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Personal Jurisdiction and Rule 23

Defendant Class Actions

The problems posed to the Court and litigants under Class Action Rule 23 appear to be endless and increasingly complex. We have from each side in this case on this issue alone a stack of briefs and other materials approximately nine inches in height. If we were to decide the question solely by the weight of the material submitted, we would have to give the decision to the defendants because they have contributed more to this stack of papers than has plaintiff. Despite the deceptive simplicity of the laudable purposes of Rule 23, the result has been a serious drag upon judicial functions.1

Surely it is a rare judge who cannot empathize with the frustrations which led Judge Knox, in Stavrides v. Mellon Bank, N.A., to conclude that while the originally perceived function of class action rule 23 of the Federal Rules of Civil Procedure may have been “praiseworthy,” its application may intiate that “in some respects the cure is worse than the disease.”2 It is by now a cliche to assert that the class action device is viewed with considerable suspicion by courts,3 and recent pronouncements by the Supreme Court in Eisen v. Carlisle & Jacquelin5 have gone far to insure that the frequency of class action suits will be diminished.

In light of this trend it may appear paradoxical that one of the most complex, and potentially profitable, varieties of class action suits, the defendant class action, is apparently becoming increasingly common.6 Quite frequently, such suits involve two classes—both plaintiff and defendant—and thus the

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3Id. at 426.


5417 U.S. 156 (1974). Eisen imposes a stringent requirement that “individual notice be sent to all class members who can be identified with reasonable effort.” Id. at 177.

6The absence of detailed statistics makes it difficult to verify this intuitive conclusion. A comparison of early commentary with more recent observations may, however, provide some support for this assessment. Compare Note, Federal Class Actions: A Suggested Revision of Rule 23, 46 COLUM. L. REV. 818, 827 n.43 (1946), where the author determines that defendant classes are only “rarely” approved as of 1946, with the recent determination that “[m]any defendants’ classes have been certified in civil rights class actions, and in criminal justice, housing, and sex discrimination class actions, as well as other types of class litigation.” 1 NEWBERG ON CLASACCTIONS § 1148b, at 252 (1977).

issues involved in assessing "representativeness," "commonality," and the other by-ways of Rule 23 become doubly laborious for the courts. The judicial response to the "new" phenomenon of claims against defendant classes has nevertheless been tolerant. While the most ambitious instances of the defendant class suit have met with reprimand, as in Kline v. Coldwell, Banker & Co., where one judge half-seriously remarked that defendant class certification should be "conditioned upon an agreement by counsel that they will pay all costs of all defendants if the suit is lost," a more accommodating judicial response is evident in cases such as United States v. Trucking Employers, Inc. III. In that action, the court acknowledged little difficulty in certifying a defendant class even though it conceded there was no precedent which "appears so ambitious as this one."14

The facts of the Trucking Employers case are simply stated. Black and Spanish-surnamed employees brought suit under Title VII against a nationwide class of defendant trucking employers, alleging discriminatory employment policies and practices within the industry. The plaintiffs sought injunctions against several hundred firms located throughout the United States, and damages in the form of back pay for individuals allegedly injured by members of the defendant class.

One of the important issues raised by the case was whether the court must obtain personal jurisdiction over all members of the defendant class before a binding decree could be entered. This note analyzes the precedents and policy considerations which should inform a judicial response to this question. Ultimately the conclusion reached here is very similar to the result in Trucking Employers I, II: A requirement of in personam jurisdiction over all members of a defendant class would in many instances deprive the class action device of much of its utility or produce anomalous and inequitable results. The more important conclusion of this note, however, is that no

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8See FED. R. CIV. P. 23(a).
9As the discussion in the text accompanying note 23 indicates, the concept of the defendant class is not a new one, although application of the FED. R. CIV. P. 23 provision for defendant classes is a relatively modern phenomenon.
11508 F.2d 226 (9th Cir. 1974).
12Id. at 237 (concurring opinion).
16The class was defined so as to include only common carriers of general commodity freight by motor vehicle that employed over-the-road drivers, were parties to or were bound by a national master freight agreement and area supplements thereto, employed at least 100 persons, and had annual gross revenue of at least $1,000,000. Id. at 682.
analysis of the personal jurisdiction question should end with this vague invocation of the wonder-working economies of class actions. Rather, courts certifying defendant class actions in the absence of complete personal jurisdiction should be aware that they are seeking a compromise and that such a compromise requires that members of a defendant class be afforded special protections. In particular, it is urged that constitutional due process requires notice to absent members in the case of a defendant class. The *Trucking Employers* court implicitly arrives at this conclusion. In that case, the named party representatives signed a partial consent decree with the plaintiffs prior to the commencement of the class action litigation. Absent class members later challenged the ability and desire of those named defendants to adequately represent all the defendants' interests. While the court analyzed the problem within the familiar rubric of "adequacy of representation," the court also recognized that in the defendant class context, no assurance of adequate representation is a complete substitute for the due process requirements of notice and opportunity to be heard:

The court is in essence defining a class of defendants who are neither parties nor absent class members according to the common usages of those terms. Perhaps it should not be surprising that a court adjudicating a defendant class action should find itself fashioning new procedural law. Although Rule 23 expressly provides for actions against a defendant class, this aspect of the rule has only recently been explored, and there is a scarcity of legal literature on the subject.

