Winter 1983

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Class Actions: Judicial Control of Defense Communication with Absent Class Members

Class action litigation under rule 23\(^1\) requires that the trial court take firm control over the adversarial process to ensure a fair and efficient result.\(^2\) At each pretrial stage, difficult class action considerations are encountered, and effective management is essential to prevent the action from being consumed in “the jaws of potential chaos in multiparty adversary litigation.”\(^3\) Rule 23(d)\(^4\) gives a court discretion to accomplish its role as manager. Given the complexity of the class action device and the potential for its abuse, appellate courts have construed rule 23(d) in a manner which gives the trial court greater discretion to regulate the conduct of litigation than it usually enjoys.\(^5\) The United States Supreme Court has explicitly stated in a unanimous opinion that federal district courts have “both the duty and broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.”\(^6\)

As one aspect of their managerial power, district courts prior to 1981 frequently entered orders or enacted local rules which regulated communication

2. 3 H. Newberg, Newberg on Class Actions § 3000 (1977); Manual for Complex Litigation § 1.10 (4th ed. 1977). [Both this edition and the fifth edition, 1982, are cited throughout this Note. Citation will be to Manual, with the specific edition noted.]
3. 3 H. Newberg, supra note 2, § 3000, see also 7A C. Wright & A. Miller, Federal Practice and Procedure § 1791 (1972).
4. Fed. R. Civ. P. 23(d) provides:
Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, 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 at any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.
of named parties and counsel with active and nonactive, absent class members. These "no-communication" orders and local rules commonly prohibited such communication unless approved by the court in advance. These district court practices were based on recommendations by the Federal Judicial Center. As outlined in the Manual for Complex Litigation, this recommendation was made because of repeated instances, reported by federal judges, of actual ex parte communications with class members that impaired, frustrated, and adversely affected the administration of justice. These reports demonstrated that the improper and unethical communications were frequently difficult, and sometimes impossible, to detect in time to prevent harm; that they had virtually unlimited variety in form and content; and that opportunities for direct, great, and often irreparable injury were better prevented than attempts made to repair the injury after it had already occurred.

In June 1981, the Supreme Court issued its decision in Gulf Oil Co. v Bernard. This decision provided the impetus for a complete policy reversal concerning judicial screening of class action communications. Although the Court specifically narrowed its ruling to proscribe only broad restraint of communications with class members absent specific findings of fact, the effect of the ruling has been much greater. The Federal Judicial Center, on the basis of Gulf, now recommends that all local no-communication rules be revoked, and that severe restrictions be imposed on the use of such orders. This
restrictions, together with constitutional questions that have been raised, have triggered a new policy of nearly unregulated communications with class members.

This Note will evaluate the new communications policy in terms of its ability to control abuses of rule 23 by class action defendants and their counsel. First, present limits on judicial control of class action communication will be discussed. This discussion will include an examination of Gulf Oil Co. v. Bernard, the latest recommendations of the Federal Judicial Center, and first amendment analysis of no-communication orders. Second, the new communications policy will be evaluated to determine whether it is entirely consistent with the underlying policies of rule 23, and whether narrow regulation is needed to cure unwanted side effects of open communication with absent class members. This evaluation will suggest that unregulated communication will not ultimately further the purpose of rule 23, and that a need exists to control defense communications in order to prevent subversion of rule 23 substantive policies. Third, means of improvement in the present policy will be suggested, and these suggestions will be tested for consistency with rule 23's underlying policies, and for validity under the first amendment. This Note concludes that the present policy of nearly unregulated communications with absent class members is inadequate to deal with defense tactics that undermine the effectiveness of the class action device, and that alternatives exist to alleviate this problem consistent with rule 23 and class action defendants' constitutional rights.

I. CURRENT LIMITATIONS ON JUDICIAL CONTROL OF COMMUNICATIONS

A. Gulf Oil Co. v. Bernard

In Gulf Oil Co. v. Bernard, the Supreme Court ruled on the authority of a district court to order judicial screening of communications between for-
mal parties, or their counsel, and absent class members. Specifically, the Court questioned whether the no-communication order entered by the district court was an "appropriate" use of rule 23(d) discretion. The Court held that the order was not "appropriate," and therefore an abuse of discretion, because the order did not further the underlying policies of rule 23. In a unanimous opinion, the Court recognized that the broad order in question was in conflict with the rule 23 objective of "vindicat[ing] the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost." Since the order prevented named plaintiffs from contacting absent class members, named plaintiffs were hampered in informing absent class members of the existence of the suit, and in obtaining information about the merits of the case from persons they sought to represent. The concern of the Court was that absent a specific finding of need for the order, the order would create undue difficulties for named plaintiffs seeking redress via the class action.

In vacating the order in Gulf, the Court placed substantive limits on the future use of no-communication orders. According to Gulf, whether an order is "appropriate" under rule 23(d) is determined by a three-step analysis. First, the order must be examined for its consistency with rule 23 policy. Second, if the order is in any way inconsistent with rule 23, the order must be narrowly drawn to ensure that on balance the policies of rule 23 are being furthered. This requires a court to support its order with a clear record and specific findings. To justify a no-communication order, the need to prevent abuses must be outweighed by any conflicts which the order may have with policies embodies in rule 23. Finally, the record must demonstrate actual or threatened abuse of the class action through improper communications.

