Co., 39 F. Supp. 337, 339 (E.D. Tenn. 1941); Alabama Ind. Service Station Ass'n v. Shell Pet. Corp., 28 F. Supp. 386, 390 (N.D. Ala. 1939).

mutality of estoppel,[19] prejudicing the class opponent's defenses and impairing his reliance interest,[20] and discouraging putative class members from contributing to the named plaintiff's litigation expenses.[21] The 1966 Rules Advisory Committee did not specify its objections to this practice, but the Advisory Committee's Note accompanying the proposed rule 23 states that under subdivision (c)(3), "one-way intervention is excluded."[22]

Though the Committee pointed to subdivision (c)(3), courts have not been in agreement about which subdivision of rule 23(c), if any, accomplishes the "exclusion" of one-way intervention.[23] Subdivision (c)(1) encourages, but does not compel, class certification prior to judgment by requiring that a court determine by order "[a]s soon as practicable after the commencement of an action" whether a suit can be maintained as a class action.[24] Early certification by itself, however, does not ensure that putative class members will not opt out after judgment. Thus, subdivision (c)(2) requires that the court direct notice to (b)(3) class members and specify the date beyond which they may not opt out.[25] Like subdivision (c)(1), subdivision (c)(2) does not prescribe the order in which notice and judgment on the merits is to be determined. The same ambiguity exists in subdivision (c)(3), which directs the court when it enters judgment only to "specify or describe" those to whom (c)(2) notice was sent and who have been designated as class members.[26]

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[19] *See* notes 78-82 and accompanying text *infra*. Mutuality of estoppel is the doctrine whereby "[n]o party is . . . bound in a subsequent proceeding by a judgment, unless the adverse party now seeking to secure the benefit of the former adjudication would have been prejudiced by it if it had been determined the other way." 1 A. FREEMAN, JUDGMENTS § 159 (4th ed. 1892). *See also* RESTATEMENT OF JUDGMENTS § 93 (1942).

[20] *See* notes 89-93 and accompanying text *infra*.

[21] *See* notes 83-88 and accompanying text *infra*. Under the 1938 rule, a defendant's verdict precluded cost-sharing altogether by eliminating the incentive to intervene.

[22] *Advisory Committee Notes*, *supra* note 4, at 106.

[23] *See, e.g.*, cases cited in note 138 *infra*.

[24] FED. R. CIV. P. 23(c)(1). Because subdivision (c)(1) does not explictly state when certification must occur, some district courts have adopted local rules to require certification within a certain number of days. *See, e.g.*, D.D.C. LOCAL CIV. R. 1-13(b); S.D.N.Y. LOCAL CIV. R. 4(c). Such a rule would not by itself prevent one-way intervention, however, if a motion to decide the merits were disposed of before the specified time had elapsed. Even where no specific time limitation applies, the time necessary for a merits determination may be shorter than the period specified by "as soon as practicable."

[25] *See* note 17 *supra*.

[26] (3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to

B. *The Supreme Court: 1973 Term*

Following the 1966 amendment, discussion concerning class certification timing centered on the meaning of "[a]s soon as practicable" in subdivision (c)(1).[27] Several courts read the new rule to require a "prompt" certification order,[28] but the desirability of flexibility in timing was also recognized.[29] The Supreme Court shifted the debate in 1974, however, when it employed strong language in two cases to suggest that one-way intervention is impermissible under the new rule.

In *American Pipe & Construction Co. v. Utah,*[30] the district court had ruled that the plaintiff's alleged (b)(3) class action could not be maintained and had denied subsequent attempts by putative class members to intervene because the statute of limitations had run.[31] The Supreme Court affirmed the Ninth Circuit's reversal as to the issue of intervention, holding that "the filing of a timely class action complaint commences the action for all members of the class as subsequently determined" now that the (b)(3) action, unlike the former spurious action, is a "*truly* representative suit."[32] The Court also suggested in dictum that the Rules Advisory Committee had approved the provision in the new rule binding absent members to an adverse judgment only after proscribing one-way intervention.[33]

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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 exclusion, and whom the court finds to be members of the class.

FED. R. CIV. P. 23(c)(3).

[27] *See* Frankel, *supra* note 15, at 39-42.

[28] *E.g.*, Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324, 326 (E.D. Pa. 1967).

[29] *See* Frankel, *supra* note 15, at 41-42.

[30] 414 U.S. 538 (1974).

[31] *See* Utah v. American Pipe & Constr. Co., 50 F.R.D. 99 (C.D. Ca. 1970); Utah v. American Pipe & Constr. Co., 49 F.R.D. 17 (C.D. Ca. 1969).

[32] 414 U.S. at 550 (emphasis added). The Court did not clarify whether its holding depended on the 1966 amendment; it did acknowledge that the statute of limitations issue had not reached the Supreme Court prior to 1966. *Id.* Under the old rule, "[a] majority of the courts ruling on the question, emphasizing the representative nature of a class suit, concluded that such intervention was proper." *Id.* at 549 (citations omitted).

[33] According to the Court, "[t]he 1966 amendments were designed, in part, specifically to mend this perceived defect in the former Rule [of permitting one-way intervention] and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments." *Id.* at 547. On the other hand, the Court did not consider whether it would have held that a representative class action device that *permitted* one-way intervention *would* toll the statute for individual members. Thus, it cannot be determined whether the one-way intervention aspect of the new rule was even relevant to the Court's holding. *See* text accompanying note 148 *infra.*

The Supreme Court later confronted the one-way intervention issue more directly in *Eisen v. Carlisle & Jacquelin.*[34] The district court in *Eisen* had conducted a precertification "mini-hearing" to assess the merits informally in order to apportion costs of class notice between the parties.[35] The Supreme Court invalidated the hearing[36] on the ground that it "contravene[d] the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it [, which is] . . . directly contrary to the command of subdivision (c)(1) [of rule 23]."[37] The Court's opinion is ambiguous as to whether the mini-hearing, by delaying the certification decision, merely violated subdivision (c)(1)'s command to certify "[a]s soon as practicable," or whether the procedure also violated an implied command in (c)(1) against one-way intervention.[38] In any event, some lower courts have interpreted *Eisen,* as well as *American Pipe,* as disapproving one-way intervention and, hence, postjudgment certification.[39]

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[34] 417 U.S. 156 (1974).

[35] Eisen v. Carlisle & Jacquelin, 54 F.R.D. 565 (S.D.N.Y. 1972).

[36] The Court also held that rule 23 requires that the plaintiff bear the costs of individual notice to class members who can be identified through reasonable effort. 417 U.S. at 172-79. In holding that individual notice is mandatory, the Court, echoing its earlier language in *American Pipe,* stated that the "unambiguous requirement of Rule 23 . . . was intended to insure that the judgment, whether favorable or not, would bind all class members who did not request exclusion from the suit." *Id.* at 176.

[37] *Id.* at 177-78. The Court also raised two secondary objections to the mini-hearing. First, "nothing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits. . . ." *Id.* at 177. *See also* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1015 (2d Cir. 1973) (arguing absence of provision in rules for mini-hearing). Second, the Court noted that a mini-hearing "is not accompanied by the traditional rules and procedures applicable to civil trials [, which could] result in substantial prejudice to a defendant." *Id.* at 178. Lower courts, however, have deemphasized the significance of *Eisen*'s procedural objection. *See, e.g.,* Peritz v. Liberty Loan Corp., 523 F.2d 349, 353 & n.2 (7th Cir. 1975). *But cf.* Haas v. Pittsburgh Nat'l Bank, 381 F. Supp. 801, 805 (W.D. Pa. 1974), *aff'd in part and rev'd in part on other grounds,* 526 F.2d 1083 (3d Cir. 1975) (precertification summary judgment distinguished from *Eisen* mini-hearing on ground that summary judgment offers procedural protections found wanting in mini-hearing).

[38] The Court seems to have relied more heavily on the "as soon as practicable" requirement, presumably believing that any consideration of a merits motion would have required more time than was permitted by subdivision (c)(1). 417 U.S. at 178. *See* notes 95-100 & 149-50 and accompanying text *infra.*

[39] It has been argued that the Seventh Circuit's decision in Peritz v. Liberty Loan Corp., 523 F.2d 349 (7th Cir. 1975) (certification impermissible even after summary judgment despite its procedural safeguards, *see* note 37 *supra*) suggests that "*Eisen* is being interpreted as a case about one-way intervention." *Developments in the Law—Class Actions,* 89 HARV. L. REV. 1318, 1425 n.193 [hereinafter cited as *Developments—Class Actions*]. In addition, the *Peritz* court, citing *American Pipe,* argued that "[t]he obvious import of [the Court's] language is that the amended Rule 23 *requires* class certification prior to a determination on the merits." 523 F.2d at 353 (emphasis in original). *See also* Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270, 273-75 (10th Cir. 1977). *Cf.* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 354 & n.14

II

EROSION OF THE RULE AGAINST ONE-WAY INTERVENTION

A. *Rule 23(b)(1) and 23(b)(2) Actions*

Courts in (b)(1) and (b)(2) class actions after *American Pipe* and *Eisen* rejected the Supreme Court's implied prohibition against one-way intervention. Limiting the rule against one-way intervention to (b)(3) actions,[40] courts in (b)(1) and (b)(2) actions concluded that delay in the (c)(1) certification order until after judgment did not extinguish their power to certify a class. Instead they sought to determine case-by-case whether it would be reversible error to grant postjudgment relief.[41] It is difficult, however, to acertain the basis upon which the courts determined that the language in rule 23 distinguishes (b)(3) actions from non-(b)(3) actions for purposes of one-way intervention.[42]

B. *Rule 23(b)(3) Actions: Developing Exceptions*

1. *Waiver*

In *Katz v. Carte Blanche Corp.*,[43] the Third Circuit effectively proposed a type of postjudgment certification in a (b)(3) class action

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(1980) (Powell, J., dissenting) (relying only on Rules Advisory Committee "intention" to preclude one-way intervention, *see* note 22 and accompanying text *supra,* rather than on *Eisen* or *American Pipe*). For pre-*Eisen* cases disapproving postjudgment certification, see Miller v. Mackey Int'l, Inc., 452 F.2d 424, 427-30 (5th Cir. 1971) (consideration of merits before deciding certification request improper); Buchholtz v. Swift & Co., 62 F.R.D. 581, 595 (D. Minn. 1973) (summary judgment postponed until after class determination where "notice problems . . . do not seem particularly awesome").

[40] *See, e.g.,* Larionoff v. United States, 533 F.2d 1167, 1182-83 (D.C. Cir. 1976) ((b)(1) action), *aff'd,* 431 U.S. 864 (1977); Jimenez v. Weinberger, 523 F.2d 689, 698, 700 & n.25 (7th Cir. 1975). ((b)(2) action), *cert. denied,* 427 U.S. 912 (1976). *See also* cases cited at notes 143, 159 *infra.*

[41] *E.g.,* Jimenez v. Weinberger, 523 F.2d at 699.

[42] *See* Larionoff v. United States, 533 F.2d at 1182-83 (relying in part on "express" language of subdivision (c)(2) to distinguish (b)(3) actions); Jimenez v. Weinberger, 523 F.2d at 697 (relying in part on inference of language of rule 23 to distinguish (b)(3) actions). Subdivision (c)(2), cited by the *Larionoff* court, may assume that (b)(3) class notice is sent prior to judgment, but the rule nowhere specifies that the certification order itself in such actions should be treated differently than it is in (b)(1) and (b)(2) actions.

Under the *Larionoff* and *Jimenez* view, plaintiffs' attorneys may be able to avoid the *Eisen* prejudgment certification requirement merely by adding to their class allegations a prayer for injunctive relief. The action may then qualify for (b)(2) prosecution under more relaxed certification procedural requirements. *See* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1775 (1972); Note, *Notice in Rule 23(b)(2) Class Actions for Monetary Relief:* Johnson v. General Motors Corp., 128 U. PA. L. REV. 1236 (1980) (criticizing Fifth Circuit for subjecting (b)(2) plaintiffs seeking monetary relief to an "onerous" (b)(3) procedure by imposing mandatory individual notice requirements); note 168 *infra.*

[43] 496 F.2d 747 (3d Cir.) (en banc), *cert. denied,* 419 U.S. 885 (1974).

by permitting a "test case." The court suggested that the class plaintiff litigate his claim individually against the defendant, who would "waive" the protection of the rule against one-way intervention and agree to be bound by an adverse judgment after subsequent class certification.[44] Concluding that the "as soon as practicable [requirement of subdivision (c)(1)] does not necessarily mean at the outset of the lawsuit,"[45] the court found prejudgment certification both unnecessary and undesirable where neither party would be affected adversely by postjudgment certification,[46] and where prejudgment notice otherwise would have damaged the defendant's business.[47] The *Katz* court justified this test case exception to the rule against one-way intervention on the ground that a recent Supreme Court decision had relaxed the requirement of mutuality of estoppel.[48]

Commentators predicted that *Katz* would have limited impact, arguing that it is unusual for a *defendant* to wish to avoid early certification and notice.[49] Two circumstances in *Katz* supported this view. First, the defendant expressly agreed to postjudgment certification, and the court suggested that there would have been a different result

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[44] A test case, although sometimes identified as a form of postjudgment certification, *see* Jimenez v. Weinberger, 523 F.2d 689, 701 & n.27 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976), differs in one important respect: Because the test case procedure in *Katz* arose before judgment, the court lacked the power to require the defendant to submit to certification. The *Katz* court suggested that plaintiff could "condition[] postponement of notice upon the filing of an appropriate stipulation by the defendant agreeing to be bound in favor of potential class members by an adverse determination of liability." 496 F.2d at 760 n.7. *See also id.* at 758-62.