The concept of the defendant class is, however,

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21"One or more members of a class may sue or be sued as representative parties on behalf of all . . . ." Fed. R. Civ. P. 23(a).
22This is also the conclusion reached in 1 NEWBERG ON CLASS ACTIONS § 1148, at 249 (1977). That treatise includes a useful recent survey of the issues involved in defendant class actions. Discussions are also found in 1 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1770 (1972) and in 3B MOORE'S FEDERAL PRACTICE (1977). Early discussions of defendant classes are Note, *Action Under the Codes Against Representative Defendants*, 36 HARV. L. REV. 89 (1922); and Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 COLUM. L. REV. 818, 887-99 (1946).

much older than the federal rules; indeed, it may be that the defendant class was once more prevalent than its familiar plaintiff class counterpart: "The earliest class actions, or bills of peace in nature of class actions, brought in English chancery court of the 17th and 18th centuries, were largely defendants' class actions in which the plaintiff needed to join numerous parties defendant in order to receive an effective remedy."23 Of course, the initial impetus of the class action device was that it provided "an escape from and an adjustment to the rule of joinder."24

The modern defendant class action is found in a variety of substantive contexts. Although commentators contradictorily conclude that the defendant class is most typically employed in civil rights cases25 and in actions against unincorporated associations, such as labor unions,26 there is general agreement that the device is most often employed with the ultimate aim of injunctive or declaratory relief with respect to a "numerous class of defendants who are engaged in similar practices."27

Having said this, it is evident, as the Trucking Employers court and others have recognized, that the court cannot practicably allow defendant class actions wherever it is merely alleged that a putative class of defendants have engaged in "similar practices." The potential threat to judicial economy and the due process rights of defendants is clear; less obvious is the danger that massive actions involving both plaintiff and defendant classes will erode an important distinction between the judicial and administrative processes.28 Little reflection is necessary to perceive the Pandora's box of adjudicative evils lurking in a rule which allows one class of litigants to sue another class. In Kline, for example, a transaction between two parties almost burgeoned into litigation between 400,000 sellers seeking $750 million in damages from 2,000 jointly and severally liable defendants.29

A rigorous application of Rule 23 may eliminate many inappropriate cases, and to some observers these protections may appear adequate.30 Whether properly or not, however, a plentitude of federal courts have placed

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23NEWBERG ON CLASS ACTIONS § 1148, at 250 (1977).
243B MOORE'S FEDERAL PRACTICE ¶23.02[1], at 23-72 (1977).
271 NEWBERG ON CLASS ACTIONS § 1148, at 251 (1977).
28This point is interestingly discussed in LaMar v. H & B Novelty & Loan Co., 489 F.2d 461, 463-64 (9th Cir. 1973).
29Kline v. Coldwell, Banker & Co., 508 F.2d 226, 228 (9th Cir. 1974).
30It should be emphasized, however, that the drafters of Rule 23 appear to have inadequately considered the problems of defendant classes. This criticism of the rule prior to the 1966 amendments is advanced in Note, Federal Class Actions: A Suggested Revision of Rule 23, 46 COLUM. L. REV. 818, 827, and is reiterated with respect to the present rule in 5 NEWBERG ON CLASS ACTIONS § 9715g, at 1420 (1977). See generally Vestal, Uniform Class Actions, 65 A.B.A.-J. 837 (1977), which provides an analysis of provisions of the Uniform Class Action Act which would modify the treatment of defendant classes.
more fundamental limitations, generally arising out of constitutional constraints, upon defendant class actions. If such extra-procedural limitations exist, it is important that they be defined, if only to avoid extracting double service from a procedural rule which was never a paragon of draftsmanship. It seems axiomatic that the more functions a procedural rule must serve, the less likely it is that any will be served well.

Jurisdiction over the person is one of the most important of the judicially-cited constraints. The consensus is that defendant class actions should be administered no differently in this regard than their plaintiff class counterparts. That is, personal jurisdiction requirements need only be observed with respect to the class representatives. But as the Trucking Employers court and others have perceived, such a rule does not fully address many of the subtle problems encountered in a defendant class action. Moreover, the issue is far from settled in light of conflicting Supreme Court precedents on whether jurisdiction must be met with respect to all members of a defendant class. The answer to this question should begin with a consideration of the policies of venue and service of process.

While personal jurisdiction is generally distinguished from the formal requirement of venue and service of process, the evolution of personal jurisdiction from a strict geographic constraint to the more vague notion of "fundamental fairness" may make reliance on such distinctions misleading. As a practical matter, the "mere prerequisites" of venue and service of process may often be dispositive of questions of fundamental fairness, and hence it may be somewhat inaccurate to speak of them as separate requirements apart from jurisdiction over the person.

THE POLICIES OF VENUE AND SERVICE OF PROCESS AS APPLIED TO DEFENDANT CLASS ACTIONS

Venue

Venue is an important element of protection for a defendant in any litigation. Venue requirements generally insure convenience of personal ap-

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WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1757, at 566 (1972); NEWBERG ON CLASS ACTIONS § 1355h, at 492 (1977).


Traditionally, notions of personal jurisdiction have been based on defendant's presence within the territorial jurisdiction of a particular court. . . . [T]he current philosophy is that a defendant must have sufficient contacts with the forum so that the maintenance of a suit against him in that locale does not offend traditional notions of "fair play and substantial justice."

pearance and serve to limit the plaintiff's choice of available forums.\textsuperscript{36} When applied in the defendant class context, however, venue statutes may achieve an anomalous result which is the opposite of the intended protection; as the limitations of a venue statute become more restrictive, it becomes easier for the plaintiff to select the representative defendant party by bringing the action within his district. The resulting opportunity for duplicitous conduct may be easy to correct where extreme. Courts may find the problem more difficult to perceive and resolve, however, when a plaintiff employs venue requirements to avoid the strongest defendant representative. Certainly nothing in the federal rules suggests that the representative defendant must be the most capable member of the defendant class;\textsuperscript{37} yet to allow a plaintiff to gain even this advantage is an obvious perversion of venue statute objectives. A similar problem would arise where venue requirements were so stringently applied as to defeat the logical class definitions of the federal rules;\textsuperscript{38} a plaintiff who sought to limit a defendant class to unmotivated or financially secure defendants could do so by his choice of courts.\textsuperscript{39}

Federal courts have been inconsistent in their application of venue statutes to defendant class actions. In \textit{Appleton Electric Co. v. Advance-United Expressways},\textsuperscript{40} counsel appointed to represent the absent members of the defendant class argued that some of the absent defendant corporations did not possess the requisite "minimal contacts" with the Northern District of Illinois.\textsuperscript{41} The court's response was that the relevant statute\textsuperscript{42} established the

\textsuperscript{36}"The principles of federal venue have been designed to insure that litigation is lodged in a convenient forum and to protect the defendant against the possibility that plaintiff will select an arbitrary place in which to bring suit." \textit{Wright \& Miller, Federal Practice \& Procedure: Civil} § 1063, at 203 (1969).