As a practical matter, the Gulf decision is incomplete and imprecise guidance [hereinafter cited as Bernard II]. The Supreme Court granted certiorari to consider the question whether the order limiting communications was constitutionally permissible, Gulf Oil Co. v. Bernard, 449 U.S. 1033 (1980). However, the first amendment issue was never reached as the Court decided Gulf on available non-constitutional, rule 23 grounds. Gulf, 452 U.S. at 99.

18. Id.
19. Id. The order in question in Gulf was taken nearly verbatim from the Manual's suggested pretrial order found at § 1.41 (4th ed. 1977). Id. at 94 n.5.
20. See id. at 99-103.
22. Id. at 101.
23. Id.
25. Gulf, 452 U.S. at 101-03. See Williams, 658 F.2d at 435.
26. See Gulf, 452 U.S. at 101-02; Williams, 658 F.2d at 435.
28. Id. at 101-02.
29. Id. at 102-04; Williams, 658 F.2d at 435.
for a trial court contemplating the use of no-communication orders and should
discourage district courts from using such devices.\textsuperscript{30} The holding is incomplete
in the sense that it never indicates what standards should be followed for
the entry of a valid no-communication order. While the Court offered a three-
part analysis to test the validity of an order under rule 23(d), the Court also
noted that such an order is confined by first amendment considerations. The
Court, however, failed to provide any substantive guidelines on this issue.
Furthermore, Gulf is imprecise because rule 23’s three-part analysis was not
thoroughly applied due to the exceptional facts of the case. Since the district
court entered the broad order with no specific findings of need, the balancing
test adopted by the Supreme Court in Gulf resolved the case easily without
discussing or weighing all possible relevant factors. The Gulf opinion is not
as helpful to a trial court considering a no-communication order in a closer
case with a more fully developed record. A trial court, therefore, may be
hesitant to enter a no-communication order given the uncertainties left in Gulf.

\textbf{B. Manual for Complex Litigation}

Prior to its 1982 edition, the \textit{Manual for Complex Litigation} recommended
the use of local no-communication rules and pretrial orders in federal district
courts and these recommendations were widely followed.\textsuperscript{31} On the basis of
Gulf, however, the \textit{Manual} has significantly modified its section 1.41
recommendations.\textsuperscript{32} While Gulf merely implemented standards for refined use
of no-communication orders, the latest \textit{Manual} edition interprets Gulf to im-
pose severe restrictions on the use of such orders.

Judicial screening of communications is greatly restricted in the new recom-
mendations. The \textit{Manual} suggests that Gulf be read liberally and that eight
rules should be followed before entry of a no-communication order.\textsuperscript{33} Five
of these rules incorporate the three-part test in Gulf by quoting specific passages
from Gulf and Williams \textit{v. United States District Court.}\textsuperscript{34} The other three
rules state:

2. No order forbidding communications by formal parties or their counsel
with potential and actual class members should be entered without writ-

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\textsuperscript{30} Since Gulf and Bernard II, the cases indicate that trial courts are vacating, rather
than revising, previously entered no-communication orders. \textit{See}, e.g., Zinser \textit{v. Continental Grain
Co.}, 660 F.2d 754 (10th Cir. 1981); \textit{Williams}, 658 F.2d at 430; Marmol \textit{v. Adkins}, 655 F.2d
594 (5th Cir. 1981); Impervious Paint Indus. \textit{v. Ashland Oil}, 508 F. Supp. 720 (W.D. Ky. 1981);
Cada \textit{v. Costa Line, Inc.}, 93 F.R.D. 95, 98 (N.D. Ill. 1981); Kilgo \textit{v. Bowman Transp., Inc.},
Dental Ass’n}, 95 F.R.D. 372 (N.D. Ill. 1982).

\textsuperscript{31} \textit{See supra} notes 7-10 and accompanying text. \textit{But see} Coles \textit{v. Marsh}, 560 F.2d 186 (3d
Cir.), \textit{cert. denied}, 434 U.S. 985 (1977); Rodgers \textit{v. United States Steel Corp.}, 508 F.2d 152

\textsuperscript{32} \textit{Manual} § 1.41 (5th ed. 1982).

\textsuperscript{33} \textit{Id.}

\textsuperscript{34} \textit{Id.}
ten notice and opportunity for an evidentiary hearing, whether proposed on motion of a party or on initiative of the court . . .

7. The district court should examine the reported decisions of the circuit court of appeals of the circuit in which the district court is located . . . to determine if there are further limitations on issuance of any such order.

8. If the district court enters a valid order controlling specified abusive communications, provision should be made for swift and liberal exceptions to the order.35

These recommendations may have a significant impact on the use of no-communication orders. The Manual is very influential,36 and at minimum its suggestions may inhibit federal judges from entering such an order for fear of reversal.

C. First Amendment Limits on No-Communication Orders

The first amendment is the greatest barrier to viability of no-communication orders as a class action management tool. Although the holding in Gulf and the new Manual position allow limited use of no-communication orders, courts and commentators applying a constitutional analysis question whether any remnant of the past practice can continue. Although the Supreme Court declined to resolve this issue in Gulf,37 lower courts and commentators have sharply criticized the orders as being unconstitutional "gag" orders,38 and have suggested that the order, as used in the past, is now proper in only the most extreme case.39

Whether a no-communication order is constitutionally infirm has turned on its characterization as a prior restraint on speech. Analysis of judicial decisions indicates that courts have taken conflicting positions on this matter. A prior restraint has been defined as a "predetermined judicial prohibition