[45] 496 F.2d at 758.

[46] *Id.*

[47] The defendant was concerned that certification would result in class notice that would cause its credit card holders to withhold payments, a result "possibly catastrophic to [the defendant]." *Id.* at 757. Furthermore, the defendant argued that certification would require it to file compulsory counterclaims for past due accounts against those who did not opt out upon receiving notice. According to the court's description of the defendant's position, "[t]his course . . . would be disruptive of its normal collection practices and of its relations with its account debtors." *Id.* at 758.

[48] *Id.* at 759-60 (citing Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971)). *See* notes 78-82 and accompanying text *infra*.

[49] 3B MOORE'S FEDERAL PRACTICE ¶ 23.50, at 428 & n.32 (2d ed. 1981); Becker, *The Class Action Conflict: A 1976 Report,* in *Proceedings of Seminar for Newly Appointed United States District Judges,* 75 F.R.D. 89, 173 (1978) (*Katz* procedure will be "suggested by and agreeable to a defendant" only "in very exceptional circumstances"); 88 HARV. L. REV. 825, 834 (1975) ("Because a defendant will consent to a test-case procedure only in rare instances, and because that procedure appears to be inappropriate without such consent, the effect of *Katz* on class litigation is likely to be extremely limited"); 21 WAYNE L. REV. 1195, 1207 (1975). *Cf.* Izaguirre v. Tankersley, 516 F. Supp. 755 (D. Or. 1981) (class certification conducted simultaneously with partial summary judgment for defendants *held* permissible where they waive "protection" of rule against one-way intervention).

in the absence of such agreement.[50] The second circumstance arises out of *Katz*'s subsequent history. The Third Circuit denied certification and held in favor of a test case on the ground that a class action was not superior to the test case as required by subdivision (b)(3).[51] Although the circuit court apparently anticipated certification once the test case resulted in a plaintiff's verdict,[52] the district court refused to certify a class on remand, and required instead that each individual plaintiff bring his own action.[53] Thus, the district court rendered permanent the Third Circuit's temporary determination that a class action was not superior.

Since *Katz*, courts have used both the "express waiver" and "superiority" limitations to deny plaintiffs the option of a test case and/or postjudgment certification.[54] Not all courts, however, have

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[50] [I]t must be understood that we are dealing only with the defendant who declines the protection against one-way intervention after a violation has been proved which rule 23(b)(3) was designed to afford. If a class action defendant insists upon early class action determination and notice, he is, under the rule, entitled to it.

Katz v. Carte Blanche Corp., 496 F.2d at 762.

Recent case law suggests the possibility of a new type of express waiver by the defendant. In Izaguirre v. Tankersley, 516 F. Supp. 755 (D. Or. 1981), the court permitted class certification simultaneous with partial summary judgment in favor of the defendants. Arguing that the rule against one-way intervention "is intended to protect the defendant," *id.* at 757, it noted, curiously, that the defendant can "waive that protection and attempt to obtain a favorable decision which is not binding on the potential class members who were not afforded the opportunity to opt in or out of the class." *Id.* Though the precise meaning of the latter point is unclear in light of its decision to *permit* certification, *Izaguirre* seems to suggest a new view of the defendant's power to certify postjudgment when it is in his interest to do so.

[51] Katz v. Carte Blanche Corp., 496 F.2d at 760.

[52] It has been suggested that *Katz* was ambignous as to the court's intention to grant postjudgment certification, *see* 88 HARV. L. REV. 825, 827 n.12, 834 n.53 (1975), but the court clearly contemplated "postponement of [the class action] issues until violation [could be] decided." 496 F.2d at 760. *See also id.* at 762 n.8.

[53] The district court apparently was influenced by the implied prohibition against one-way intervention in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). 88 HARV. L. REV. 825, 834 n.53 (1975).

[54] For example, in a closely related action involving the same defendant, the district court rejected consideration of plaintiff's pending summary judgment motion until after the (c)(1) determination on the ground that Carte Blanche Corporation had not expressly waived its rights:

> Plaintiff has briefed the merits of [his summary judgment] motion; defendant has briefed only its position that the motion is not ripe for determination until after a decision on the class certification question—a position to which I adhere and which plaintiff does not appear to challenge *in the absence of an express waiver* by defendant of its rights to enjoyment of the benefits of mutality of estoppel and to protection against 'one-way intervention.' *See* Katz v. Carte Blanche Corp.

Zeltzer v. Carte Blanche Corp., 76 F.R.D. 199, 200 n.1 (W.D. Pa. 1977) (emphasis added). For other cases denying a test case procedure on the ground that the defendant had not expressly waived rule 23, see Byrnes v. IDS Realty Trust, 70 F.R.D. 608, 613 n.6 (D. Minn. 1976); Manning v. Princeton Consumer Discount Co., 390 F. Supp. 320, 324 (E.D. Pa. 1975) ((b)(2) action), *aff'd*, 533 F.2d 102 (3d Cir.), *cert. denied*, 429 U.S. 865 (1976); Sommers v.

read *Katz* so narrowly. For example, *Katz*'s waiver analysis has been applied in cases in which the defendant has moved for summary judgment, so that the defendant is prevented from requesting class certification after a judgment has been entered in his favor.[55] Some courts have gone further by suggesting that the defendant's summary judgment motion *also* constitutes a waiver of his right to object to postjudgment certification if the plaintiff moved simultaneously for summary judgment and was successful.[56] One court even has applied

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Abraham Lincoln Fed. Sav. & Loan Ass'n, 66 F.R.D. 581, 592 n.13 (E.D. Pa. 1975); Connor v. Highway Truck Drivers & Helpers, 68 F.R.D. 370, 372-73 (E.D. Pa. 1975) (mere objection by defendant sufficient to defeat proposed test case procedure). *Cf.* Eovaldi v. First Nat'l Bank, 71 F.R.D. 334, 335 (N.D. Ill. 1976) (refusal to decertify class that was notified postjudgment because defendant had expressly agreed to test case procedure), *rev'd on other grounds,* 596 F.2d 188 (7th Cir. 1979). One commenator has suggested that the test case procedure should not be invoked unless the defendant can also demonstrate that he will suffer "great harm" from prejudgment notice. 21 WAYNE L. REV. 1195, 1206 n.58 (1975).

A number of courts have implied that the test case alternative, combined with offensive issue preclusion by class members in individual actions, renders the class action an inferior device even after judgment. *See, e.g.,* Bogus v. American Speech & Hearing Ass'n, 582 F.2d 277, 290 (3d Cir. 1978) (alternative holding); Windham v. American Brands, Inc., 565 F.2d 59, 69 & n.32 (4th Cir. 1977) (contemplation of future individual actions invoking collateral estoppel), *cert. denied,* 435 U.S. 968 (1978). *In re* Anthracite Coal Antitrust Litigation, 78 F.R.D. 709, 720 (M.D. Pa. 1978); Gelman v. Westinghouse Elec. Corp., 73 F.R.D. 60, 69 (W.D. Pa. 1976), *aff'd per curiam,* 612 F.2d 799 (3d Cir. 1980) (en banc); Boring v. Medusa Portland Cement Co., 63 F.R.D. 78, 83-85 (M.D. Pa.), *appeal dismissed,* 505 F.2d 729 (3d Cir. 1974); Rappaport v. Katz, 62 F.R.D. 512, 515 (S.D.N.Y. 1974).

Commentators have also suggested that *Eisen* casts doubt on a court's power to certify following a test case. *See* 88 HARV. L. REV. 825, 832-33 (1975); *Developments—Class Actions, supra* note 39, at 1425.

[55] *See, e.g.,* Haas v. Pittsburgh Nat'l Bank, 381 F. Supp. 801, 802-06 (W.D. Pa. 1974), *aff'd in part and rev'd in part on other grounds,* 526 F.2d 1083 (3d Cir. 1975) (postponement of class notification permitted until after consideration of cross motions for summary judgment). The *Haas* court suggested that "[t]he defendants, by moving for summary judgment prior to the sending out of class notice, thereby assume the risk that a judgment in their favor will not protect them from subsequent suits by other potential class members. . . ." *Id.* at 806. Unlike *Katz,* the court did not suggest that the defendant had expressly agreed to be bound to the class. In fact, the defendant appears to have opposed the precertification merits determination. *Id.* at 802. Torosian v. National Capital Bank, 411 F. Supp. 167, 169-70 (D.D.C. 1976) failed to cite *Katz,* but did rely on *Haas* for the proposition that the defendant's summary judgment motion constituted an "assumption of the risk" that a defendant's victory on the merits would not bind the class. The *Torosian* defendant had "explicitly acknowledged this principal [*sic*]." *Id.* at 170 & n.11. In Postow v. OBA Fed. Sav. & Loan Ass'n, 627 F.2d 1370, 1380-84 (1980) (dictum), the District of Columbia Circuit, citing *Katz,* suggested that a defendant's successful summary judgment motion would have constituted a waiver on his part of postjudgment certification. As in *Haas,* the court did not state that the defendant had expressly agreed to proceed with the merits before certification. *But see* Izaguirre v. Tankersley, 516 F. Supp. 755 (D. Or. 1981) (successful motion for partial summary judgment by defendant held not to preclude simultaneous class certification motion by defendant because rule against one-way intervention intended only to protect defendant).

[56] *E.g.,* Postow v. OBA Fed. Sav. & Loan Ass'n, 627 F.2d 1370, 1382 (D.C. Cir. 1980); Torosian v. National Capital Bank, 411 F. Supp. 167, 170 & n.12 (D.D.C. 1976) (dictum);

such waiver where the plaintiff moved successfully for summary judgment after the defendant's motion was decided.[57]

2. *Postjudgment Appeal*

A second exception to the rule against one-way intervention involves cases in which an appellate court permits postjudgment certification *sub silentio* by reversing, after a decision on the merits, a trial court's order denying certification. Appellate courts historically have been reluctant to foreclose the right of an interested party to intervene in order to appeal, although a judgment has been entered below.[58] Because the Supreme Court recently declared that a plaintiff may not appeal as a matter of right an order denying class certification prior to judgment,[59] sometimes the only opportunity for appeal of a (c)(1) order is postjudgment. In fact, the Supreme Court in *United Airlines, Inc. v. McDonald*[60] held that a member of the putative class could intervene postjudgment to appeal a denial of certification. Similarly,

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Haas v. Pittsburgh Nat'l Bank, 381 F. Supp. 801, 806 (W.D. Pa. 1974) (dictum), *aff'd in part and rev'd in part on other grounds,* 526 F.2d 1083 (3d Cir. 1975). Unlike the defendant in *Katz,* the defendant in *Postow* neither argued that prejudgment certification would disrupt its business nor expressed its willinguess to be bound by a plaintiff's judgment. Instead, it vigorously opposed efforts to certify the class on appeal. In fact, the defendant's motion to delay discovery on the plaintiff class pending the defendant's summary judgment motion, 627 F.2d at 1383 n.30, was its only affirmative act—hardly evidence of a desire to submit to a class judgment.

[57] Postow v. OBA Fed. Sav. & Loan Ass'n, 627 F.2d 1370, 1382, 1383-84 (D.C. Cir. 1980). Thus, the defendant in *Postow* may have been unaware of the possibility of a precertification decision in favor of the plaintiff at the time he made his own summary judgment motion. Consequently, according to the D.C. Circuit, waiver may apply to precertification merits motions regardless of which party makes them or their outcomes.

[58] *See, e.g.,* Hodgson v. United Mine Workers, 473 F.2d 118, 129 (D.C. Cir. 1972); Smuck v. Hobson, 408 F.2d 175, 181-82 (D.C. Cir. 1969); Pellegrino v. Nesbit, 203 F.2d 463 (9th Cir. 1953); American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., 3 F.R.D. 162 (S.D.N.Y. 1942).