\textsuperscript{37}Rule 23 requires only that a representative party will "fairly and adequately protect the interests of the class." \textit{Fed. R. Civ. P.} 23(a)(4). Many of the problems discussed here are also raised in determining whether the plaintiff has chosen an adequate representative for the defendant class. \textit{See} the discussion at note 73, \textit{infra}.

\textsuperscript{38}\textit{See} \textit{Fed. R. Civ. P.} 23(b).

\textsuperscript{39}The ease with which this could be accomplished is evident when one considers that a great many defendant class suits involve plaintiff classes as well. In such a case, a great many jurisdictions would likely be available to the plaintiffs as forums for the litigation. The possibility that the plaintiff would choose financially secure defendants may produce an inequitable result where defendants are made jointly and severally liable. While it may be argued that this inequity is simply a function of the substantive law, it would be an unusual situation indeed where defendant class actions were legislatively anticipated. \textit{See generally Kline v. Coldwell, Banker \& Co.}, 508 F.2d 226, 235 (9th Cir. 1974).

\textsuperscript{40}494 F.2d 126 (7th Cir. 1974).

\textsuperscript{41}Id. at 139. The court's action in appointing representative counsel for absent class members is interesting. In \textit{Trucking Employers III}, non-representative parties repeatedly urged that their interests were not adequately represented before the court by the named defendants. The court held that the named defendants did not have to raise all of the procedural defenses of all absent members. 75 F.R.D. 682, 587-88 (D.D.C. 1977). A recent Supreme Court case holds that the representative party lacks standing to assert procedural defenses not relevant to his own situation. \textit{Zablocki v. Redhail}, 434 U.S. 374, 380-81 n.6 (1978). This leaves absent class members in the uncomfortable position of having to rely on later collateral attacks to assert procedural defenses.

\textsuperscript{42}49 U.S.C. § 16(4).
trial court as a proper place of venue, and in dictum it supported the conclusion reached in *Research Corp. v. Pfister Associated Growers, Inc.* that "venue need not be established as to those non-representative-party class members, since to do so would eliminate the use of the class action route in all cases where a defendant class is appropriate." More recently, this position has been endorsed in *Trucking Employers I*, which avowed that the class action device is the "outstanding exception" to the rule that an in personam judgment will not be binding unless an individual is made a party through service of process. The court held that "lack of proper venue as to such absent class members does not impair the Court's ability to entertain the action and adjudicate the rights and liabilities of those absent class members."46

While the *Appleton* and *Trucking Employers I* opinions considerably muddle what distinctions may be made between venue, service of process, and personal jurisdiction, their answer to the venue question is clear; since a non-representative party need not appear before the court, the convenience considerations embodied in venue statutes are irrelevant.

A very different position is advanced in *Sperberg v. Firestone Tire & Rubber Co.* In that case the court considered not only whether it is meaningful to apply venue statutes to absent members of a defendant class, but also whether courts are empowered to ignore those requirements if they choose. The court concluded that ignoring the venue statute would be "contrary to the mandate of Congress in Sec. 1400(b), contrary to Rule 82, Fed. R. Civ. P., and contrary to the reasoning of the Supreme Court in *Schnell . . . and Snyder . . . ."48 *Snyder v. Harris* underscored the jurisdictional limitation expressed in Rule 82, refusing to allow the aggregation of claims in a plain-

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4Id. at 501. While the court undoubtedly was aware of the exaggeration in its assertion that defendant class actions would be thwarted in "all" appropriate cases, its pronouncement should by no means be dismissed as mere hyperbole. The suit involved allegations of patent infringement, and objections to defendant class membership have always been especially strong in patent cases due to the highly restrictive patent venue statute. Concurring with this conclusion of *Research Corp.* is Dale Elecs., Inc., v. R.C.L. Elecs., Inc., 53 F.R.D. 531, 538 (D.N.H. 1971).
4Id. at 100.
4Id. at 73, 28 U.S.C. § 1400(b) is the potent venue statute: "Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

The court also drew support from Technitrol, Inc. v. Control Data Corp., 164 U.S.P.Q. 552, 552 (D. Md. 1970), where the court concluded it is "highly questionable that Rule 23 was intended to cross-out the specific venue provisions of 28 U.S.C. 1400(b). . . ." 61 F.R.D. 70, 73 (H.D. Ohio 1973). Another case, In Re Yarn Processing, 175 U.S.P.Q. 645 (S.D. Fla. 1972), labeled the question as being "far from settled." Id. at 647, n.5.
49Id. at 341. "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein." Fed. R. Civ. P. 82.
tiff class action to meet federal venue diversity requirements. The Snyder court held that only causes of action which had historically permitted the aggregation of these claims would be permitted to do so in the future.51

The response to this argument by the Trucking Employers I court was that "[s]ettled law has long been that class suits may be maintained without the personal appearance of class members."52 The court relied upon Supreme Tribe of Ben-Hur v. Cauble53 to reach this conclusion. While the Sperberg opinion may seem to be a more mechanical, less policy-oriented conclusion than the one in Trucking Employers I, there may at least be a certain wisdom in its apparent humility. An absolute requirement that venue must be shown for all members of a defendant class eliminates the danger that venue statutes may be used by a plaintiff to define the class boundaries or to select a vulnerable class representative. On the other hand, the Sperberg approach would also eliminate many legitimate class actions. The Trucking Employers I court offers the reasonable alternative of applying venue requirements only to the representative parties if the court determines that some other device will protect the rights of absent defendants. Extensive notice to such nonparty defendants and an opportunity to be heard individually may provide the needed safeguards.