35. Id.
36. The Manual is highly respected among judges and lawyers and is the most widely used source of class action management guidance. 3 H. Newberg, supra note 2, at § 3025.
37. Gulf, 452 U.S. at 101-02 n.15, 103-04. While avoiding the constitutional issue, the Court in Gulf also recognized in dicta that the entry of a no-communication order is also confined by the first amendment. The Court did not suggest what substantive limits the first amendment imposes on the use of such orders; however, the Court noted that "the order involved serious restraints on expression . . . [and] at minimum, counsels caution on the part of a district court in drafting such an order, and attention to whether the restraint is justified by a likelihood of serious abuses." Gulf, 452 U.S. at 104. The Court may have needlessly avoided the first amendment issue. See 49 Geo. Wash. L. Rev. 339, 361 n.166 (1981).
39. See supra note 38.
restraining specified expression' which is accorded a "heavy presumption against its constitutional validity." In *Waldo v. Lakeshore Estates*, the district court did not find a no-communication ban taken verbatim from the *Manual* to be a prior restraint. The court noted that one aspect of a prior restraint is that violation entails immediate and irreversible punishment, and that a violator cannot challenge the constitutionality of the ban as a defense to contempt. The court distinguished the ban at issue by entertaining a constitutional defense to the contempt charge. This protection, in addition to the ban's exemption for communication made pursuant to an asserted constitutional right, supported the court's finding that the local "gag" rule was not a prior restraint. Thus, the heavy presumption against constitutionality was not applied in *Waldo*, and the court justified the ban by asserting a compelling governmental interest in the prevention of potential abuse of rule 23, and on a specific finding that the ban was the least restrictive means of achieving that end.

It would appear that the more cognizable position, however, is that no-communication orders are a prior restraint on speech. In *Bernard II*, the Fifth Circuit gave exhaustive treatment to the first amendment issue. The court first identified the four characteristics of a prior restraint:

43. *Id.* at 789.
44. *Id.*
45. The *Waldo* court permitted a constitutional defense to the contempt charge by relying on the reasoning in *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976). *See also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *Near v. Minnesota*, 283 U.S. 697 (1931); *Bernard II*, 619 F.2d at 467. In both *Waldo* and *Chicago Council of Lawyers* the prior restraint status of a local rule was at issue. The court in *Chicago Council of Lawyers* did not find the local court rules to be a prior restraint because the enactment of the rules was an act of the court in its "legislative" role, 522 F.2d at 248. Thus, the unconstitutionality of the order could be used as a defense to contempt, just as anyone charged with violation of a statute could raise such a defense. Although *Waldo* and *Chicago Council of Lawyers* were concerned with the validity of local court rules, the analysis is also applicable to no-communication orders. The *Manual's* suggested local rule is nearly identical to the suggested pretrial order, *Manual* § 1.41-II (4th ed. 1977); moreover, since the orders were entered promptly without hearing in potential and actual class actions, the orders are in a sense an act of the court in its legislative role. See *e.g.*, cases cited within the commentary in *note 7 supra*.
46. Nor does the rule forbid communications protected by constitutional right. However, in the latter instance the person making the communication shall within five days after such communication file with the court a copy of such communication, in writing, or an accurate and substantially complete summary of the communication if oral.
49. 619 F.2d at 466-78.
1. Origin. A prior restraint is generally judicial rather than legislative in origin. The essence of prior restraint is that it places specific communications under the personal censorship of the judge.

2. Purpose. The sole purpose of a prior restraint is suppression rather than punishment.

3. Means of enforcement. Punishment by contempt is an important attribute of a "prior restraint" that distinguishes it from a criminal statute that forbids a certain type of expression. [citation omitted] The penalty is thus both more swiftly imposed and less subject to the mitigating safeguards of the criminal justice system than is the punishment for violation of a statute.

4. Means of constitutional challenge. While the unconstitutionality of a statute may be raised as a defense to prosecution for its violation, a litigant who disobeys an injunction is precluded from raising its constitutional invalidity as a defense in contempt proceedings.

After finding the order in question to meet these four characteristics, the court applied the "presumption" against prior restraints. "It [the order] must fit within one of the narrowly defined exceptions to the prohibition against prior restraints. It must prevent direct, immediate and irreparable damage, and it must be the least restrictive means of doing so. Finally, it must comport with required procedural safeguards." The court found that the no-communication order at issue failed to fulfill these requirements and concluded that the order was an unconstitutional prior restraint on speech.

Several factors suggest that the Fifth Circuit's position is superior. First, the case relied upon by the Waldo court, Chicago Council of Lawyers v. Bauer, did not apply prior restraint analysis to judicial "gag" rules, but rather was primarily concerned with orders or rules restraining speech in the context of a criminal trial. Chicago Council of Lawyers recognized a difference in treatment between orders entered in a criminal trial and those entered in a civil action. In criminal trials, the accused enjoys extraordinary safeguards to a fair trial under the sixth amendment that are not provided to civil litigants, and accordingly a trial court in a criminal case has a more compelling interest than would be present in a civil case to justify a restraint on speech. The law relied upon by Waldo, therefore, should not be extended unthinkingly to orders restraining class action parties and counsel. In addition, permitting a violator to contest the constitutionality of the order as a defense to...
contempt does not lessen the order's chilling effect. Although the Bernard II court did not address the approach taken in Waldo, the court explained that "the defense is so freighted with preconditions and uncertainties that it [the exemption for constitutional speech] is little comfort to attorney or party." Even the Supreme Court in Gulf agreed in dicta that the exemption does "little to narrow the scope of the limitation on speech imposed by the court." The exemption has also been criticized as being in violation of the Hickman v. Taylor work product rule, and as being impermissible, even if compliance was feasible, because the speaker still has the burden of justifying his speech.