[59] Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). Until *Livesay,* circuit courts were divided over whether the "death knell" doctrine, under which an order denying class certification would be appealable as a matter of right under 28 U.S.C. § 1291, applied to class actions. *Id.* at 465 & n.2.

Before judgment on the merits, the plaintiff does have an opportunity to request discretionary interlocutory appeal under 28 U.S.C. § 1292(b). According to one commentator, however, § 1292(b) is a "limited" remedy because simultaneous approval by both the trial and appellate courts requires that "exceptional circumstances exist to justify a departure from the final order rule." 11 J. MAR. J. PRAC. & PROC. 635, 656 n.92 (1978). In Link v. Mercedes-Benz, Inc., 550 F.2d 860, 863 (3d Cir.), *cert. denied,* 431 U.S. 933 (1977), the Third Circuit warned that trial courts "should not certify for § 1292(b) consideration without stating persuasive reasons why the particular class action question is so unusual as to demand the intervention of an appellate court." *But see* note 162 *infra.*

[60] 432 U.S. 385 (1977).

in *Deposit Guaranty National Bank v. Roper,*[61] the Court held that settlement in favor of the plaintiffs did not preclude appeal of a (c)(1) order against the class. By implicitly contemplating certification after an initial judgment on the merits,[62] both *McDonald* and *Roper* cast doubt upon the *Eisen/American Pipe* rule against one-way intervention. Although the Court's failure in *McDonald* and *Roper* to address its earlier one-way intervention decisions[63] beclouds its stance on one-way intervention, lower courts have viewed these recent cases as signaling an attenuation of the rule against one-way intervention.[64]

3. *Amendment of Class Notice*

The District of Columbia Circuit's recent decision in *Postow v. OBA Federal Savings & Loan Association*[65] suggests a third equitable exception to the rule against one-way intervention in 23(b)(3) actions. In *Postow,* the court permitted (b)(3) class certification following summary judgment in favor of the plaintiffs. Relying on *Katz,* the court concluded that the defendant had waived the "protection" of prejudgment certification by moving for summary judgment.[66] Furthermore, the court identified two other "equitable" grounds for its decision. First, the postjudgment notice sent to class members had not

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[61] 445 U.S. 326 (1980).

[62] In neither *McDonald* nor *Roper* did the subsequent class certification result in immediate recovery, as there remained outstanding class issues that were not resolved in the initial judgment. *See, e.g.,* McDonald v. United Air Lines, Inc., 587 F.2d 357 (7th Cir. 1978). In such cases, one-way intervention technically does not occur. *See* Cohen, *"Not Dead But Only Sleeping": The Rejection of the Death Knell Doctrine and the Survival of Class Actions Denied Certification,* 59 B.U. L. REV. 257, 280 (1979) (new trial for class necessary following reversal of trial court order against certification). The initial judgment in favor of the named plaintiff, however, is likely to influence significantly both the litigation strategy and the actions of those who must later decide whether to opt out. And as in the test case in Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir.), *cert. denied,* 419 U.S. 885 (1974), and the mini-hearing in *Eisen,* the *McDonald/Roper* procedure discourages early class intervention and creates the same "imbalance" referred to by those who sought to preclude one-way intervention in the 1966 amendment to rule 23. 445 U.S. at 354.

[63] Only Justice Powell, in dissent, mentioned that certification on remand following a judgment for the named plaintiff raises problems of one-way intervention. 445 U.S. at 354 & n.14; 432 U.S. at 401 n.4 (by implication). *See* notes 125-28 and accompanying text *infra.*

[64] For example, in Postow v. OBA Fed. Sav. & Loan Ass'n, 627 F.2d 1370, 1382-83 (1980), the District of Columbia Circuit seized upon *McDonald* and *Roper* to support postjudgment certification of a (b)(3) action. Other courts may follow in light of the fact that courts considering postjudgment certification in class actions before 1977 noted other circuit court *sub silentio* appeals cases similar to *McDonald* and *Roper* to justify one-way intervention. *See, e.g.,* Peritz v. Liberty Loan Corp., 523 F.2d 349, 354 n.4 (7th Cir. 1975) (dictum) (noting Partain v. First Nat'l Bank, 336 F. Supp. 65 (M.D. Ala. 1971), *rev'd,* 467 F.2d 167 (5th Cir. 1972), *class certified on remand,* 59 F.R.D. 56 (M.D. Ala. 1973)).

[65] 627 F.2d 1370 (D.C. Cir. 1980).

[66] *Id.* at 1382. *Cf.* notes 56-57 and accompanying text *supra.*

informed them of the plaintiff's judgment.[67] The court concluded that this procedure "reduc[ed] substantially the 'one way street' danger of post-judgment certifications."[68] Second, the trial judge had, *inter alia,* certified the class prior to the plaintiff's summary judgment motion but subsequently vacated certification pending appeal.[69] According to the circuit court, this "unique sequence of . . . proceedings in the court below"[70] also supported class certification.

Time will tell whether other courts will adopt and expand *Postow*'s new exceptions. Notwithstanding the circuit court's attempt to limit its holding to the facts of the case,[71] judicial impatience with the rule against one-way intervention suggests that *Postow* may represent another significant step in the erosion of the rule.

III

A Reexamination of One-Way Intervention

The willingness of some courts to find equitable grounds to avoid the rule against one-way intervention raises doubts about the merits of retaining it at all. It seems disturbing, for example, that a plaintiff need only add to his complaint a request for injunctive relief in order to avoid the procedural requirements of subdivision (b)(3) and, hence, the one-way intervention rule. No apparent reason has been suggested to explain why such actions should be treated differently from those that do not pray for an equitable remedy.[72] This section analyzes the traditional justifications for banning one-way intervention and discusses the costs that such a rule imposes on plaintiffs and defendants as well as its effects on judicial efficiency. It then criticizes current judicial attempts to fashion equitable exceptions to alleviate the hardship caused by the rule.

A. *Traditional Justifications*

The 1966 Advisory Committee's Note accompanying the proposed amendments to rule 23 did not articulate the Committee's reasons for disfavoring one-way intervention, but only referred to the

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[67] 627 F.2d at 1382.

[68] *Id.* at 1383.

[69] *Id.* at 1383 n.30. The court did not approve notice to class members until after the plaintiffs' summary judgment motion and subsequent recertification. *Id.*

[70] *Id.* at 1381.

[71] *See id.* at 1381, 1383-84.

[72] *See* notes 40-42 and accompanying text *supra.*

"conflicting views"[73] on the issue. Proponents of the rule prohibiting one-way intervention have, however, offered four arguments in support of their position.

1. *Equalizing Risk Exposure*

According to then-Judge John Paul Stevens, "[a] procedure which permits a claim to be treated as a class action if plaintiff wins, but merely as an individual claim if plaintiff loses, is strikingly unfair."[74] Underlying this idea is the apparent inequity of allowing a class member to benefit from a favorable judgment without having undertaken the burdens and risks of litigation. "As with William James' cocktail," one commentator analogized, "he must take the bitter with the sweet—or else not drink any of it."[75] This argument falsely assumes, however, that legal rights should not be vindicated in the absence of the danger of losing. The judicial system does not operate in a gambling paradigm.[76] Kalven and Rosenfeld, champions of postjudgment "participation in the decree," dismissed the argument in the following way:

> [P]olicy considerations . . . virtually compel the construction [of the former class action rule] that participation by absentee members is permitted *after* the decree. That this must be so is evident if the real argument of the defendant is made explicit. The court has just decided that the defendant is liable to those in the same legal position as the plaintiff. The defendant in resisting participation must contend not that he is not liable to the others, but that each must endure the normal inconvenience of litigation, that each must harass him with a separate suit, and ultimately, that justice has been made too quick, too convenient, too exact, and too complete.[77]

2. *Consistency with Mutuality of Estoppel*

Until recently, the leading rationale for prohibiting postjudgment certification was that permitting a nonparty to the original proceeding

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[73] *Advisory Committee Notes, supra* note 4, at 105. *See also Developments—Class Actions, supra* note 39, at 1395 ("The reasons the rulemakers opposed one-way intervention are not clear."). The Committee implied that one-way intervention violates mutuality of estoppel, observing that a postjudgment intervenor "would presumably be unaffected by an unfavorable decision." *Advisory Committee Notes, supra*, at 105.

[74] Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1207 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) (Stevens, J., dissenting).

[75] Z. CHAFEE, SOME PROBLEMS OF EQUITY 280 (1950).

[76] *See* Kalven & Rosenfeld, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 713 (1941). In fact, it may be no less "unfair" for an absentee to sue individually following the first action and garner the benefit of hindsight. *Id.*

[77] *Id.* at 701 (footnote omitted) (emphasis in original).

to intervene after the court enters judgment against the defendant contravenes the mutuality of estoppel doctrine.[78] The demise of mutuality,[79] however, undermines the foundation of a per se requirement of prejudgment certification. Despite the growing use of issue preclusion by nonparties in a class action context,[80] there remains a reluctance to acknowledge that the dramatic changes in res judicata law wholly recast class action procedural issues. Perhaps the intent of the 1966 revisions was to inhibit one-way intervention, but the deeper purpose was to bring class action procedure into line with res judicata law.[81] Ironically, a per se requirement of prejudgment certification today sometimes achieves the opposite result by denying class litigants the benefit of a favorable judgment that they otherwise might have enjoyed under the modern law of issue preclusion.[82]

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[78] *See* note 19 and accompanying text *supra*. "The literature on the development of rule 23(b)(3) makes it quite clear that the early notice requirement was directly related to dissatisfaction with the lack of mutuality of the estoppel which resultcd from [permitting intervention by plaintiffs after the defendant's liability had been determined]." Katz v. Carte Blanche Corp., 496 F.2d 747, 759 (3d Cir.), *cert. denied,* 419 U.S. 885 (1974). *See also* Kaplan, *supra* note 8, at 385-86.

[79] *See, e.g.,* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971); Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 812, 122 P.2d 892, 895 (1942); RESTATEMENT (SECOND) OF JUDGMENTS § 88 (Tent. Draft No. 3, 1976) [§ 29] [Throughout this Note, the corresponding section numbers that will appear in the final *Restatement Second* are given in brackets after citation to the tenative drafts.]; Holland, *Modernizing Res Judicata: Reflections on the* Parklane *Doctrine,* 55 IND. L.J. 615 (1980); Kadue & Callen, *To Bury Mutuality, Not to Praise It: An Analysis of Collateral Estoppel After Parklane Hosiery Co. v. Shore,* 31 HASTINGS L.J. 755 (1980); Note, *Mutuality of Estoppel and the Seventh Amendment: The Effect of* Parklane Hosiery, 64 CORNELL L. REV. 1002 (1979). Although practice prior to *Parklane* was to draw a distinction between offensive and defensive assertion of issue preclusion by a nonparty, *see, e.g.,* Currie, *Mutality of Collateral Estoppel: Limits of the* Bernhard *Doctrine,* 9 STAN. L. REV. 281 (1957), assertion of preclusion now depends on the discretion of the trial judge. Parklane Hosiery Co. v. Shore, 439 U.S. at 331 & n.16; Holland, *supra,* at 631-33.

[80] *See* Katz v. Carte Blanche Corp., 496 F.2d 747, 760 (3d Cir.) (suggesting that recent approval by the Supreme Court of issue preclusion by a nonparty "requires that a new look be taken at the alternative of a test case in lieu of an early class action determination"), *cert. denied,* 419 U.S. 885 (1974); cases cited in note 54 *supra* (holding that availability of issue preclusion to putative class members renders class action inferior device under rule 23(b)(3)); Holland, *supra* note 79, at 634-38. *See also* Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification,* 92 HARV. L. REV. 718, 736-37 (1979).

[81] *See generally Developments—Class Actions, supra* note 39, at 1394-1402.

[82] If the plaintiff does not request or fails to obtain class certification and seeks only individual relief, a subsequent action by a second plaintiff against the same defendant may establish de facto class certification: If the second plaintiff succeeds in invoking issue preclusion as to substantive issues from the first action, the determination that issue preclusion applies may be res judicata in the third and subsequent actions by other plaintiffs. *See* George, *Sweet Uses of Adversity:* Parklane Hosiery *and the Collateral Class Action,* 32 STAN. L. REV. 655, 659 & n.32 (1980).

Few courts have actually held that postjudgment certification is permissible on the ground that mutality is no longer required. *See* Jimenez v. Weinberger, 523 F.2d 689, 701 (7th Cir.