Service of Process

While both venue and service of process are inextricably bound to the notions of fairness which underlie in personam jurisdiction, it does not, of course, follow that the requirements of one may be ignored if the requirements of the other are met. Thus, while the court in Junior Spice, Inc. v. Turbotville Dress, Inc.54 found valid service of process under a long-arm statute, the court emphasized that it would be an "untenable fiction" to conclude that the statute created "constructive residency" within the state for venue purposes.55

An examination of existing precedent suggests that there is somewhat more agreement that requirements for service of process, as opposed to venue limitations, need be satisfied only with respect to class representatives.56 It ap-
pears, however, that judicial justifications in this context are often no more enlightening than in the case of venue requirements. Thus, Management Television Systems, Inc. v. National Football League responded to a due process objection to absence of service by relying on precedent. The court determined that service on the representative is sufficient for suing an association via the class action device.

Consideration of the arguments with respect to service of process requires, as in the case of venue, that the specific policies at issue be considered in the defendant class context. At an elementary level, successful service of process is a means to show expeditiously that a party has adequate notice of a claim against him. At the same time, service of process represents a means of tempering a court's jurisdiction by imposing geographical limitations on the exercise of its power. Combined with venue, service of process is a method of protecting the defendant from the plaintiff's initial advantage. It may be that such limitations provide no protections which could not be supplied by judicial supervision; it is likely, however, that venue and service of process are a more economical means to that end.

The significance of judicial economy as a policy basis for service of process may pose a dilemma in the context of defendant class actions, since economy is also an important rationale for the class action device. One may reasonably consider whether there is a net gain when service of process requirements are ignored to make way for the class action. At the same time, the loss of these safeguards by a defendant class may involve risks not evident to the same extent in the more typical plaintiff class action. One must question the conclusion of the Trucking Employers I opinion that "[t]he fact that . . . the class is a defendant class does not suggest a different result," even though the court is certainly correct to state that "[a]n absent plaintiff choosing to appear personally is no more likely to be in a proper venue district than an absent defendant." While there may be no mandate for a different result, a heightened concern for the peculiar dangers encountered by a defendant class seems warranted.

While it may be argued that such dangers are wholly speculative, cases such as Dale Electronics, Inc. v. R.C.L. Electronics, Inc. at least suggest the kind of subtle abuses that may occur when the policies of venue and service of process are wholly ignored. The court in Dale certified a defendant class of only thirteen members because "[i]n the instant case, with the exception of

U.S. 356, 366-67 (1921) (plaintiff class); Appleton Elec. Co. v. Advance-United Expressways, 494 F.2d 126, 139 (7th Cir. 1974) (defendant class); Calagaz v. Calhoon, 309 F.2d 248, 259 (5th Cir. 1962) (defendant class); and Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 148 F.2d 403, 406 (4th Cir. 1945) (defendant class).  
id. at 164. The court relies on Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 148 F.2d 403 (4th Cir. 1945).  
Sprague which does business in New Hampshire, the locations of the defendants range from California . . . to Nebraska. Joinder is not only impracticable, but impossible."61 The "impossibility" of joinder here is apparently a function of venue requirements and/or an inability to satisfy service of process through a long arm statute.62 Certification in such a case is a clear subversion of the class action principle; the facts of Dale suggest a forum which is more convenient to the plaintiff than to the defendant class. One can only speculate as to how suitable R.C.L. or Sprague may have been as class representatives when compared with the other eleven defendants in the action who could not represent the class in the absence of proper jurisdiction.

**DUE PROCESS AND FUNDAMENTAL FAIRNESS**

The general questions discussed thus far have occasionally, though ambiguously, been addressed as constitutional issues by the Supreme Court. Thus, a 1938 opinion suggests that in personam jurisdiction must be established as a matter of fundamental fairness before a class action may proceed. In *Christopher v. Brusselback*,63 the Court acknowledged that "[t]he question decisive of the case is whether petitioners are bound by the Illinois adjudication, in their absence,"64 where the petitioners were class members in the earlier adjudication but were not served with process. The plaintiff sought to enforce a previous Illinois judgment against a defendant stockholder class including Ohio residents. Although the class action aspects of the suit were obvious, it is not clear whether the Court focused on those questions or on the corporate-stockholder relationship to evaluate the circumstances under which a shareholder may be bound by a judgment against the corporate entity.65 The ultimate conclusion of the Court is nevertheless clear: some "warning" must be given the shareholder before a decree results in a res judicata ef-

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61Id. at 534. The court at this point is discussing the "numerosity" requirement of Fed. R. Civ. P. 23(a)(1). The court's approach to this basic requirement of Rule 23 erroneously concludes that impossibility of joinder will satisfy the spirit of the (a)(1) subsection, even though it seems clear in the rule that difficulty of joinder must be a function of numbers, rather than geographical distribution, for a class action to be appropriate. *Compare* Coniglio v. Highwood Serv. Inc., [1973] 1 TRADE CAS. (CCH) ¶74,314 (W.D. N.Y. 1972) (deciding the issue of class certification). [1973] 2 Trade Cas. (CCH) ¶74,795 (W.D. N.Y. 1973), aff'd 495 F.2d 1286 (2d Cir. 1973), cert. denied, 419 U.S. 1022 (1974). The district court concluded that "although joinder of all such teams in a single suit may be impractical, that is not a result of numbers." [1973] 1 TRADE CAS. (CCH) ¶74,314 at 98,460.

62Nationwide service of process statutes of course present no insurmountable constitutional barriers, and seem increasingly desirable in complex litigation such as the typical defendant class action. See 4 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1063, at 204 (1969). The court in Mariash v. Morrill, 496 F.2d 1138 (2d Cir. 1974), thus concludes that "the 'minimal contacts' principle does not, in our view, seem particularly relevant in evaluating the constitutionality of in personam jurisdiction based on nationwide . . . service of process." Id. at 1143.