Whatever vitality no-communication orders retained after Gulf and the recent Manual recommendation is diminished when the order is subjected to a first amendment analysis. Since a broad order is a prior restraint implicating protected speech, a moving party can only overcome the great presumption of unconstitutionality by showing that direct, immediate and irreparable harm would occur. Hence, the entry of a no-communication order is made extremely difficult.

II. UNREGULATED COMMUNICATIONS AND RULE 23 SUBSTANTIVE POLICY

The policy of restricting judicial power to regulate communications presumably has evolved because it is more consistent with the purpose of rule 23. Gains made by recent developments, however, may be diminished because an open communications policy encourages the use of questionable defense tactics that are inconsistent with rule 23.

58. Bernard II, 619 F.2d at 467-68.
59. Id. at 470. The Fifth Circuit as well as other courts and commentators have urged that the constitutional right exemption in the order is illusory. See Gulf, 452 U.S. at 103 n.17; Zarate, 86 F.R.D. at 103-04; L. Tribe, AMERICAN CONSTITUTIONAL LAW 726 n.2 (1978); Seymour, supra note 39, at 942; Comment, supra note 8, 1980 DUyrE L.J. at 372; Comment, supra note 7, 55 N.Y.U. L. REV. at 679-83; 49 GEO. WASH. L. REV., supra note 7, at 358, 362; Recent Developments, 88 HARV. L. REV. 1911, 1921 n.74 (1975).
60. Gulf, 452 U.S. at 103 n.17.
62. Bernard II, 619 F.2d at 471; Seymour, supra note 38, at 942.
63. Comment, supra note 7, 55 N.Y.U. L. Rev. at 677-83.
64. See infra note 65.
65. The primary problem with no-communication orders as they were previously used was that the orders frustrated plaintiffs in realizing the benefits of rule 23. See supra text accompanying notes 21-23. The Supreme Court noted that a broad no-communication order unconstitutionally restricts plaintiff's speech rights in regard to "collective efforts to gain economic benefits accorded a specific group of persons under federal law." Gulf, 452 U.S. at 98 n.9. See United Transp. Union v. Michigan Bar, 401 U.S. 576 (1971); United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217 (1967); NAACP v. Button, 371 U.S. 415 (1963). While limits on judicial screening of communication enable plaintiffs to more readily achieve the intended use of rule 23, the opposite side of the coin is that defendants consequently have more freedom to engage in communications with absent class members. See Kleiner v. First Nat'l Bank of Atlanta, No. C80-921 and No. C81-1553, slip. op. (N.D. Ga. August 24, 1983); Winfield v. St. Joe Paper Co., MCA 76-28 (N.D. Fla. Order of Dec. 22, 1981) (based on the court's interpretation of Gulf, defendants were not ordered to refrain from communicating with absent class members until after defen-
A. Defense Tactics Under an Open Communications Approach

Class action defendants have a great incentive to avoid or minimize class recovery through any possible means. Exposure to class liability can be tremendous, especially in antitrust suits where damages are trebled. Even in civil rights class suits where damages may or may not be sought, defendants may still be assessed with plaintiffs' attorney fees as well as their own costs in litigating the protracted suit. Defendants, therefore, have vigorously opposed class actions, and this tension between parties to the action has led one federal judge to observe that "it appears that unremitting social and economic warfare is being waged in the class action field."

Class action defendants have employed various controversial means involving communication with absent class members to reduce potential liability through prevention of class certification under rule 23(c)(1). One tactic has been the solicitation of affidavits of non-interest from absent class members. Defendants have used such affidavits to contest the numerosity and representation issues at the certification hearing. Courts are split on whether this

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67. See 89 Harv. L. Rev., supra note 7, at 1325 & n.31.
69. Ethical considerations prevent defense counsel from making contacts with absent class members. See Gulf, 452 U.S. at 104 n.21. Model Code of Professional Responsibility DR 7-104 provides:

(A) During the course of his representation of client a lawyer may not:

(1) Communicate or cause another to communicate on the subject of representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

As DR 7-104 has been applied in class suits, this duty does not attach until the class has been certified under rule 23(b)(3) and the opt-out period has expired, or in the case of other rule 23 actions at the time of class certification. 2 H. Newberg, supra note 2, at § 2730d; see also Resnick v. American Dental Ass'n., 95 F.R.D. 372, 376-77 (N.D. Ill. 1982); Winfield v. St. Joe Paper Co., MCA 76-28 (N.D. Fla. Order of Dec. 22, 1981). This view holds that an otherwise unrepresented absent class member is not represented by class counsel until after the member's inclusion as an "official" class member at the time of certification. However, at least one court has recognized the constructive attorney-client relationship that exists from the time of filing between class counsel and absent class members. Impervious Paint Indus. v. Ashland Oil, 508 F. Supp. 720, 723 (W.D. Ky. 1981). In any event, defendants are not bound by DR 7-104 and may communicate with absent class members in the ordinary course of business. 2 H. Newberg, supra note 2, at §§ 2720d, 2730d.