3. *Shared Burden of Litigation*

Professor Chafee suggested that the rule against one-way intervention forces class plaintiffs to enter the action earlier, thus helping the named plaintiff to undertake the costs of litigation by making available class support and financial assistance.[83] Permitting the putative class member to remain on the sidelines until judgment, the argument goes, increases the likelihood that he will not contribute to expenses if the plaintiff loses.[84]

Although litigation costs may be a legitimate concern, rule 23 was not structured to address this problem. A plaintiff's judgment may apportion costs by reducing the award pro rata among class recipients,[85] but the rule does not provide for collection of expenses in the event of a judgment against the class.[86] Moreover, the proliferation of contingency fee arrangements as well as statutory provisions under which a plaintiff may avoid attorney's fees[87] diminishes the need for a procedural mechanism to govern the apportionment of litigation expenses.[88]

4. *Protection of the Defendant's Reliance Interest*

Defendants have come to perceive the certification decision as a critical stage in (b)(3) litigation.[89] Because postjudgment certification

1975) ((b)(2) action), *cert. denied,* 427 U.S. 912 (1976). *Cf.* Postow v. OBA Fed. Sav. & Loan Ass'n, 627 F.2d 1370 (D.C. Cir. 1980) (permitting postjudgment certification without raising mutuality issue). Courts that have in the past attempted to apply modern res judicata law to class action procedure have been criticized. For example, commentators reacted to Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir.), *cert. denied,* 419 U.S. 885 (1974) with criticism of, *inter alia,* its reliance on the Supreme Court's disapproval of mutuality in *Blonder-Tongue, see* note 48 and accompanying text *supra. See* 88 HARV. L. REV. 825 (1975); 21 WAYNE L. REV. 1195 (1975). Of course, at the time the Third Circuit heard *Katz,* the Supreme Court had not yet decided *Parklane Hosiery Co.,* which expanded significantly *Blonder-Tongue*'s approval of the use of issue preclusion by non-parties.

[83] Z. CHAFEE, *supra* note 75, at 278-79.

[84] *Id.* at 278.

[85] *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980) (discussing whether precertification plaintiff's judgment moots class allegations for purposes of appeal, taking into consideration plaintiff's incentive to spread costs among class members).

[86] Courts have actually restricted communication between the plaintiff's attorney and the class in matters involving solicitation of fees and expenses. *Developments—Class Actions, supra* note 39, at 1597 & n.81. *See also Manual for Complex and Multidistrict Litigation,* 49 F.R.D. 217, 229-30 (1970).

[87] *See, e.g.,* 15 U.S.C. § 1640(a)(3) (1976) (recovery of attorney's fees in Truth-in-Lending action).

[88] In addition to spreading litigation costs, prejudgment notice may encourage early intervention by putative class members, *see* FED. R. CIV. P. 23(c)(2)(C), but the thrust of this requirement is to determine the adequacy of the named plaintiff's representation. Of course, by the time notice is sent, this determination already has been made.

[89] According to Professor Miller, "certification often is critical to the viability of the suit. . . . Once the case is certified as a class action, the size of the potential liability takes on a

may increase dramatically the defendant's liability, early certification affords class opponents some protection from unfair surprise. In certain cases, an early certification decision may be important to the class opponent in providing notice of potential liability[90] and in devising defense and settlement tactics.[91] If the class is certified late in the action, the class opponent may discover that he has relied to his detriment on the nonclass character of the action.

A per se prohibition of one-way intervention to protect the class opponent's reliance interest, however, is overbroad. Courts have permitted postjudgment certification in rule 23(b)(1) and (b)(2) actions, recognizing that parties sometimes proceed on the assumption that the action will become a class action.[92] In such situations, the class defendant will assert the same defenses and litigate as vigorously

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frightening dimension. . . ." Miller, *supra* note 5, at 679 n.63. *See also* A. MILLER, AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT AND FUTURE 12 (1977); SENATE COMMERCE COMMITTEE, 93D CONG., 2D SESS., CLASS ACTION STUDY 12-15 (1974) [hereinafter cited as CLASS ACTION STUDY] [substantially reprinted at 62 GEO. L.J. 1123 (1974), but without the Senate Committee's comments on predicted impact of *Eisen* on post-1974 class action practice]; Berry, *supra* note 5, at 300 & n.8.

[90] *See* Note, *Title VII and Postjudgment Class Actions,* 47 IND. L.J. 350, 364 (1972). An early certification decision will also affect putative class members who, relying on the existence of a class action, may suspend prosecution of individual actions against the class opponent. If the court delays the (c)(1) order long enough and eventually denies certification, the statute of limitations may prevent the filing of individual claims. *See* Frankel, *supra* note 15, at 42 (warning against delayed amendment of certification order under second sentence of subdivision 23(c)(1)). The Court in American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), *discussed at* notes 30-33 and accompanying text *supra,* protected subsequent individual actions by holding that the named plaintiffs' filing of a class action suspends the limitations period for all putative class members. There remains, however, some judicial confusion about the *American Pipe* rule. For example, it is unclear when and under what circumstances class members may receive extensions of the statute of limitations when needed. Moreover, there is disagreement as to whether a class member must intervene in the action after a denial of certification, or whether he may file a separate action. *See* Comment, *Class Actions and Statutes of Limitations,* 48 U. CHI. L. REV. 106 (1981) (arguing for extension rather than mere suspension of statute of limitations, but also advocating a post-denial intervention requirement). *See generally Developments—Class Actions, supra* note 39, at 1448-54; Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations,* 65 CORNELL L. REV. 1011, 1084-95 (1980). Thus, while the *American Pipe* rule grants putative class members some protection, early certification is still desirable to protect class claims in the event that certification eventually is denied.

[91] *See* A. MILLER, *supra* note 89, at 12 ("Defense lawyers believe that their ability to settle the case advantageously or to convince the plaintiff to abandon the case depends on blocking certification."); AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATION OF THE SPECIAL COMMITTEE ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE 15-17 (1972); Frankel, *supra* note 15, at 42; *Developments—Class Actions, supra* note 39, at 1536-76; Note, *Interlocutory Appeal from Orders Striking Class Action Allegations,* 70 COLUM. L. REV. 1292 (1970); Note, *Appealability of Class Action Determinations,* 44 FORDHAM L. REV. 548, 577-78 (1975); 40 OHIO ST. L.J. 441, 443-44 (1979).

[92] *See* cases cited at note 159 *infra.*

regardless of when certification occurs. Although in certain cases the existence of a judgment may be relevant in gauging the damage to the defendant's reliance interest, an inquiry that rests solely on whether certification was before or after judgment is misguided.[93] A more appropriate inquiry would focus on whether delay in certification has affected the defendant's substantive defenses or strategy so adversely as to render certification undesirable. Courts should deny certification on such grounds only if the delay sufficiently has prejudiced the defendant. Thus, although prejudice to the defendant is a legitimate concern of class action practice, a more accurate approach to certification timing questions is warranted.

B. *Costs of Prohibiting One-Way Intervention*

Recognizing that procedural complexities are inherent in the management of class actions, the 1966 Advisory Committee granted trial judges broad discretion in such litigation.[94] Its intention to exclude one-way intervention and deprive trial judges of discretion to certify after judgment therefore represents an aberration in the overall scheme of rule 23. In addition, the disadvantages that stem from the Committee's desire to determine in advance the order of certification and judgment underscore the wisdom of judicial flexibility.

The Committee's position on one-way intervention was based in part on the erroneous premise that the certification decision always

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[93] For example, in a (b)(3) action, a class defendant may have a particular need to know who may opt out before presenting substantive defenses if he wishes to press different defenses against different opponents. Subdivision 23(d) already may be available, however, to protect the defendant in such situations by providing for the establishment of subclasses. Moreover, if different subclasses present different problems for the defendant, at least part of the class may be ineligible for certification on the grounds that the named plaintiff does not represent the class. *See* FED. R. CIV. P. 23(a)(3) & 23(b)(3)(A).

The defendant may also argue that prejudgment certification is necessary to predict the extent of liability exposure. Prejudgment certification often fails to guarantee such a benefit for a defendant who faces a large class, however, because subdivision 23(c)(2) does not require the identification of class members who cannot "be identified through reasonable effort." FED. R. CIV. P. 23(c)(2).

[94] For example, discretionary power is granted in: the class action prerequisite provision of subdivision 23(a); the predominance and superiority requirements of subdivision (b)(3); the open-ended "practicable" standard of subdivision (c)(1); and subdivision 23(d), which grants discretion in controlling presentation of evidence, notice and class communication, intervention, pleadings, and "similar procedural matters," with orders "altered or amended as may be desirable from time to time." For a criticism of the scope of such discretionary power, see Justice Black's dissent to the Supreme Court's adoption of the 1966 amendments. Order of Feb. 28, 1966, 383 U.S. 1031, 1035. Responding to Justice Black, Professor Kaplan argued that, even in the short time following adoption of the new rules, "the courts have prevailingly shown good understanding in spelling out and applying the delimiting criteria [of rule 23]." Kaplan, *supra* note 8, at 395. *See also id.* at 395 n.151.

requires less time than a decision on the merits. Although early case law called for a "prompt" certification decision,[95] actual practice suggests a different picture. According to a 1974 study,[96] parties often delay certification requests from one month to three years after filing suit, and final court orders require an additional month to four years.[97] Because a court often cannot make an informed (c)(1) determination from the pleadings alone, further factual investigation and even discovery may be necessary to appraise the nature and scope of the class.[98] Added delays may result from the trial judge's desire to investigate informally the merits of the plaintiff's case.[99] The Committee's failure to foresee such delays, combined with a requirement that rigidly preorders certification and judgment, has not only promoted judicial inefficiency, but has caused hardship for both plaintiffs and defendants as well.[100]

1. *Costs to Plaintiffs*

When confronted with a summary judgment motion[101] or motion to dismiss,[102] a court may feel pressured to make a hasty certification

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[95] Philadelphia Elec. Co. v. Anaconda Brass Co., 42 F.R.D. 324, 326 (E.D. Pa. 1967).

[96] CLASS ACTION STUDY, *supra* note 89. The Study included all class actions filed in the U.S. District Court for the District of Columbia between July 1, 1966 and December 31, 1972. *Id.* at 3.

[97] *Id.* at 13. In the majority of cases studied, the motion for certification was made within six months. *Id.*

[98] *Id. See also* Frankel, *supra* note 15, at 41-42.

It is difficult to assess the degree to which courts analyze class issues prior to making a (c)(1) order for or against the class. Discovery as to class issues is common, *see, e.g.*, Huff v. N.D. Cass Co., 485 F.2d 710, 713 (5th Cir. 1973); 3B MOORE'S FEDERAL PRACTICE, ¶ 23.50, at 423 & n.19 (2d ed. 1981), although it is not required by the rules. *Cf. id.* at 422 & nn.16, 17 (suggesting that class allegations should be stricken from complaint only after evidentiary hearing). In a number of cases, courts have rendered the (c)(1) order on the basis of the pleadings or affidavits alone. *See, e.g.*, Johnson v. Long, 67 F.R.D. 416, 417-18 (M.D. Ala. 1975); Berman v. Narragansett Racing Ass'n, 48 F.R.D. 333, 336 (D. R.I. 1969).

[99] Although the Supreme Court in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) struck down the trial court's use of a full preliminary hearing on the merits as a tool for deciding certification, *see* notes 34-38 and accompanying text *supra;* notes 149-51 and accompanying text *infra,* it is unlikely that a trial judge's consideration of the merits can be fully deterred. According to one recent study, trial courts are now investigating the merits "covertly, to evade Supreme Court precedent." Berry, *supra* note 5, at 313. *See also* CLASS ACTION STUDY, *supra* note 89, at 14-15; A. MILLER, *supra* note 89, at 15 ("[T]here is no way the judge can make the seven findings required by Rule 23 without at least a preliminary exploration of the merits.").

[100] The discussion below of the costs imposed by the rule against one-way intervention is not intended as an exhaustive survey of the countless permutations possible in class action practice; rather, it is to highlight the problems likely to recur in current practice.

[101] FED. R. CIV. P. 56.