63902 U.S. 500 (1938).

64Id. at 501.

65Id. at 503.
To the extent that the Court considered the class action aspects of the suit, its comments are striking in light of their seeming contradiction of earlier Court opinions. Thus, the opinion acknowledged that "in a class suit 'one or more may sue or defend for the whole,'" but explicitly held that this procedure was only "to be followed in cases of the federal courts, and not to enlarge their jurisdiction.

The language of *Christopher* may be contrasted with earlier Supreme Court holdings involving both plaintiff and defendant classes. The prior opinion in *Smith v. Swormstedt* was the first determination by the Court that a defendant class certification may satisfy constitutional standards. The Court found it was "well established" that such suits may be brought, and explained that "[f]or convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court." The sole admonishment was that "care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried." Thus, the Rule 23(a)(4) "adequacy of representation" constraint of the Federal Rules of Civil Procedure apparently serves as the dominant due process safeguard in the opinion of the *Swormstedt* court.

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66Id. at 504.
67Id. at 505 (quoting superceded Fed. R. Equity 38).
68Id.
70Id. at 302.
71Id. at 303.
72Id.

Adequacy of representation has been held to be an essential element of due process in the plaintiff class context. See 7 Wright & Miller, Federal Practice & Procedure: Civil § 1765, at 618 (1972). There are obvious difficulties encountered, however, when applying this test to a defendant class representative chosen by the plaintiff. "It is a strange situation where one side picks out the generals for the enemy's army." Z. Chafee, Jr., Some Problems of Equity 237 (1950). The test for adequate representation of a defendant class has been termed "similar to that employed to determine whether a plaintiff will fairly protect the interests of the class members." 7 Wright & Miller, Federal Practice & Procedure: Civil § 1770, at 658 (1972). Other commentators have raised special considerations in the case of the defendant class, though not with agreement. One controversy centers around the relevance of the representative's "desire" or "motivation" to represent the class. It has been urged that "[t]he representative's personal motivation to be the representative of a class should not play more than a nominal role in a defendant class action. Otherwise, every possible representative would claim a lack of desire to be the named party." Note, Federal Rules of Civil Procedure 23: A Defendant Class Action with a Public Official as the Named Representative, 9 Val. L. Rev. 357, 380 (1975). The opposite conclusion is reached in Note, Class Actions in Patent Suits: An Improper Method of Litigation Patents? 1971 U. Ill. L. F. 474, where the author determines that "[d]esire to defend should be considered when the class is the defendant, since a plaintiff could easily name class representatives who would not defend vigorously." Id. at 483. The disagreement may be more semantic than real, however, and in part a function of two distinct kinds of defendant class actions. If by desire to defend one means a desire to be a defendant, then such a test would clearly be meaningless. The only meaningful concept of a "desire" to represent is that found in the plaintiff class context: whether a party has a "personal stake" in the outcome. This formulation of the test is inap-
Another case prior to the *Christopher* decision, *Hartford Life Insurance Co. v. Ibs*, reflects the Court's willingness to carry the principle of *Swormstedt* to its logical extreme. One Ibs had attempted to recover on a life insurance fund, but was precluded from proving an essential element of her claim because of previous adverse adjudication in a class action suit. Ibs was a non-participating member of the class. Without reference to jurisdictional issues, the Court pointed to the appropriateness of the class action treatment given to the earlier suit and relied upon policies of convenience and uniformity to arrive at this result. The Court emphasized that "[t]o use the Mortuary Fund in one way for claims of members residing in one State and to use it another way as to claims of members residing in a different State" would be destructive of the fund. Of course, the same policies of

propriate to some defendant class actions, as where the constitutionality of a statute is challenged by suit against representative officials. See Note, Federal Rules of Civil Procedure 23: A Defendant Class Action with a Public Official as the Named Representative, 9 VAL. L. REV. 357 (1975). In such a situation, it may not be accurate to speak of any official's "stake" in the litigation outcome. But such defendant classes should be distinguished from suits against private interests. See the discussion of Richardson v. Kelly, 144 Tex. 497, 191 S.W.2d 857 (1945), at note 111 infra. In cases such as *Kelly* it may well be appropriate to require that the "stake" be more substantial in the case of a defendant class as opposed to a plaintiff class, if one assumes that liability to a defendant class member is more onerous than a plaintiff's lost day in court.

This argument suggests a different result should possibly have been reached in the *Trucking Employers* case. Defendant and plaintiff classes are explicitly equated on this issue: "This court takes the view that fair representation will be assured if the named parties—be they plaintiffs or defendants—share the interests of all class members with respect to the substantive issues in the suit." United States v. Trucking Employers, Inc., 75 F.R.D. 682, 687 (D.D.C. 1977). Defendants pointed to two factors, however, which warranted consideration: First, the fact that the defendants were competitors may create a dangerous conflict of interest between the class and its representative. Id. at 688. This factor should call for a restrictive determination of "representativeness." See Note, Class Actions in Patent Suits: An Improper Method of Litigating Patents? 1971 U. ILL. L.F. 474, 484-85. One at least suspects that the court is being unnecessarily narrow in its determination that "it is well established that only a conflict that goes to the essential subject matter of the litigation . . . will defeat a claim of representative status," even if that is the test in plaintiff class actions. United States v. Trucking Employers, Inc., 75 F.R.D. 682, 688 (D.D.C. 1977). At the same time, the defendants urged that the representative parties could not adequately protect the interests of the entire class because they were parties to an earlier consent decree with the plaintiffs. Id. at 690. The court's conclusion that the parties' representativeness would not be hampered by the decree raises important questions. While the court argues that the earlier decree in no way constituted an admission of any illegal practices, and that litigable issues remained with respect to the representatives, it would surely seem more appropriate that new representatives be named under the circumstances. The case may create a dangerous precedent that less than adequate representative parties will be tolerated by courts where it would be jurisdictionally difficult or otherwise inconvenient to name proper representatives. Moreover, while the court cites several precedents to the effect that a class action is not mooted where the representative parties have signed a decree [id. at 690 n.4], one must question its conclusion. Important "case or controversy" questions must arise in an action involving both plaintiff and defendant classes where none of the named parties have a continuing stake in the litigation.