70. Rule 23(c)(1) states: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."

Fed. R. Civ. P. 23(c)(1).
71. See infra note 75.
72. Rule 23 provides:

(a) Prerequisites to a Class Action. One or more members of a class may sue or
tactic can defeat certification; a majority of courts have recognized that such affidavits have probative value in regard to certification issues. The view of the minority, however, is nonetheless persuasive. The minority position questions whether such affidavits are the result of a rational class member acting in self-interest, or rather the result of overreaching defendants soliciting unsophisticated litigants with the aim of stifling the action. Moreover, courts aligning themselves with the minority view recognize that absent class members are often subject to economic leverage applied by the class action defendant, and are therefore skeptical of “irrational” affidavits that are seemingly against the absent member’s interest. Yet, as long as the unregulated communications policy continues, and courts are amenable to the use of affidavits to defeat a class, defendants will undoubtably pursue this tactic.

Rule 23(b)(3) damage actions afford absent members a choice whether to be included in the suit; accordingly, defendants have solicited absent class members to opt-out according to rule 23(c)(2) procedure. This tactic is designed to reduce the size of the class and hence reduce potential liability. If enough members opt-out, the class can be stifled completely for lack of

be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, . . . (4) the representative parties will fairly and adequately protect the interests of the class.


74. See Grogan, 70 F.R.D. at 582; Moss, 50 F.R.D. at 125-26; see also 89 Harv. L. Rev., supra note 7, at 1599-1600. In Northern Acceptance Trust, the “[d]efendant used informal and apparently clandestine efforts to secure affidavits from members of the class plaintiff purported to represent, denying that plaintiff represented the affiants. The court found that the affidavits did not contain anything of persuasive evidentiary value.” 2 H. Newberg, supra note 2, at § 2720d n.88a. “There is respectable authority for plaintiffs’ contention that defendants violated both the spirit and letter of Rule 23.” Northern Acceptance Trust, 51 F.R.D. at 491.

75. Class actions often pit employees against employers, franchisees against franchisors, or others in ongoing business relationships. Even when plaintiff class members are not unsophisticated litigants, “the class opponent is likely to have greater financial resources than the class attorney, and will engage in repeated communications with class members, thereby intimidating class members or undermining their confidence in the class attorney’s representation.” 89 Harv. L. Rev., supra note 7, at 1600.

76. See Moss, 50 F.R.D. at 125-26; see also 2 H. Newberg, supra note 2, at § 2720d; Homberger, State Class Actions and the Federal Rule, 71 Colum. L. Rev. 609, 637 (1971).

numerosity. This mode of defense is also suspect, and tantamount to adjudication by coercion in many cases. Ordinarily, an absent member will sit back in the windfall position of being able to collect on a claim that would have never been brought because the potential recovery would be less than the expense to litigate the claim. Thus, a rational absent class member will simply not opt-out. Absent class members, however, are fair game for an opt-out campaign for the same reason they are vulnerable to affidavit solicitation: absent members are in general legally unsophisticated and often under the defendant’s economic influence. The impact of a successful opt-out campaign is that viable claims are extinguished, regardless of their merit, since members cannot afford to litigate their claims individually. While such a solicitation tactic is controversial, an unregulated communications policy leaves defendants free to pursue this option.

Defendants have also pursued the tactic of individual settlements with absent class members to prevent certification and to reduce potential liability. Prior to the class determination or a motion to dismiss the class allegation, settlements may be regulated by an “appropriate” rule 23(d) order. In instances where the district court fails to enter such an order, however, defendants have significant freedom. After certification or at the time of a motion to deny the class, the court’s power to approve a settlement emanates from rule 23(e). Courts have construed rule 23(e) to prohibit only the settlement of the entire action without court approval, and therefore have permitted defendants to seek individual settlements. It is unclear whether court approval of individual settlements is required under rule 23(e) in instances where so many absent members settle that the class action can no longer proceed for lack of numerosity. Some courts have indicated that defendants may diminish and consequently decertify a class through settlements as long as the rights

78. Class certification does not guarantee that the suit will be tried as a class action. If enough opt-outs are secured, defendants may move to decertify the class. “[A]n order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.” Fed. R. Civ. P. 23(c)(1).

79. See Homburger, supra note 76, at 637. Experience has shown that only about one percent of absent class members who receive rule 23(c)(2) notice actually opt-out. Pomerantz, New Developments in Class Actions—Has Their Death Knell Been Sounded?, 25 Bus. Law. 1259, 1266 (1970). See, e.g., In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1138 (7th Cir. 1979) [hereinafter cited as In re GM Corp.] (99.97% of potential class of 3500 did not opt-out).

80. See 89 Harv. L. Rev., supra note 7, at 1546 & n.56.

81. “Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.” Fed. R. Civ. P. 23(e). See generally 89 Harv. L. Rev., supra note 7, at 1546-52.


83. In re GM Corp., 594 F.2d at 1138 n.58.
of remaining unsettled class members are not affected. According to the court in Vernon J. Rockler & Co. v. Minneapolis Shareholders Co., "an improper effect only occurs when the settlements impinge on the substance of plaintiffs' complaints." Thus, only if dismissal of the class would leave the unsettled class members with meritless individual claims would dismissal of the class be improper under rule 23(e). This view, however, mistakenly assumes that individual members in every class action can afford to refile and assert their claims, and hence defendants will have an incentive to satisfy these remaining claims if the class does not proceed.