[102] FED. R. CIV. P. 12(b)(6).

decision under subdivision (c)(1) in order to avoid one-way intervention by class members. In so doing, the court will undermine the accuracy of the certification process[103] and may render a determination that is subject to collateral attack.[104] Alternatively, if the judge decides the merits before certifying the class,[105] a per se rule against one-way intervention applied by an appellate court would deny the class plaintiff certification and support from other class members.[106] Occasionally, a trial court simply will deny certification at the outset or refuse to hear the certification motion if the court intends to rule for the defendant.[107] If, for example, the appellate court reverses on the merits, the plaintiff is then without a class remedy, an unfair result if the plaintiff filed his (c)(1) motion in a timely manner but was unable to control the court's schedule for deciding the merits.[108]

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[103] For example, the court could overlook potential class members. *Developments—Class Actions, supra* note 39, at 1422-24. An underinclusive class certification order disadvantages neglected class members by forcing them to litigate separately, or by precluding recovery altogether. *See* note 106 *infra.*

[104] A class member who has failed to opt out and is thus bound to an unfair or adverse judgment may attack the judgment on the grounds of inadequacy of representation by the named plaintiff, failure by the court to take into account conflicting class and party interests, or failure to describe adequately the class. *See* Note, *Class Action Judgments and Mutuality of Estoppel,* 43 GEO. WASH. L. REV. 814, 832-38 (1975) (discussing grounds for due process attack on class judgment). If the class judgment is overturned in subsequent proceedings, the named plaintiff loses the financial benefit of class certification, and the defendant may be forced to relitigate class issues.

[105] Some courts are reluctant to certify and subject the defendant to notice if the merits appear weak. *See, e.g.,* Haas v. Pittsburgh Nat'l Bank, 381 F. Supp. 801, 806 (W.D. Pa. 1974) (denial of certification can be effected to save parties "costs of litigation" in event that defendant wins on the merits), *aff'd in part and rev'd in part on other grounds,* 526 F.2d 1083 (3d Cir. 1975) (dictum). *Cf.* Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir.) (certification delayed to avoid disruption of defendant's business), *cert. denied,* 419 U.S. 885 (1974).

[106] Denying postjudgment certification could also terminate future class litigation altogether if the named plaintiff is in a unique financial and/or legal position enabling him to prosecute the action on behalf of the class. Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative,* 1974 DUKE L.J. 573, 587 n.60.

Individual actions by class plaintiffs may also be extremely burdensome to the class defendant. Under certain circumstances, however, individual actions may be desirable to a class opponent who is better able than individual plaintiffs to finance litigation costs. In such a case, rather than litigate, the plaintiffs may settle for smaller amounts than they otherwise would receive in class litigation, or they may choose not to prosecute their actions at all.

[107] Berry, *supra* note 5, at 312-13 & nn.84-85. In the Senate Commerce Committee Study, 55% of pending class actions in the District of Columbia were "disposed of in favor of the defendant on preliminary motions" prior to certification. The Study also noted that the merits frequently were considered along with certification and notice. CLASS ACTION STUDY, *supra* note 89, at 9. The Study, however, did not account for distinctions between (b)(1) and (b)(2) actions and (b)(3) actions; some courts apply different certification timing considerations to the latter actions. *See* notes 40-42 and accompanying text *supra.* Further, the Study was undertaken before *Eisen,* which altered lower court behavior with respect to certification questions. *See* CLASS ACTION STUDY, *supra,* at 15; note 39 and accompanying text *supra.*

[108] The plaintiff may be able to delay his own motion for summary judgment, but the defendant or the court may initiate an early merits determination independent of the plaintiff's

2. *Costs to Defendants*

Trial courts sometimes delay a merits determination to preserve the certification option. To take advantage of this delay, a plaintiff need only add class allegations to the pleadings to lock a defendant who is anxious to avoid litigation into a lengthy certification battle.[109] Courts that have read *Eisen* to require a total separation of the certification decision and the merits[110] may conclude that they cannot even hear a defendant's motion to dismiss before certification.[111]

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wishes. For example, if the only contested question involves a legal issue, the defendant's summary judgment motion may precipitate a plaintiff's judgment, because ruling against the defendant's summary judgment motion may be tantamount to a decision on the merits for the plaintiff. Thus, judges may view the postponement of a plaintiff's summary judgment motion following denial of a defendant's summary judgment motion as pointless and counter to effective management of litigation. *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980) (judgment for plaintiffs entered over their objection and before they could obtain certification); Postow v. OBA Fed. Sav. & Loan Ass'n, 627 F.2d 1370, 1383 n.30 (D.C. Cir. 1980) (following denial of defendant's summary judgment motion involving legal interpretation of Truth-in-Lending Act, plaintiff's summary judgment motion on same issue granted before giving of notice undertaken); Brief for Plaintiffs-Appellants at 19, Postow v. OBA Fed. Sav. & Loan Ass'n, 627 F.2d 1370 (D.C. Cir. 1980) (arguing that defendant's summary judgment motion, although unsuccessful as to Count II, "precipitat[ed] the early decision on the merits").

Under this scenario, the per se rule against one-way intervention effectively deprives appellate courts of the opportunity to review a denial of a (c)(1) certification request once a merits judgment has been entered and approved on appeal. In light of the perceived significance of a (c)(1) order, granting trial courts uncontrolled discretion seems undesirable.

[109] On the other hand, if the defendant wants to bind the class to a judgment in his favor, he would wish to postpone the merits determination. *Cf.* Roberts v. American Airlines, Inc., 526 F.2d 757, 762-63 (7th Cir. 1975) (postjudgment certification denied to defendant whose motion for summary judgment was granted before certification), *cert. denied,* 425 U.S. 951 (1976). Otherwise, the costs of delay to defendants include litigation expenses, uncertainty as to loss exposure, and lack of judicial guidance in how to shape future conduct to avoid liability. Berry, *supra* note 5, at 306. For an extreme example, see Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977), *cert. denied,* 434 U.S. 1086 (1978).

[110] Berry, *supra* note 5, at 312-14; notes 34-39 and accompanying text *supra.*

[111] Recent evidence of *Eisen*'s influence on defendants' merits motions is Pruitt v. Allied Chem. Corp., 85 F.R.D. 100 (E.D. Va. 1980), in which the district court, citing *Eisen,* refused to consider a defendant's precertification motion to dismiss, concluding that

> a determination of class certification must be made without consideration of defendant's motion to dismiss the claim. Defendant's motion to dismiss requires an inquiry into the merits of the proposed class action. . . . As inviting as such a determination might be, the Court has no authority to conduct a preliminary inquiry into the merits of this suit. . . .

Id. at 104. *See also* CLASS ACTION STUDY, *supra* note 89, at 15 (noting probable adverse impact on motions to dismiss caused by *Eisen*).

On the other hand, hearing a defendant's motion to dismiss may be permissible because denial of the motion would result only in a trial, not one-way intervention. *See* Haas v. Pittsburgh Nat'l Bank, 381 F. Supp. 801 (W.D. Pa. 1974), *aff'd in part and rev'd in part on other grounds,* 526 F.2d 1083 (3d Cir. 1975); Acker v. Provident Nat'l Bank, 373 F. Supp. 56 (E.D. Pa. 1974), *modified,* 512 F.2d 729 (3d Cir. 1975); Kenney v. Landis Financial Group, Inc., 349

Predetermining the sequence of certification and judgment may also skew settlement negotiation. By naming as broad a class as possible,[112] the plaintiff obtains a powerful bargaining weapon if the court accepts the class allegations in order to reach the merits.[113] On the other hand, if the court postpones judgment to improve certification accuracy, the defendant may be forced to pay an inflated settlement price to avoid the time and expense of (c)(1) litigation.[114]

3. *Judicial Inefficiency Costs*

The largest potential waste of judicial resources occurs when a court decides a protracted certification contest in a litigation involving a weak claim.[115] Similarly, a court that mistakenly renders judgment

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F. Supp. 939 (N.D. Iowa 1972); Gerlach v. Allstate Ins. Co., 338 F. Supp. 642 (S.D. Fla. 1972). *See also* 3B MOORE'S FEDERAL PRACTICE ¶ 23.02-2, at 101 & n.45 (2d ed. 1981); CLASS ACTION STUDY, *supra* note 89, at 9; *Developments—Class Actions, supra* note 39, at 1419 n.157.

Of the cases cited above, however, only *Haas* was decided after *Eisen*. Significantly, *Haas* is also the only case cited by Professor Moore to support the prosposition that courts may dispose of weak claims prior to certification. Although arguably not fatal to Professor Moore's argument, *Haas* did not even involve consideration of the merits before certification: The class had been certified before the court considered the merits, *see* 381 F. Supp. at 803, but *notice* had not yet been sent. One might draw a distinction between certification and notice, *see* Eovaldi v. First Nat'l Bank, 71 F.R.D. 334, 335 (N.D. Ill. 1976) ("[N]otification is not at the jurisdictional threshold where certification is."), *rev'd on other grounds,* 596 F.2d 188 (7th Cir. 1979), but the *Haas* court treated the failure to notify the same as a failure to certify.

Finally, it has been argued that a requirement that the action be certified prior to the defendant's summary judgment motion or motion to dismiss "will have little practical impact" if adopted by courts. Defendants will continue to attempt by motion to defeat the merits, the argument goes, and, in effect, waive the benefit of certification, because the stare decisis effect of a defendant's judgment may be as great as the res judicata benefit of certification. *Developments—Class Actions, supra* note 39, at 1421-22. This, however, assumes that courts are willing to *hear* the motions. As *Pruitt* demonstrates, except in clear cases, courts that are intimidated by *Eisen* and are uncertain as to how they will eventually rule on a merits motion, or are concerned that dismissal may be reversed on appeal, will want to certify the action first to avoid prejudicing the opportunity to certify later.

[112] Plaintiffs will allege a broad class to "be sure of tolling the statute of limitations for all whom discovery will show to be actual class members and to minimize the costs charged against individual recoveries." *Developments—Class Actions, supra* note 39, at 1426-27 (footnote omitted).

[113] Unless the class sues a limited fund, the defendant's potential liability increases as class size increases.

[114] *See* Katz v. Carte Blanche Corp., 496 F.2d 747, 761-62 (3d Cir.) (noting "additional settlement leverage which results from the disruption or injury which may occur to a defendant's business relationships regardless of the merits of the claim"), *cert. denied,* 419 U.S. 885 (1974); Haas v. Pittsburgh Nat'l Bank, 381 F. Supp. 801, 806 (W.D. Pa. 1974) (prejudgment notification requirement acts to plaintiff's advantage regardless of merits of claim), *aff'd in part and rev'd in part on other grounds,* 526 F.2d 1083 (3d Cir. 1975); CLASS ACTION STUDY, *supra* note 89, at 14-15 (*Eisen* may increase abuse by plaintiffs of class action allegations).

[115] Katz v. Carte Blanche Corp., 496 F.2d 747, 760 (3d Cir.) ("[P]ostponement of [class] issues until violation is decided will actually protect the judicial system from time and expense

on the merits while postponing the certification hearing wastes resources adjudicating a potentially relatively insignificant single claim if the appellate court later refuses postjudgment certification.[116] Moreover, the necessity of a second, duplicative class action involving a new named plaintiff who probably knows of the initial favorable judgment, and who may be able to invoke issue preclusion from the initial action, augments the inefficiency.[117]

C. *Equitable Avoidance of the Rule Against One-Way Intervention*

Faced with the above difficulties, federal courts have allowed postjudgment certification under limited circumstances. Instead of challenging the outdated theoretical foundation of the rule against one-way intervention, these courts have developed categories of equi-

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which might have been wasted on them in a nonliability case."), *cert. denied,* 419 U.S. 885 (1974); Haas v. Pittsburgh Nat'l Bank, 381 F. Supp. 801, 806 (W.D. Pa. 1974) ("[A] correctly granted judgment for the defendant would protect both the parties and the court from needless and costly further litigation."), *aff'd in part and rev'd in part on other grounds,* 526 F.2d 1983 (3d Cir. 1975).

Even if a defendant *wants* to certify prejudgment to bind the class to a later judgment on the merits for the defendant, postponing judgment may not be worth the disadvantage of judicial delay. If the plaintiff's claim is weak, the defendant will be protected by the stare decisis effect of his first judgment, which will probably discourage potential claimants.

[116] Such refusal may occur where an appellate court reverses a trial court's order certifying a class after a plaintiff's judgment below, or where a trial court intended to certify on remand following appellate reversal of a defendant's judgment on the merits. *See* Kalven & Rosenfeld, *supra* note 76, at 684-85; *Developments—Class Actions, supra* note 39, at 1324-25. An example of the inefficiency suggested here is Postow v. OBA Fed. Sav. & Loan Corp., 627 F.2d 1370 (D.C. Cir. 1980): If the plaintiffs on appeal had been denied certification under the rule against one-way intervention, the plaintiffs and judicial system would have expended large sums over four years of litigation for one individual recovery of perhaps $100. *Id.* at 1384.