237 U.S. 662 (1915).


237 U.S. 662, 670-71 (1915). It should be noted that *Hartford* plaintiff Ibs was not a resident of Connecticut, where the previous class action was conducted. Additionally, the Court at no point indicates a concern with whether Ibs had any notice of the prior class action during the pendency of that action.
judicial consistency would also have been relevant in *Christopher*, and indeed in any case which satisfied the minimal requirements of Rule 23. Those who find the *Christopher* conclusion more appropriate may draw support from the fact that in *Hartford*, Ibs had received no notice from the representative parties of the previous class adjudication.

The important case of *Supreme Tribe of Ben-Hur v. Cauble*7 confirmed the language of *Swormstedt* and *Hartford*, and continues to be cited by lower courts. Unlike *Swormstedt*, *Supreme Tribe of Ben-Hur* involved only a plaintiff class, though it cited *Swormstedt* in arriving at the determination that Indiana citizens may be part of the plaintiff class without destroying diversity jurisdiction because “their rights were duly represented by those before the court.”78 The policy concerns of *Hartford* were reiterated:

[7]If the Indiana citizens are not concluded by the decree, and all others in the class are, this unfortunate situation may result in the determination of the rights of most of the class by a decree rendered upon a theory which may be repudiated in another forum as to part of the same class.

If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all the class properly represented . . . . If the decree is to be effective and conflicting judgments are to be avoided all of the class must be concluded by the decree.79

The court in *Hansberry v. Lee*80 alluded to the developing confusion by noting the general rule that a non-party cannot be bound by an adjudication includes a class action exception “to an extent not precisely defined by judicial opinion.”81 Moreover, the *Hansberry* Court acknowledged that *Christopher* represents some limitation to this exception, though it failed to define it.82 It may be that the *Christopher* opinion does not require in personam jurisdiction over the entire class. An alternative reading is that if personal jurisdiction is not obtained, absent class members must receive ade-

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7255 U.S. 356 (1921).
73Id. at 366.
74Id. at 366-7. The Court here, opposed to the *Hartford* court, does recognize a jurisdictional question. It disposed of it with the cryptic comment:

The change in Rule 38 by the omission of the qualifying clause is significant. It is true that jurisdiction, not warranted by the Constitution and laws of the United States, cannot be conferred by a rule of court, but class suits were known before the adoption of our judicial system . . . .

*Id.*. *Christopher v. Brusselback*, 302 U.S. 500 (1938), appears to answer this directly:

Equity Rule 38 . . . was adopted . . . to prescribe the procedure in equity to be followed in cases within the jurisdiction of the federal courts and not to enlarge their jurisdiction. The omission [also referred to above in *Supreme Tribe of Ben-Hur*] . . . of the phrase “. . . the decree shall be without prejudice to the rights and claims of all the absent parties” preserved unimpaired the jurisdiction in federal courts . . . to render a decree binding upon absent defendants . . . within the jurisdiction of the court.

*Id.* at 505 (emphasis added).
8211 U.S. 32 (1940).
83Id. at 41.
84Id. at 41-43.
quate notice in addition to adequate representation. The extent of notice and accompanying "opportunity to be heard" may depend on the facts of the case. It will be recalled, for example, that the Trucking Employers III court required that absent class members be notified of the pendency of the action and that they also be notified of significant developments throughout the litigation with a corresponding opportunity to appear before the court. In most instances this would seem to be the minimum required by due process. Whether fundamental fairness requires as well that separate counsel be appointed for such absent members, as in Appleton, may depend on the facts in each case. One can at least offer valid policy reasons for a different treatment of absent members of plaintiff and defendant classes. Such a distinction would explain the different results in Christopher as opposed to Hartford and Supreme Tribe of Ben-Hur, inasmuch as the latter two cases involved plaintiff classes.

Consider the positions of both a plaintiff and defendant class after a judgment adverse to the class. While one could argue that the liability imposed upon a nonparticipating defendant class member is no more unfair than the loss to a plaintiff who may never have his day in court, one may intuit that the two situations are not precisely identical. Where class action suits involve damage claims, it is likely that the liability of an individual defendant will be greater than the lost recovery of an individual plaintiff. Stated differently, plaintiff classes are generally larger than defendant classes, a fact which is neither surprising nor likely to change in light of the fact that collecting judgments from individual defendants may be a time-consuming endeavor and because of the "link" between defendants which must be shown under Rule 23 before defendants may be sued as a class. A plaintiff is not likely to be able to show such a connection among a large number of defendants even assuming he wanted to tackle the difficulties of proceeding against so large a class. And even where damages are not claimed against a defendant class, there is an obvious, though perhaps intangible, stigma which must be borne by an unsuccessful defendant that has no counterpart in the case of a plaintiff who loses his day in court. Thus, the nonparticipating defendant may be more in need of judicial protection than is the absent plaintiff class member.

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83 Even where courts have held that defendant classes may be sued without obtaining personal jurisdiction over all defendants it has been required that plaintiffs obtain a collateral judgment of enforcement by a court which does have in personam jurisdiction. Jurisdiction over the person is a necessity for exercise of the various forms of judicial coercion. See Note, Damage in Class Actions: Determination and Allocation, 10 B. C. INDUS. & COMM. L. REV. 615, 619-21 (1969).