Other courts have advanced a more realistic position, recognizing the tremendous opportunity for defendants to use the individual settlement technique to circumvent class liability. Accordingly, one court has refused to dismiss a class under rule 23(e) due to lack of numerosity caused by individual settlements on the basis that such an order would effectively preclude remaining unsettled members from a hearing on the merits or claim satisfaction. The court emphasized the factors of unsophisticated litigants, inability to maintain individual claims, and economic relationships. If the reasoning of the Rockler court is applied, defendants could easily short-circuit class actions. Defendants could stifle the class by offering premium settlements "to selected members of the class, including named plaintiffs, whose resources or claims are necessary . . ." to sustain numerosity or litigation expenses. The danger also exists that defendants could mislead class members about the strength of their claims by offering nominal consideration in exchange for releases which "may amount to little more than a request that class members opt-out of the class." Unfortunately, the issue whether rule 23(e) permits stifling of class actions through individual settlements has not been definitively resolved. Due to courts' reluctance to screen communications under rule 23(d), defendants will likely employ individual settlements to effectively minimize the potential for class liability.

B. Conflict with Rule 23 Policies

The defense tactics discussed above contravene the underlying policies of rule 23 in three important ways. First, these tactics are inconsistent with the class action policy of providing a forum for redress of valid claims that otherwise could not be brought. The class action is an invention of equity that

84. Weight Watchers, Inc., 455 F.2d at 774-75; Rodgers, 70 F.R.D. at 642-43; Vernon J. Rockler & Co., 425 F. Supp. at 150.
87. 89 HARV. L. REV., supra note 7, at 1547.
88. In re GM Corp., 594 F.2d at 1140 n.60.
attempts to further the general notion of complete justice by providing a mechanism for easy joinder of small claimants to assert a collective interest in remedy of a common wrong. In the many cases where individual claims are non-maintainable, defense tactics that stifle the class have the effect of subverting this mechanism by denying small claimants their day in court.

Second, these defense tactics are inconsistent with the rule 23 policy of judicial economy. As the Supreme Court stated in Gulf, "Rule 23 expresses 'a policy in favor of having litigation in which common interests, or common questions of law or fact prevail, disposed of where feasible in a single lawsuit.'" Tactics that attempt to persuade non-participation in the class are in conflict with this policy. Courts are burdened by duplicative suits whenever class members can afford to bring a separate suit, and, in any case, these tactics deprive the court of the ability to end the matter through res judicata. The present communications policy that encourages such defense behavior often serves little purpose other than defendant’s pecuniary gain.

Finally, these tactics undermine the purpose and function of the class notice which issues from the court under rule 23(c)(3). When rule 23(b)(3) provides for exclusion from the class in damage actions,

[j]t is essential that the class members' decision to participate or to withdraw be made on the basis of [an] independent analysis of its [the class member's] own self-interest. . . . The mechanism selected for accomplishing this is the class notice, which is designed to present the relevant facts in an unbiased format.

Permitting defendants, whose interests are at odds with class members, to communicate with the class concerning their participation in the suit is inimical to the purpose of the notice. Recent cases suggest that given the opportunity, defendants can, without threat of significant sanction, intentionally sabotage the class notice policy.

90. Id.
91. See Hohmann v. Packard Instrument Co., 399 F.2d 711, 715 (7th Cir. 1968).
94. Impervious Paint Indus., 508 F. Supp. at 723.
95. In Ehrhardt v. Prudential Group, Inc., 629 F.2d 843 (2d Cir. 1980), a rule 23(b)(3) action where the lower court did not implement a no-communication order, the defendant sent class members "letters commenting on the litigation, warning them that a successful defense might make them liable for costs, and urging them to disassociate themselves from the lawsuit." Id. at 845. This information concerning liability for costs had been specifically excluded from the class notice prepared during the certification hearing because there was no legal precedent supporting the idea that class members would be liable for costs. Id. The lower court's invocation of the sanction of contempt was overturned because no specific order of the court had been violated. Id. at 846. The circuit did note, however, that the remedial measure imposed, assessing the cost of a corrective notice on the defendant and extending the time limit for class
These inconsistencies indicate that the present communications policy is ultimately inadequate to further the purpose of rule 23. Although tactics encouraged by an unregulated communications policy invite the use of fraud and coercion, instances of misconduct may not in themselves justify a need for judicial control over defense communications. However, these tactics, even when used in good faith, are inconsistent with the underlying aims of rule 23. Narrow regulation of defense communication with absent class members, therefore, may be preferable to the present policy which tolerates the risk of abuses in exchange for little substantive benefit.

III. "APPROPRIATE" CONTROLS ON DEFENSE COMMUNICATION

The foregoing analysis indicates a need for preventive regulation of defense communications with absent class members. One means to control abusive communications would be to implement a local district court rule. Such a rule would in all potential and actual class actions prohibit defendants and their counsel from communicating with absent class members concerning the suit without leave of the court. Alternatively, a no-communication pretrial order limiting only defense communications could be promptly entered without hearing in all potential or actual class actions on motion of the court or a party. This ensuing discussion will analyze the feasibility of these proposals.