[117] Relitigation cannot be justified if the defendant's only concern is that certification following a plaintiff's judgment will increase the size of the class that chooses not to opt out. So long as the class opponent had a full and fair opportunity to litigate, he should not be afforded a second chance to litigate merely to achieve a different outcome. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 88 (Tent. Draft No. 3, 1976) [§ 29]. If, on the other hand, the defendant has a valid reason to relitigate (for example, certification was not foreseeable and he interposed defenses against the named plaintiff that would be inappropriate against the class), then protection of the defendant's reliance interest should outweigh efficiency considerations.

Decreasing the opt out rate of notified class members by permitting certification after a plaintiff's verdict would reduce the chance that putative class members would bring their own duplicative actions. Thus, requiring a second class action may spawn even further duplicative litigation: By requiring prejudgment certification and notification in a new class action, class members will be less certain of victory and may opt out to press their own individual actions. This multiplicity of action is precisely the result that rule 23 was designed to avoid.

The alternative to a second class action, individual claims by class members, is even less efficient. Moreover, the availability of issue preclusion undermines whatever valid reason the class opponent might have in litigating each claim separately. *Cf.* Jimenez v. Weinberger, 523 F.2d 689, 701 (7th Cir. 1975) (noting inefficiency of requiring second (b)(2) class action), *cert. denied,* 427 U.S. 912 (1976).

table avoidance. As discussed earlier, some courts have relied on waiver[118] or amendment of class notice;[119] but they have done so in unclear, misleading, and potentially dangerous ways. Other courts simply have signalled approval of postjudgment certification *sub silentio* in cases in which the plaintiff or other class member has appealed successfully a negative certification decision following judgment for the individual plaintiff.[120]

The development of the waiver exception after *Katz v. Carte Blanche Corp.*[121] demonstrates the difficulty of categorizing equitable exceptions. As originally conceived, the *Katz* test case procedure was justifiable because it promoted the defendant's interest in maintaining sound business relations with the class.[122] On the other hand, applying *Katz* to imply waiver of the defendant's right to object to a plaintiff's request for postjudgment certification is unprincipled if the defendant has not agreed explicitly to be bound to a class judgment and, in fact, has opposed delay in certification.[123] Focusing on an isolated act—such as a summary judgment motion by a defendant—to infer intent to forego substantive rights represents an unacceptably narrow view, and may prejudice the defendant's reliance interest.[124]

The case law involving *sub silentio* approval of postjudgment certification on appeal[125] requires further judicial clarification before its role in postjudgment certification law can be evaluated properly. The failure of courts to identify and weigh competing party interests, however, is unacceptable. Valid policy reasons may exist for permitting a plaintiff to appeal a certification denial following judgment, but such approval should not be forthcoming, as it apparently was in

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[118] *See* notes 43-57 and accompanying text *supra.*

[119] *See* notes 65-71 and accompanying text *supra.*

[120] *See* notes 58-64 and accompanying text *supra.*

[121] 496 F.2d 747 (3d Cir.) (en banc), *cert. denied,* 419 U.S. 885 (1974).

[122] *See* note 47 and accompanying text *supra.* The *Katz* court did not address the question whether parties have the power to waive a requirement of the federal rules, the authority for which is derived from the Rules Enabling Act.

[123] *See* cases cited at notes 55-57 *supra.*

[124] *See* notes 89-93 and accompanying text *supra.* When moving for dismissal or pressing for summary judgment, the defendant probably is aware that a favorable ruling will prevent him from certifying and binding the class to his judgment. But if he loses his motion, he may proceed on the assumption that he is defending an individual action if the plaintiff has not yet moved to certify. If the defendant were to raise defenses unique to the individual plaintiff or negotiate a settlement that he assumes does not extend to the class, the subsequent expansion of his liability to include the class would prejudice his reliance rights. *See id.* The waiver doctrine ignores such intervening interests and holds the defendant's effort to dismiss the action as conclusive grounds *by itself* to permit certification at any point before or after judgment for the plaintiff. Courts should consider a number of other relevant factors in determining whether a certification decision would prejudice the defendant. *See* notes 154-63 and accompanying text *infra.*

[125] *See* notes 58-64 and accompanying text *supra.*

McDonald and *Roper,* absent a full consideration of the defendant's reliance interests and the plaintiff's need to certify.[126] Arguably, the Supreme Court in *McDonald* considered whether certification would prejudice the defendant,[127] but the Court also should have considered the option of refusing to certify the class to protect the defendant.[128]

The suggestion of *Postow v. OBA Federal Savings & Loan Association*[129] that postjudgment certification is permissible when the (c)(2) notice letter sent to class members does not refer to the judgment[130] is

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[126] The one-way intervention problem was raised only by Justice Powell, who dissented in both cases. *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 354 & n.14 (1980); United Airlines, Inc. v. McDonald, 432 U.S. 385, 401 n.4 (1977) (by implication). The District of Columbia Circuit has characterized the *McDonald* decision as one in which the "majority expressed no concerns about the possibility of prejudice to the defendant," and *Roper* as not considering the one-way intervention issue. Postow v. OBA Fed. Sav. & Loan Ass'n, 627 F.2d 1370, 1382, 1383 n.28 (1980).

[127] In *McDonald,* the class opponent, Unitcd Airlines, settled with the individual parties following denial of class certification. Dissenting from the majority's holding that a putative class member could intervene postjudgment to appeal a denial of class certification, Justice Powell argued that after denial of certification rendered the action a nonclass action and the settlement was accepted, United "was prejudiced by [the putative class member's] attempt to reopen the case," 432 U.S. at 400, particularly because three years had elapsed between the time of certification denial and postjudgment appeal. 432 U.S. at 401 n.4. The majority rejected Justice Powell's argument on the ground that computation of liability had been determined in previous litigation involving United (*see* Sprogis v. United Air Lines, Inc., 517 F.2d 387, 392-93 (7th Cir. 1975)), and that the instant settlement was merely an application of the earlier liability determination. Thus, according to the majority, any unfair "surprise" was harmless, apparently because United could not have altered the settlement outcome. 432 U.S. at 393 n.14. *See* Note, *Resurrecting Claims through Post-Judgment Appeal of Class Certification Denial,* 64 IOWA L. REV. 964, 971 (1979) (United Airlines should reasonably have expected postjudgment challenge to denial of certification and hence was not prejudiced). The majority, however, gave only "casual treatment" to the possibility that postsettlement certification might upset the defendant's reliance on the earlier settlement and deter settlements generally. 432 U.S. at 399-401 (Powell, J., dissenting). Most of the majority's discussion concerned whether the agreement was a "settlement." *Id.* at 393 n.14. And as in Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980) (discussed *infra*), the settlement offer and its acceptance by the court may have prejudiced the court's ultimate class judgment, if any, and influenced class members later as to whether to opt out.

In *Roper,* the class defendant offered a settlement to plaintiffs, and the court entered judgment over their objcction, following the trial court's denial of class certification. As in *McDonald,* the majority, in deciding whether to permit postjudgment appeal of the certification decision, failed to consider the one-way intervention issue, but, unlike *McDonald,* it did not even mention the issue of defendant prejudice. *Id.* The *Roper* Court may have blindly assumed that overturning the defendant's settlement with the individual plaintiff obviated the need to consider the issue.

[128] If the named plaintiff has no interest in seeking class recovery, overturning the plaintiff's judgment to permit class prosecution as occurred in *Roper* may be unfair to him. *See Developments—Class Actions, supra* note 39, at 1420 n.163. In such cases, a second class action may be the only means to avoid prejudicing the class opponent. Thus, an appellate court should weigh the disadvantages of requiring a new class action against the alleged prejudice to the parties resulting from late certification.

[129] 627 F.2d 1370 (D.C. Cir. 1980).

[130] 627 F.2d at 1383-84. *See* notes 67-68 and accompanying tcxt *supra.*

also misplaced. Even if the federal rules provide for a class letter that omits reference to the judgment,[131] keeping the class ignorant of the outcome in order to reduce one-way intervention[132] does not protect the actual interests of the defendant.[133] If the defendant has entered settlement negotiations or has offered defenses on the assumption that he is litigating an individual action, any harm resulting from post-judgment certification would not be reduced by altering the content of the class letter. A notice letter exception may even institutionalize prejudice within the class. Some class members will be aware of a judgment regardless of the content of the letter, thus ensuring that class members will have disparate levels of awareness as to the status of the litigation.[134]

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[131] Rule 23(c)(2) is silent as to notice requirements other than the inclusion of the three items listed in subdivisions (c)(2)(A)-(C). The only possibly relevant provision is subdivision 23(d)'s discretionary notice section, which grants courts the power to "requir[e], for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action."

Apparently, rule 23 does not forbid notice that includes reference to the plaintiff's judgment, *see* Katz v. Carte Blanche Corp., 496 F.2d 747, 760 (3d Cir.) (mention of plaintiff's judgment included in contemplated postjudgment notice), *cert. denied,* 419 U.S. 885 (1974). In fact, prohibiting such communication between the attorney and the class may be impracticable or even unconstitutional under the first amendment. *See generally* Comment, *Judicial Screening of Class Action Communications,* 55 N.Y.U. L. REV. 671 (1980); Note, *Restrictions on Communication by Class Action Parties and Attorneys,* 1980 DUKE L.J. 360, 370-84. Furthermore, this type of gag rule would represent a significant step beyond current practice, which only prohibits transmission of inaccurate or misleading information. Finally, a broader remedial provision regnlating class communication would be ineffective if a class member who was not directly involved in the initial action had any incentive to inform other class members of the judgment.

[132] Postow v. OBA Fed. Şav. & Loan Ass'n, 627 F.2d at 1383.

[133] Prohibiting notice of judgment would not serve any of the four justifications for the rule against one-way intervention. *See* notes 73-93 and accompanying text *supra.* Because a court probably would not certify and order notice if the *defendant* were to win on the merits, there is no mutuality of estoppel. If all the judge need do is delete reference to the judgment in the notice letter, certification may occur late in the litigation, and cost sharing is not encouraged. For the same reason, the defendant is not earlier informed as to the nature and scope of his liability, and thus his reliance interest is not protected. And though potential class members may not know personally of the judgment, they still are not subjected to any "risk." At worst, they might opt out to sue the class opponent independently. Risk exposure, on the other hand, requires that the party be subjected to the risk of being bound by an adverse judgment. Thus, there is little justification for depriving the class of relevant litigation information. *Cf.* Katz v. Carte Blanche Corp., 496 F.2d 747, 760 (3d Cir.) (informing class of judgment advantageous because opting out decision "more informed"), *cert. denied,* 419 U.S. 885 (1974).

[134] In many actions, a number of class members are aware of developments in the pending action because they are similarly situated with other class members. For example, in Postow v. OBA Fed. Sav. & Loan Ass'n, 627 F.2d 1370 (D.C. Cir. 1980), the class involved only 41 customers of a local savings and loan, and it is likely that some of them were aware of the litigation. Yet the court made no attempt to discern whether they had actual knowledge of the existence of a judgment in their favor. In actions involving, for example, employment discrimination against a common employer, a class member may learn of the plaintiff's judgment other than by letter from the court. *See, e.g.,* United Airlines v. McDonald, 432 U.S. 385, 387-90

The problem with equitable exceptions is that they operate within a framework that brands one-way intervention a per se evil. If this made sense when the doctrine of mutuality of estoppel was in vogue, it is no longer appropriate now that courts facing questions of issue preclusion use a discretionary test designed to fit the circumstances of a particular litigation.[135] As long as courts refuse to modernize their approach to certification questions to accord with modern res judicata law, confusion and impairment of party interests will linger.

IV

PROPOSAL

The foregoing suggests that the one-way intervention framework should be abandoned altogether. First, developments in res judicata law suggest that one-way intervention sometimes may be appropriate. Second, predetermining the sequence of certification and judgment wastes judicial resources and prejudices defendants' and plaintiffs' interests. Finally, attempts at equitable avoidance seem artificial and still may prejudice the parties.

A. *Structuring Reform*

Given the alternatives of rule reform and judicial refinement of certification analysis under rule 23, rule reform would be the simpler and more effective course, although an unlikely one in the near future.[136] Nevertheless, an analysis of the rule's language, combined with a review of the underlying goals of the drafters, suggests that courts may adopt a more flexible view of one-way intervention and yet remain within the confines of the language in rule 23 and Supreme Court precedent.

Among courts that view rule 23 as prohibiting one-way intervention, there is little agreement as to which language in the rule accomplishes the result. Some courts have ignored the Advisory Committee's focus on subdivision (c)(3)[137] and have relied instead on other subdivisions.[138] In fact, it appears that none of the subdivisions of rule 23,

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(1977). Moreover, a gag order imposed on notice is impractical because other types of suggestive communication with the class attorney are permitted. *See, e.g.*, Postow v. OBA Fed. Sav. & Loan Ass'n, 627 F.2d at 1383 n.30 (describing permitted correspondence between attorney and class).