Subsequent conclusions of courts and commentators have undermined a literal interpretation of *Christopher* which would require jurisdiction over all defendants. An example is *Turnstall v. Brotherhood of Locomotive Firemen and Enginemen*, a labor discrimination case involving a black railroad worker who attempted to sue the railroad and a labor union. A major obstacle faced by the plaintiff was obtaining jurisdiction over the union association. While service was possible on the local brotherhood, it clearly was impractical with respect to the entire association, which encompassed numerous federal jurisdictions throughout the nation. The court allowed the suit, which involved a claim for declaratory and injunctive relief and monetary damages, with the explanation that

It cannot be contended with any show of reason that Munden and the subordinate lodge, who were admittedly served, were not fairly representative of the membership of the brotherhood, or that service upon them would not give adequate notice to the class sued to come in and defend . . . .

We think that the suit here was unquestionably maintainable as a class unit and that there has been sufficient service upon representative members to give jurisdiction over the entire class constituting the brotherhood.

While the argument would not reconcile *Christopher* and a case such as *Turnstall*, it may be possible to argue that *Christopher* requires jurisdiction over all defendants where damages are sought, since it is in such cases that the absent defendant is most likely to be prejudiced vis-a-vis his plaintiff class counterpart. At least one commentator has urged that defendant class members subjected to damage claims “may be able to raise serious constitutional objections if, because of the class action device, they are forced to defend in a forum where they have no personal contacts.” Such an argument may draw support from *Research Corp. v. Pfister Associated Growers, Inc.*, where the court certified the defendant class under the (b)(3) subsection of Rule 23 with respect to the antitrust damage claim. The notable characteristics of that subsection of the rule are that notice must be given to all class members and they may “opt out” of the litigation if they choose. However, such an approach is neither typical, nor, it may be argued, practicable. Courts have certified defendant classes under the less restrictive (b)(1) and (b)(2) subsections of Rule 23 where a damage claim was contained within the remedies sought, among them the court in *Trucking Employers*.  

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148 F.2d 403 (4th Cir. 1945).  
*Id.* at 406.  
1 NEWBERG ON CLASS ACTIONS § 1148c, at 256 (1977).  
*Id.* at 502-04.  
*FED. R. Civ. P.* 23(c)(2) provides for notice of the class action: “[T]he court shall direct to the members of the class the best notice practicable . . . . The notice shall advise each member that (a) the court will exclude him from the class if he so requests by a specified date . . . .”  
See, e.g., *Research Corp. v. Pfister Associated Growers, Inc.*, 301 F. Supp. 497, 500 (N.D. Ill. 1969) (patent infringement claims); *Technograph Printed Circuits, Ltd. v. Methode
Moreover, as that court recognized, the opt-out provision of Rule 23 (b)(3) may bring an untimely end to the litigation:

Defendants, unlike plaintiffs, are ordinarily involuntary participants in a law suit. To provide them the wherewithal to frustrate a suit that is properly certifiable as a class action simply by refusing to participate in it—by opting—out would be anomalous . . . . Hence, once a court has determined that an action such as this one is fair to the defendant class, manageable, and otherwise proper under Rule 23(a), (b)(2) may be the only practical certification available. 92

Still another commentator has suggested that special considerations may apply where injunctive, rather than declaratory, relief is sought from a defendant class. 93 Professor Moore relies upon United States v. T.I.M.E.—D.C., Inc. 94 to conclude that such a situation requires that jurisdiction may be necessary with respect to all members of a defendant class. While the holding of that case seems to support his contention, 95 the real concern of that opinion may be with the appropriateness of the class action device itself, rather than the nature of the remedy sought. After determining at one point that jurisdictional requirements are especially important where injunctive relief is sought, 96 the court ultimately narrows its decision: "[I]t is true . . . that injunctive relief can be afforded against defendants who are members of a class, [but] the suit now under consideration involves not only injunctive relief but also the varying terms of some 70 different contracts with the local unions." 97 In any event, the possibly broad holding of this case does not rest on any clear policy basis, and has not been reiterated in other opinions.

The Pfister court appears to have been headed in a generally correct direction when it required certification under Rule 23(b)(3), since that course would at least insure notice to absent defendant class members. Notice, as well as being fundamental to most notions of fairness, is central to any effi-
cient administration of controversies and is one of the fundamental purposes of service of process. Again, however, the precedents are unclear. *Mullane v. Central Hanover Bank & Trust Co.* 98 is a leading Supreme Court case which ties notice to due process considerations. Though not technically a class action dispute, the case shares many elements with the typical class action to the extent it concerns itself with "the constitutional sufficiency of notice to beneficiaries on judicial settlement of accounts by the trustee of a common trust fund." 99 The Court held that in these circumstances, constructive notice by publication was inadequate. 100 In contrast to *Mullane*, class action decisions have frequently sought to avoid any rigid requirement of notice, with some going so far as to suggest that it is unnecessary in the case of absent class members. 101 This conclusion is implied in many class actions by the absence of any discussion of notice. 102 A middle position tends to require sufficient notice to insure adequate representation, though as a practical matter this may be a difficult standard to apply. *Tunstall*, for example, found that service upon a local representative would give adequate notice to the class. 103 By a similar line of reasoning, a court has held in a plaintiff class action that sufficient notice may in certain circumstances constitute a waiver of any objections to adequacy of representation by the representative party. 104

The famous plaintiff class action case, *Eisen v. Carlisle & Jacquelin*, 105 suggests that notice is crucial to due process, but avoids so holding. While the Court finds "little to commend" the prevailing argument that adequacy of representation, rather than notice, is the "touchstone of due process," 106 the holding of the case does not impose a constitutional requirement of notice,