A. Consistency with Rule 23 Policy

A local district court rule which subjects defense communication to judicial screening would be entirely consistent with rule 23, and therefore would be a valid exercise of rule-making power. The statutory sources of a court's rule-making power are rule 83 and 28 U.S.C. § 2071 (Rules Enabling Act).
Courts have interpreted these statutes to uphold local court rules which are consistent with the Federal Rules of Civil Procedure and do not modify "substantive" rights.\(^8\)

Whether restrictions on communications with absent class members would be in any way inconsistent with rule 23 or constitute a modification of a party's substantive rights is unlikely; yet possible inconsistencies have been raised. Commentators have suggested that an order restricting defense communication prevents absent class members from receiving needed information for an objective, independent decision whether to support or participate in a class action.\(^9\) This concern, however, ignores the class notice as the proper mechanism for providing class members with relevant information.\(^{10}\) The class notice insures that the views of both sides are expressed, and that only relevant, unbiased information is released to the class.\(^{11}\) "Gag" orders or rules restricting defendants also have been criticized because such orders inhibit defendants' ability to gather information from class members necessary to contest class certification and the merits of the suit.\(^{12}\) Yet, there are many viable alternatives to gather needed information, and "[i]t is difficult to believe that adequate information . . . cannot be obtained from such available sources . . . ."\(^{13}\) Moreover, rule 23 does not contemplate absent class members to be "parties" who can be subject to information requests without leave of the court.\(^{14}\) Permitting information requests from absent class members "so shifts the burdens in the action that the passive role of the class member is destroyed and the class action's potential as a semi-public enforcement mechanism is critically reduced."\(^{15}\) Thus, judicial screening of communications in the manner proposed is overall more consistent with rule 23 aims, and constitutes a valid use of rule-making power under rule 83 and section 2071.

Likewise, pretrial no-communication orders would be a feasible means of regulating class action defendants' conduct.\(^{16}\) Although *Gulf* and other cases
RULE 23(d) "GAG" ORDERS

state that an order must be based on a hearing and specific findings of fact concerning threatened or actual abuses, this requirement should not apply to an order which screens only defense communication. The requirements of a hearing and specific findings of fact emanate from cases in which courts were faced with conflicting policy considerations: plaintiff's uninhibited use of the class action device versus the potential of abuse from unauthorized communications with absent class members. A pretrial order which restrains only defense communication does not involve assessment of conflicting policy considerations. As the analysis herein shows, such an order would be completely consistent with rule 23. Hence, the entry of a limited no-communication order would be an "appropriate" use of rule 23(d) trial court discretion.

B. First Amendment Requirements

Judicial screening of defense communication is not only permissible under rule 23, but is also not violative of defendants' constitutional rights. Regulation of communication with absent class members proposed herein is distinguishable from no-communication orders frequently entered prior to the Fifth Circuit decision in Bernard. The holding in Bernard, that a no-communication order is an unconstitutional prior restraint on speech, was based on the order's harmful effect on plaintiff's protected speech interests. The Bernard court, however, did not reach the question of first amendment implications of a "gag" order on defendant's speech interests. Analysis indicates that such orders are not in conflict with first amendment considerations.


107. See supra text accompanying notes 24-29. See also Bernard II, 619 F.2d at 478-81 (Tjoflat, J., concurring); Coles, 560 F.2d at 189; Zarate, 86 F.R.D. at 93.

108. See supra text accompanyng notes 21-23. See also Bernard II, 619 F.2d at 480; Coles, 560 F.2d at 189; Zarate, 86 F.R.D. at 91-92.

109. See supra text accompanying notes 89-95, 99-105.

110. The ultimate question in Gulf "is whether the limiting order . . . is consistent with the general policies embodied in Rule 23, which governs class actions in federal court." Gulf, 452 U.S. at 99. If an order is entirely consistent with rule 23, the need for balancing and specific findings of fact seem to disappear. This conclusion is supported by the concurring opinion in Bernard II, 619 F.2d at 478-81 (Tjoflat, J., concurring). "The general principle restated by the Sargeant court [that issuance of an order without adequate statement of the reasons therefor does not meet minimum standards of procedural fairness] applies to any court order that is based on the court's assessment of conflicting evidence or policy considerations." Id. at 480. The concurring opinion went on to note that "[o]f course, there are some communications that a court may restrict, in the interests of the administration of justice, without making findings or even considering the facts of the case." Id. at 481 n.2.

111. Bernard II, 619 F.2d at 477.

112. See supra note 65.

113. But see Resnick, 95 F.R.D. 372, 376 (N.D. Ill. 1982) (conclusion reached without analysis that Gulf "made it plain that the First Amendment does not shelter contacts by an adversary's lawyer").
Unlike plaintiff communication with absent class members, defense communication does not involve political or ideological expression. Rather, the sole purpose of such communication is to minimize or avoid liability. In first amendment terms, defense communication with absent class members would be characterized as "commercial speech," defined as "expression related solely to the economic interests of the speaker and its audience." The Supreme Court has perceived that "the failure to distinguish between commercial and non-commercial speech could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech." Although Justice Stevens' concurring opinion in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* argued that speech can never be strictly labeled as either commercial or non-commercial for purposes of first amendment protection, the majority held that first amendment commercial speech analysis will apply even though a plausible political implication exists in speech that is primarily related to the speaker's economic interest. The instant proposals, therefore, should be analyzed as regulation of commercial speech.

The proposals regulate speech in two ways. First, the screening process of the court would presumably filter out and ban all untruthful and misleading communications. Second, truthful speech would be regulated in the sense that its dissemination would be delayed by the screening process. This type of regulation does not foreclose speech, but rather subjects the communication to limits on the time of dissemination.

Although only implicating commercial speech, the instant proposals are still a prior restraint on speech. The mode of suppression is the same as confronted by the *Bernard II* court, but unlike the situation in *Bernard II*, only defendants and their counsel are restrained. The issue thus presented is whether the heavy presumption of unconstitutionality of prior restraints is applicable in both commercial and noncommercial speech contexts. In *Bernard II*, the court found that a prior restraint on noncommercial speech could only be justified by a showing of direct, immediate and irreparable harm. There is some question, however, that this high standard also applies to a prior restraint affecting only commercial speech.