[135] *See* note 79 *supra.*

[136] *See* note 6 *supra.*

[137] *Advisory Committee Notes, supra* note 4, at 106.

[138] For example, the following cases were decided in the same year by the Seventh Circuit: Roberts v. American Airlines, Inc., 526 F.2d 757, 763 (7th Cir. 1975) (subdivision (c)(1)

read literally, dictates the order in which certification and judgment on the merits should occur.[139]

Subdivision (c)(1) does not state that certification must precede judgment; it requires only that the court make a class determination "[a]s soon as practicable after the commencement of an action."[140] Notwithstanding the statement in the Advisory Committee's Note disapproving one-way intervention,[141] the deletion of language from an earlier proposed draft of subdivision (c)(1) stating that the class order must be "before the decision on the merits" indicates that the Committee did not intend to establish a rigid ordering of the (c)(1)

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precludes post-summary judgment certification because such certification necessarily "delayed"), *cert. denied,* 425 U.S. 951 (1976); Peritz v. Liberty Loan Corp., 523 F.2d 349, 354 (7th Cir. 1975) (citing subdivisions (c)(1) and (c)(2), but also quoting from *Advisory Committee Notes, supra* note 4, at 105-06); Jimenez v. Weinberger, 523 F.2d 689, 698 (7th Cir. 1975) (dictum) (citing (c)(2) and (c)(3)). *Jimenez* also interpreted the Supreme Court's discussion of one-way intervention in American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 547 (1974) as suggesting that "subparagraph (c)(1) was specifically intended to deal with post-merits certifications." 523 F.2d at 698 n.17. *American Pipe,* however, does not seem to point to any one specific subdivision of rule 23 as prohibiting one-way intervention. *See* 414 U.S. at 547-49. Moreover, some courts appear to have identified only Supreme Court precedent (*see* note 39 and accompanying text *supra*) or only the Rules Advisory Committee Notes (*see* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 354 n.14 (1980) (Powell, J., dissenting) (citing only *Advisory Committee Notes* and subdivision (c)(2) in discussing postjudgment certification following appeal)).

[139] A court seeking to certify postjudgment may have available two other courses of action if it concludes that rule 23 expressly requires prejudgment certification. First, an appellate court may find that a procedure in the trial court violates the federal rules but nevertheless is not grounds for reversal under the harmless error doctrine. *See* 28 U.S.C. § 2111 (1976); note 153 and accompanying text *infra.* Second, a court may read rule 1, which calls for construction of the federal rules so as "to secure the just, speedy, and inexpensive determination of every action," together with rule 23 to permit postjudgment certification, where denying it would undermine the broader purposes of efficiency and promotion of party rights associated with the federal class action rule. *Cf.* 1A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 426, at 676 (C. Wright ed. 1960) (citing rule 1 to support argument for different reading of rule 14(a) where "literal reading" would subvert joinder policies).

[140] The intent of the drafters of this language has been the subject of some debate. *Compare* Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324, 326 (E.D. Pa. 1967) ("Rule 23(c)(1) contemplates a prompt determination after the filing of the action."), *with* Frankel, *supra* note 15, at 41 ("[T]he time when a hard determination is 'practicable' as to the propriety of a class action will obviously vary from case to case.") *and* Note, *supra* note 90, at 362 ("[T]he . . . vague limitation of 'as soon as practicable' seemingly grants courts broad discretion in deciding when to make a class determination.").

The second sentence of subdivision (c)(1), which states that "[a]n order under this subdivision may be conditional, and may be altered or amended before the decision on the merits," assumes that the order is entered before judgment. The sentence is permissive and not prohibitive, however, and it does not apply to the *original* entry of a (c)(1) order. Moreover, courts have not interpreted this language to prevent postjudgment certification in (b)(1) and (b)(2) actions, although it applies equally to them. *See* note 143 and accompanying text *infra.*

[141] *Advisory Committee Notes, supra* note 4, at 106.

and merits determinations.[142] Furthermore, judicial interpretation of subdivision (c)(1) in (b)(1) and (b)(2) actions, to which (c)(1) applies with equal force, leaves no doubt that the adopted version does not require postponement of judgment until after a certification decision.[143]

Similarly, subdivision 23(c)(2), which sets out the notice requirements for (b)(3) actions, does not mandate prejudgment certification. Subdivision (c)(2) states only that (b)(3) notice is mandatory; it is silent as to the timing of notice. At most, subdivision (c)(2)(B), which requires the court to include in the judgment any putative class member "who do[es] not request exclusion," assumes the existence of notice before judgment. Nevertheless, this provision does not prevent the court from, for example, later amending the judgment so as to provide class members the opportunity to opt out.[144]

Finally, subdivision 23(c)(3), which governs the scope of judgment, also assumes that a class has been determined beforehand.[145] A court simply could announce, however, that no one has received notice yet and hold the judgment open until notification is accomplished.[146] Even courts that interpret rule 23 to require prejudgment

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[142] *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts,* 34 F.R.D. 325, 386 (1964); *cf.* Committee on Federal Rules of Civil Procedure, *Judicial Conference—Ninth Circuit* (Second Supplemental Report), 37 F.R.D. 499, 522 (1965). Unfortunately, the Committee did not articulate its reasons for deleting the provision. According to one commentator, "[t]he present version of the rule seems to contemplate an earlier determination [of class certification] than did the original draft." Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma,* 47 S. CAL. L. REV. 842, 892 n.170 (1974). Professor Landers is correct, however, only if the decision on the merits is not precipitated by a motion to dismiss or a summary judgment motion, which may precede the moment at which certification is "practicable." *See* text accompanying notes 95-100 *supra.* Otherwise, the Committee's deletion permits a precertification decision on the merits.

[143] In permitting postjudgment certification, courts have found no language barriers in subdivision (c)(1). *See, e.g.,* Larionoff v. United States, 533 F.2d 1167, 1182-83 (D.C. Cir. 1976), *aff'd* 431 U.S. 864 (1977); Jimenez v. Weinberger, 523 F.2d 689, 698, 700 & n.25 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1201 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971); Burke v. Mathiasen's Tanker Indus., Inc., 393 F. Supp. 790, 792 (E.D. Pa. 1975) (class determination postponed until after decision on motion to dismiss); Freeman v. Motor Convoy, Inc., 68 F.R.D. 196, 208 (N.D. Ga. 1974) (dictum). In addition, these cases suggest that nothing in the language of subdivision (c)(1) indicates that the interpretation of the "as soon as practicable" requirement should be any different for (b)(3) actions than for (b)(1) and (b)(2) actions. *See also* cases cited at note 159 *infra.*

[144] Subdivision (c)(2) does not state that the judgment must occur in the future; it says only which members the ultimate judgment "*will* include" (emphasis added).

[145] *See* FED. R. CIV. P. 23(c)(3) ("The judgment [in (b)(3) actions] . . . shall include and specify or describe those to whom . . . notice . . . was directed. . . .").

[146] Subdivisions (c)(2) amd (c)(3) presumably were designed in part to ensure that the decision to opt out is respected. The interpretation of the rule suggested here would be

certification have suggested that the possibility of a more liberal interpretation is not foreclosed.[147]

In addition, neither *American Pipe* nor *Eisen* forbids one-way intervention. In holding that the filing of the complaint commenced the action for all members of the class, *American Pipe* focused only on the representational nature of the (b)(3) class action;[148] permitting one-way intervention does not render the action any less representational. In *Eisen,* the majority disapproved of a mini-hearing because rule 23 does not provide for shifting costs of notice to the defendant, and because the hearing impermissibly delayed the (c)(1) order.[149] Because *Eisen* involved an interlocutory appeal,[150] the Court could not have held that postjudgment certification was impermissible. Thus, although the Supreme Court may have misled lower courts by reviewing a historical rationale no longer supportable under modern doctrine, neither these cases nor rule 23 precludes trial courts from adopting a more flexible approach to certification timing.[151]

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consistent with this purpose: A member's request to opt out would be honored postjudgment, as long as made according to the particular requirements of the class notice.

[147] *See, e.g.,* Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270, 274 (10th Cir. 1977) (suggesting that postponement of certification sometimes may be justified); Peritz v. Liberty Loan Corp., 523 F.2d 349, 354 n.4 (7th Cir. 1975) (reserving the question).

[148] *See* notes 30-33 and accompanying text *supra.*

[149] *See* notes 34-38 and accompanying text *supra.* Although *Eisen* has been said to be "about one-way intervention," notes 38-39 and accompanying text *supra,* the mini-hearing did not result in judgment for the plaintiffs. A mini-hearing creates a type of one-way intervention only in the sense that putative class members may determine whether the trial judge is favorably disposed to rule for the class on the merits at some future point in the action; this situation is not comparable to the no-risk intervention that commentators criticized before rule 23 was amended. Moreover, the adoption of an interpretation of *Eisen* as prohibiting procedures that may inform the class as to who eventually will win on the merits raises troubling questions about the propriety of *any* merits-related ruling before certification. For example, ruling on the admissibility of important evidence may be necessary in shaping the litigation early, but under this one-way intervention interpretation of *Eisen,* a court could not subsequently certify the class, because class members may be aware of the ruling and use it in deciding whether to opt out. Surely, the *Eisen* Court did not intend this result. Finally, though the Supreme Court's language may be ambiguous as to the one-way intervention question, the Second Circuit's decision, Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), clearly indicates that *Eisen* was not a one-way intervention case. The court noted that although the rule does not provide for mini-hearings, "there may be summary judgments, [and] dismissals with or without prejudice. . . ." 479 F.2d at 1015. At least one court has argued that the Supreme Court implicitly accepted this argument. Haas v. Pittsburgh Nat'l Bank, 381 F. Supp. 801, 804 n.5 (W.D. Pa. 1974), *aff'd in part and rev'd in part on other grounds,* 526 F.2d 1083 (3d Cir. 1975).

[150] 417 U.S. at 161-69.

[151] This is precisely the tack taken by some of the courts that have permitted postjudgment certification. *See* Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270, 274 (10th Cir. 1977) ("*Eisen* did not rule out specific consideration of any aspect of the merits of a case before determination of the class action issue. . . ."); Redhouse v. Quality Ford Sales, Inc., 511 F.2d

B. *Case-by-Case Evaluation of Party Interests in Certification*

Experience with a per se rule against one-way intervention indicates that class certification decisions are best left to the discretion of the trial judge. As the one most familiar with the facts and procedural history of the litigation, the trial judge is uniquely capable of determining whether certification after a judgment on the merits would promote class interests and judicial efficiency without impairing the reliance interest of the class opponent.[152] The trial court's determination under this scheme should be reversible on appeal only if it constitutes an abuse of discretion that prejudices one of the parties.[153]

In managing the certification stage of class litigation, the trial judge may draw heavily on the framework developed in recent years in the law of offensive use of issue preclusion by nonparties. Substantially analogous to one-way intervention in class suits,[154] the modern law of issue preclusion applies a discretionary test that focuses on party interests and judicial efficiency. The Supreme Court in *Parklane Hosiery Co. v. Shore*[155] recently endorsed the issue preclusion provisions

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230, 240-41 (10th Cir. 1975) (Doyle, J., dissenting), *modified on rehearing*, 523 F.2d 1 (10th Cir. 1975) (en banc); Eovaldi v. First Nat'l Bank, 71 F.R.D. 334, 335 (N.D. Ill. 1976) ("[N]either [*Eisen*] nor Rule 23 precludes the defendant from proceeding to the merits without notification. . . ."), *rev'd on other grounds*, 596 F.2d 188 (7th Cir. 1979); Haas v. Pittsburgh Nat'l Bank, 381 F. Supp. 801, 803 (W.D. Pa. 1974) ("[n]othing in either the *Eisen* decision nor Rule 23 itself precludes" ruling on a defendant's merits motion before certification), *aff'd in part and rev'd in part on other grounds*, 526 F.2d 1083 (3d Cir. 1975).

[152] Although a discretionary determination is by definition less certain for litigants, courts have operated since 1966 within a discretionary framework in rule 23 litigation. *See* note 94 *supra*. As class actions have become more complex, the exercise of discretion in their management has become more important than when the rule was restructured. One commentator noted that "[i]f class suits are to be justified substantively, . . . a class action rule cannot be applied mechanically. The trial judge, and not the rulemaker, must bear chief responsibility for the design of class action procedures." *Developments—Class Actions*, *supra* note 39, at 1366. *Cf.* Holland, *supra* note 79, at 631-33 (arguing that trend in res judicata law toward judicial discretion and away from mechanical rules is desirable).