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99Id. at 307.
100Id. at 314.
101Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, (D. Kan. 1968) explicitly stated that "the essential requisite of due process as to absent members of the class is not notice, but the adequacy of representation of their interests by named parties." *Id.* at 636. The case relied on *Hansberry v. Lee*, 311 U.S. 32 (1940), which suggested that "[T]here has been failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties..." *Id.* at 42.
102See, e.g., *Management Television Sys., Inc. v. National Football League*, 52 F.R.D. 162 (E.D. Pa. 1971), where it was held that "Where a class is adequately represented, and where there is no conflict of interest between members of a class, a judgment binding on all the members does not offend due process." *Id.* at 165. *See also* the discussions of *Swormstedt* and *Hartford Life*, *supra*.
103148 F.2d 403, 406 (4th Cir. 1945).
104In *In Re Four Seasons Sec. Laws Litigation*, 502 F.2d 834 (10th Cir. 1974), the court held that where a class member has the right to opt out, receives adequate notice, and fails to do so, "we conclude that due process may be satisfied by notice alone and that, where due process is thus satisfied, adequacy of representation need not be shown as a matter of constitutional necessity." *Id.* at 843.
106"Petitioner further contends that adequate representation, rather than notice, is the touchstone of due process in a class action and therefore satisfies Rule 23. We think this view has little to commend it." *Id.* at 176.
but instead relies upon the ground that Rule 23 was not satisfied because the Rule 23(c)(2) provision requires notice in all Rule 23(b)(3) class actions.\textsuperscript{107}

The Federal Courts of Appeals are split on whether due process requires notice in all class actions. A majority hold that it does not.\textsuperscript{108} The courts which have confronted the issue have seldom had occasion, however, to consider whether the rule should be different for plaintiff and defendant classes. Such a distinction may be appropriate; to the extent that service of process and venue requirements may defeat the utility of defendant classes and produce anomalous results, it may be that other protections, such as notice, should be required. Those courts which urge that “adequacy of representation” satisfies due process concerns may be taking a somewhat backward approach to the problem, since a principal reason for requiring an adequate representative is to insure that he will notify the class members.\textsuperscript{109} In the case of the defendant class, at least, there seems no reason to extract double service from this Rule 23(a)(4) requirement, since it is unlikely that the costs of notice will be prohibitive in light of the fact that defendant classes are generally not so large as plaintiff classes.\textsuperscript{110} Moreover, as the Trucking Employers court recognized, adequacy of representation is not a static concept which a court may easily determine. Notice to all defendants in a defendant class action and other safeguards extending so far as separate counsel may well be necessary to insure continuous adequacy of representation. It seems intuitively clear that a requirement of notice to all defendants would be less open to abuse than the looser notion of adequacy of representation.\textsuperscript{111} Moreover, it is consistent with notions of fundamental fairness, as recognized by the Eisen court, to require that the safeguard be expressed as one of

\textsuperscript{107}“Quite apart from what due process may require, the command of Rule 23 is clearly to the contrary. . . . [Rule 23(c)(2) requires that individual notice be sent to all class members. . . .” 417 U.S. 156, 177 (1974). It should be noted that (c)(2) refers only to (b)(3) actions; (d)(2), which formulates a looser, and less clear, discretionary standard, is the only other rule requirement pertaining to notice, and it applies to all categories of class actions.


\textsuperscript{109}See 7 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1770, at 659 (1972), where it is urged that “One very important factor that arises in actions involving defendant classes is whether the chosen representatives are people who will notify the class of the pendency of the action so that the collective resources of the group may be used to defend the action.”

\textsuperscript{110}It seems equitable that these costs should be borne by the plaintiff in the case of a defendant class in accordance with the general rationale outlined by the Supreme Court in Eisen v. Carlisle & Jacquelin: “Where, as here, the relationship between the parties is truly adversary, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit.” 417 U.S. 156, 178-79 (1974).

\textsuperscript{111}One suspects that a requirement of notice to all class members would have prevented the unjust result in the case of Richardson v. Kelly, 144 Tex. 497, 191 S.W.2d 8 (1945). As noted in 7 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1770 (1972), the case involved an instance where “the whole class was held bound by an action against carefully picked class representatives with a very small financial interest who made only a token defense.” Id. at 659 n.41.
notice; to suggest that a court may exert its coercive power without either warning or corresponding opportunity for objection appears alien to any concept of due process, whatever the adequacy of representation involved.

CONCLUSION

This discussion has outlined the dispute over application of personal jurisdiction requirements in defendant class actions. It has been suggested that imposing either service of process or venue requirements with respect to the entire class would debilitate the class action to no apparent purpose. The inherent anomalies of these requirements, as applied to defendant classes, have been noted; stringent limitations on jurisdiction could mean that a plaintiff could select an incompetent representative for the defendant class or re-define the class for his own purposes. Such requirements would be impractical even where they could be met, due to the difficulties and expense of serving all of the class members. The same problems would arise in a considerable number of cases if jurisdiction over all defendants were required where damages or injunctive relief are sought. To the extent that courts and commentators have only indirectly approached the notice question by requiring that such actions be brought under the (b)(3) subsection of Rule 23, their result is undesirable. The “opt-out” provision of that subsection would largely render the suit futile. At the same time, it is similarly inappropriate to approach the problem simply as one of “adequacy of representation.” A requirement of notice which may be expanded to continuous notice throughout the course of the litigation as circumstances demand would seem to be more flexible and less open to abuse. If the impetus for requiring notice is that it derives from fundamental notions of fairness, it is appropriate that the rule be expressed as a constitutional one. Thus, the conclusion reached here may encompass the remaining meaning of the seemingly-forgotten Christopher decision, which apparently required that jurisdiction be met with respect to all defendants. The Court’s pronouncement in that case was that a corporation will be allowed to enter a judgment upon its stockholders only if some “warning” is given. A “reckonable” interpretation of the case may be that for defendant class actions notice to all class members is a substitute for the protective procedural measures contained within personal jurisdiction. A narrower reading of the case and the policies with which it is concerned may defeat a time-saving device whose utility is just being realized; to abandon the cautions of Christopher altogether may unnecessarily increase the complexities and the occasional opportunism found in the already-troublesome class action conflict.

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111 The major category of defendant class actions where neither of these remedies are pursued are those cases in which declaratory relief is sought with respect to a defendant class. Most of these cases involve challenges to statutes in which public officials comprise the defendant class.