Commercial speech is accorded a lesser degree of first amendment protection than noncommercial speech. The Supreme Court has only recently acknowledged that commercial speech is even worthy of protection;

117. *Id.* at 579-83 (Stevens, J., concurring).
118. *Id.* at 562 n.5.
119. *Bernard II*, 619 F.2d at 473.
121. *Ohralik*, 436 U.S. at 455; *Virginia Pharmacy Bd.*, 425 U.S. at 758-60.
moreover, the protection afforded is limited to speech that is neither misleading nor related to unlawful activity. The value of commercial speech, and thus the reason for its protection, is in its informational value to the listener. However, two features of commercial speech preclude full constitutional protection. First, information in commercial speech is within the special knowledge of the speaker, and thus the objective truth of the message is more readily verified by the speaker rather than the audience. Second, since commercial speech is motivated by economic interest, "there is little likelihood of its being chilled by proper regulation and forborne entirely." Therefore, a lesser degree of constitutional protection is "necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.

Although the first amendment provides protection for truthful commercial speech, the Supreme Court has clearly stated that such speech is not entirely immune from government regulation. Commercial speech, even when truthful, may be subject to regulation "that might be impermissible in the realm of non-commercial speech." Government may place restrictions on the time, place and manner of dissemination to prevent deception provided such restriction serves "a significant governmental interest, and that in doing so they [government] leave open ample channels for communication of the information."

In light of the Supreme Court's treatment of commercial speech, it is unreasonable to presume that the standard for justification of a prior restraint is the same regardless of the nature of the speech implicated. A standard lower than a showing of direct, immediate, and irreparable harm should apply to justify a prior restraint implicating only commercial speech. A more appropriate standard that courts should adopt is the standard employed to review statutory restrictions on commercial speech: that a substantial governmental interest is directly advanced by the regulation. There is clearly a significant government interest in fair administration of justice and prevention of rule abuse to justify the restriction. Also, the proposals leave open channels for class members to receive the restricted information via communications

122. See Central Hudson Gas, 447 U.S. at 563-64; Friedman v. Rogers, 440 U.S. 1, 9 (1979); Virginia Pharmacy Bd., 425 U.S. at 771.
125. Virginia Pharmacy Bd., 425 U.S. at 771-72 n.24. See also Central Hudson Gas, 447 U.S. at 564 n.6; Friedman, 440 U.S. at 10.
127. Central Hudson Gas, 447 U.S. at 562-64; Carey v. Population Serv. Int'l, 431 U.S. 678, 716 (1977) (Stevens, J., concurring); Virginia Pharmacy Bd., 425 U.S. at 770. The Court has twice noted that the commercial speech attributes of greater objectivity and hardiness "may also make inapplicable the prohibition against prior restraints." Friedman, 440 U.S. at 9; Virginia Pharmacy Bd., 425 U.S. at 771-72 n.24.
128. Ohralik, 436 U.S. at 456. See Central Hudson Gas, 447 U.S. at 562 n.5, 9; Friedman, 440 U.S. at 20; Carey, 431 U.S. at 711-12.
129. Virginia Pharmacy Bd., 425 U.S. at 771. See also Carey 431 U.S. at 712 n.6 (Powell, J., concurring), 716-17 (Stevens, J., concurring).
by named plaintiffs and their counsel and the class notice. Therefore, judicial screening of defense communication with absent class members is a feasible improvement over the present policy.

First amendment scrutiny does not end when a restraint has been shown to be justified. Limits on any type of speech must also be shown to be the least restrictive alternative to achieve the desired end. Courts and commentators have suggested many less restrictive alternatives. One suggestion has been to redraft the no-communication order to prohibit only the unapproved dissemination of specified forms of abusive communications. This alternative would restrain only constitutionally unprotected speech. Both the Waldo court and the Manual have noted, however, that "as a practical matter, . . . the ingenuity of those determined to wrongly take advantage of the class action procedure would likely prevail over any such attempt at prohibition by itemization." Another suggestion would require only the filing with the court of a copy of proposed communication with absent class members, and would rely on corrective notices to remedy any abuses. This suggestion is defective because class members may have already taken action, such as an opt-out or settlement, before the correction is issued. Finally, courts have used various after-the-fact remedies to repair damage caused by defendants. Unfortunately, whether such remedies can save a class action once defendants have exerted their influence is speculative. There is no clear evidence that once a class action is "poisoned" it can be cured. Hence, the instant proposals seem to be the least restrictive alternative to prevent adverse effects on the administration of justice and the underlying policies of rule 23. The proposals, therefore, do not run afoul of the first amendment.

CONCLUSION

District courts can no longer prohibit at will all unapproved communication by parties and counsel with absent class members. The decision in Gulf, the latest Manual recommendations, and first amendment considerations have cumulatively narrowed trial court discretion under rule 23(d). A policy of nearly unregulated communication with absent class members has evolved from these recent developments; however, this policy has been shown to be inadequate to further the policies embodied in rule 23. Specifically, open communication is...
tions encourages defense tactics which undermine the effectiveness of the class action device. The shortcomings of the present policy, however, can be corrected by use of district court rules or pretrial orders which screen defense communication with absent class members. Such regulation would more fully realize the underlying policies of rule 23 and would not impinge on class action defendants’ constitutional rights.

DONALD D. LEVENHAGEN
Law and Philosophy

An International Journal for Jurisprudence and Legal Philosophy

Edited by
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P.O. Box 17, 3300 AA Dordrecht, the Netherlands
190 Old Derby St., Hingham, MA 02043, U.S.A.