[153] Under the harmless error doctrine, an appellate court would reverse the certification order if, for example, the class opponent could demonstrate impairment of its reasonable reliance upon the nonclass character of the action. In the absence of such prejudice, the trial court ruling would be upheld. *See* 28 U.S.C. § 2111 (1976) ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.").

[154] One-way intervention is different from issue preclusion only in that the intervening class member does not have to initiate his own action to take advantage of the named plaintiff's judgment. Quite different is the situation in which certification has occurred prior to a class judgment and a plaintiff who opted out of that judgment seeks to assert it in a new action. In the latter scenario, issue preclusion would be inappropriate because the integrity of the opting out mechanism should be protected. *See* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1789, at 183-84 (1972).

[155] 439 U.S. 322, 330-31 (1979), *discussed at* note 79 *supra*. In permitting offensive issue preclusion, *Parklane Hosiery Co.* relied principally on § 88 of the *Restatement (Second) of Judgments*,

of the *Restatement (Second) of Judgments,* which provide that preclusion depends in part on whether the party to be precluded had "an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action,"[156] and whether "it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action."[157] The inquiry amounts to a determination of whether issue preclusion would prejudice the party to be precluded.[158] Thus, a trial judge deciding whether to permit one-way intervention in class litigation should determine whether the class opponent had a full and fair opportunity or incentive to press his class defenses, and whether liability to the class was foreseeable after the initial judgment.[159] If the answers to both inquiries are affirmative, postjudgment certification is appropriate; if the class opponent can demonstrate that he would have litigated with significantly more vigor in the earlier stages of the litigation or would have presented different defenses had the class been certified earlier, the court should deny certification.[160]

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although both § 68.1 and § 88 are relevant to the determination of issue preclusion. Section 88 provides that, in addition to the considerations enumerated in § 68.1 (*discussed at* text accompanying notes 156 & 157 *infra*), courts should consider, *inter alia,* whether a party seeking preclusion could have effected joinder in the first action, whether the precluded party would be prejudiced, or whether "[o]ther compelling circumstances" exist to render relitigation appropriate. RESTATEMENT (SECOND) OF JUDGMENTS § 88 (Tent. Draft No. 3, 1976) [§ 29].

[156] RESTATEMENT (SECOND) OF JUDGMENTS § 68.1(e)(iii) (Tent. Draft No. 4, 1977) [§ 28].

[157] *Id.* § 68.1(e)(ii) [§ 28].

[158] *Cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 88(6) (Tent. Draft No. 3, 1976) [§ 29] (considering whether application of issue preclusion would "prejudice the interests of another party"). *See also Developments in the Law—Multiparty Litigation in the Federal Courts,* 71 HARV. L. REV. 874, 936 (1958) (courts should balance the interest in reducing litigation against unfairness to defendants in multiparty litigation).

[159] The discretionary application of postjudgment certification in rule 23(b)(1) and (b)(2) actions under current law, *see* notes 40-41 & 143 and accompanying text *supra,* may involve the type of analysis suggested here by examining whether the action has been treated by the class opponent all along as a class action. Such analysis assumes that a defendant who has treated an action as a class action from the beginning of the litigation would not be prejudiced. *See* Senter v. General Motors Corp., 532 F.2d 511, 521-22 (6th Cir.) ((b)(2) certification permissible where parties proceeded on assumption that action was class action, despite absence of formal certification order), *cert. denied,* 429 U.S. 870 (1976); Rodriguez v. East Tex. Motor Freight, 505 F.2d 40, 51 (5th Cir. 1974), *rev'd on other grounds,* 431 U.S. 395 (1977); Bing v. Roadway Express, Inc., 485 F.2d 441, 446-47 (5th Cir. 1973); Lau v. Nichols, 483 F.2d 791, 793 n.4 (9th Cir. 1973), *rev'd on other grounds,* 414 U.S. 563 (1974); *cf.* Nance v. Union Carbide Corp., 540 F.2d 718, 722 (4th Cir. 1976) ((b)(2) action not permitted where plaintiff disclaimed intention to seek certification, and action treated as individual action), *cert. denied,* 431 U.S. 953 (1977); Case & Co. v. Board of Trade, 523 F.2d 355, 360 (7th Cir. 1975) (class determination not permitted where parties treated suit as individual action).

[160] *See* notes 89-93 and accompanying text *supra.* For example, the court might consider denying postjudgment certification if the plaintiff precipitated, without reasonable justification, an early merits decision by moving for summary judgment before requesting certification. *Cf.*

In determining whether certification and classwide liability exposure was foreseeable when the class opponent defended against the claims of the named plaintiff, a defendant's motion to dismiss or motion for summary judgment prior to the certification motion would be relevant, but, unlike its treatment under the "waiver" exception, it would not be conclusive evidence.[161] If the defendant anticipated separate class litigation and selected a litigation strategy against the individual plaintiff that was incompatible with defending against a class, then he may argue that certification would prejudice his reliance interests and deny him a full and fair opportunity to present his defenses.[162] In some cases, the court might determine that the defendant should move that the action *not* be certified as a class action before pressing for the merits if subsequent certification would prejudice the defendant's position.[163]

A discretionary, interest analysis approach to (b)(3) certification timing would offer three advantages over both the per se rule against

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RESTATEMENT (SECOND) OF JUDGMENTS § 88(3) (Tent. Draft No. 3, 1976) [§ 29] (denying issue preclusion if joinder in first action was possible).

[161] *See* notes 55-57 and accompanying text *supra;* note 124 *supra.* A "unique sequence" of certification and subsequent decertification may also make class liability more foreseeable. *See* text accompanying notes 69-70 *supra.*

[162] If the defendant has presented defenses against the individual plaintiff that may be inappropriate against certain class members, the court may also consider forming subclasses so as to deny certification to these members and permit certification as to the rest. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 179-81 (1974) (Douglas, J., concurring and dissenting in part); FED. R. CIV. P. 23(c)(4)(B).

If the court makes a certification decision before judgment, it should consider certifying its order for interlocutory appeal under 28 U.S.C. § 1292(b) (1976). *See* note 59 *supra.* Although commentators have called § 1292 a "limited" remedy, *see id.,* considerations of economy and fairness sometimes would support its application to prevent party prejudice postjudgment and to preserve resources. Moreover, the Supreme Court recently has signalled its affinity for the § 1292(b) remedy:

> [O]ur ruling in [Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), in which the Court barred prejudgment appeal as a matter of right under 28 U.S.C. § 1291] was not intended to preclude motions under 28 U.S.C. § 1292(b) seeking discretionary interlocutory appeal for review of the certification ruling . . . . In some cases such an appeal would promise substantial savings of time and resources or for other reasons should be viewed hospitably.

Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 336 n.8 (1980). *But cf. id.* at 355 n.17 (Powell, J., dissenting) (suggesting need for legislative reform to establish workable certification appeals policy); H.R. 13, 97th Cong., 1st Sess. § 104 (1981), *discussed at* note 6 *supra* (providing for interlocutory appeals); H.R. REP. No. 96-1008 (pt. I), 96th Cong., 2d Sess. 20 (1980) (discussing same).

[163] Rule 23(c)(1) does not state who is responsible for initiating or pursuing a certification request. Generally placing the burden on the plaintiff, however, would comport with the goal of protecting the defendant's reliance interest. *See* CLASS ACTION STUDY, *supra* note 89, at 13 (noting that defendants raise a significant portion of (c)(1) motions); 3B MOORE'S FEDERAL PRACTICE ¶ 23.50, at 421 & n.11 (2d ed. 1981). Alternatively, the court may have a duty to render a (c)(1) determination in the absence of a motion by a party. *Id.* at 421 & n.13.

one-way intervention and the developing equitable exceptions approach. First, an evaluation of party interests would allow a court to avoid the harsh results that sometimes follow from strict adherence to the one-way intervention rule.[164] For example, a court would have the opportunity to evaluate weak claims before undertaking a review of certification issues, and certification would be available to a trial court after reversal on the merits by an appeals court. Moreover, by addressing the issue of whether certification in a particular instance would unfairly prejudice the class defendant, a court could also avoid the potentially unjust results of the equitable exceptions cases.[165]

Second, judicial articulation of the underlying factors of party prejudice may alter favorably the parties' pre-trial litigation behavior. For example, under the current waiver approach, the prohibition against one-way intervention applies until a defendant moves unsuccessfully for summary judgment; the plaintiff apparently then may move for judgment without attempting to certify the class.[166] Under the proposed test, a plaintiff aware of the court's emphasis in determining whether the class defendant was surprised and prejudiced by late certification might inform the defendant ahead of time that he intends to certify postjudgment in order to prevent the defendant from relying to his detriment on the apparent nonclass character of the action. Alternatively, the plaintiff or defendant might move for certification before pursuing any judgment on the merits. The court then could determine the best way to order the various motions, considering in advance the interests of both the parties and the class.

The third advantage goes to the heart of the role of subdivision 23(c). As suggested earlier, courts have begun to use 23(c)'s procedural requirements to burden the (b)(3) action unnecessarily, and have even used 23(c) to terminate class litigation.[167] Yet there is no reason to single out the (b)(3) action for harsh treatment under this subdivision of the rule.[168] If courts are suspicious of consumer class

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[164] *See* notes 94-117 and accompanying text *supra*.

[165] *See* notes 118-35 and accompanying text *supra*.

[166] *See* Postow v. OBA Fed. Sav. & Loan Ass'n, 627 F.2d 1370 (D.C. Cir. 1980); notes 56-57 and accompanying text *supra*. Under certain circumstances the failure of the plaintiff to seek formal certification before the summary judgment motion may justify a finding that the plaintiff has waived the "advantage" of rule 23. Glodgett v. Betit, 368 F. Supp. 211, 214-15 (D. Vt. 1973) (plaintiff's motion for summary judgment prior to seeking certification resulted in dismissal of class aspects of suit), *aff'd sub nom.* Philbrook v. Glodgett, 421 U.S. 707 (1975); *cf.* Izaguirre v. Tankersley, 516 F. Supp. 755 (D. Or. 1981) (dictum) (waiver by defendant of postjudgment certification when defendant initiates merits motion).

[167] Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270, 273-74 (10th Cir. 1977); Peritz v. Liberty Loan Corp., 523 F.2d 349, 353-54 (7th Cir. 1975).

[168] Judicial leniency in permitting (b)(3) actions to be filed under subdivision (b)(2) renders the higher procedural requirement of the former provision anomolous. *See* 7A C. WRIGHT & A.

actions, as some have suggested they should be,[169] they should vent their suspicions through the already tough requirements enunciated in subdivision (b)(3).[170] Using subdivision (c) as a screening device results in judicial inefficiency and wasted effort by plaintiffs who commence class actions, only to find out after years in court that a procedural error prevents them from certifying. Courts should make the class determination early and should not dismiss the action after a significant investment of time and effort unless the class defendant demonstrates that the procedure so prejudiced him that only a denial of certification will remedy the harm. By shifting to a test that encourages parties and courts to think in terms of substantive party interests, class actions that deserve class treatment will survive, while only those in which irremediable prejudice precludes class prosecution will be relegated to a new, second action or terminated altogether.

CONCLUSION

Analysis of postjudgment certification cases provides further evidence for the broader charge against current class action practice: Courts dwell on procedure, at the expense of substantive party rights.[171] Developments in the law since the 1966 amendments to rule 23 have changed fundamentally the foundation of a judicially established rule against one-way intervention, so that it is now an aberration in the larger procedural scheme of judicial discretion in class action management. To date, efforts by courts to squirm out from under the rule using various equitable doctrines are misfocused and may be counterproductive. Courts should recognize that the Rules Advisory Committee intended to marry class action procedure to res judicata principles and that, consequently, the modern view of res judicata calls for a more flexible approach to postjudgment certification. Rule 23(c) as currently drafted should not preclude judges from managing class litigation so as to promote party interests, or from striving towards what Professor Miller predicts will be "sophistication, restraint, and stabilization in class action practice."[172] By adopting a discretionary party interest analysis test founded on modern principles of issue preclusion, courts would make the (b)(3) claim less controversial and more effective.

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MILLER, FEDERAL PRACTICE AND PROCEDURE § 1775, at 22-24, 49-50 (1972) (arguing for non-(b)(3) treatment even in actions involving money damages); *Developments—Class Actions, supra* note 39, at 1626; note 42 *supra*; text accompanying note 72 *supra*.

[169] *See generally* Kirkham, note 8 *supra;* Simon, note 8 *supra*.

[170] *See* note 14 and accompanying text *supra*.

[171] Berry, *supra* note 5, at 300.

[172] Miller, *supra* note 5, at 680.