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Due Process Requires Notice before Individual Monetary Claims of Absent Class Members Are Barred by Res Judicata.

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utes of limitation.[109] Splitting issues and applying different law might, however, give one party a more favorable decision than he could have received had the entire law of either state been applied, thus frustrating the purposes of the laws of both states and inhibiting uniform decisions.[110]

In view of the inconsistent interpretation and application of the most significant relationship test among the various jurisdictions, it is regrettable the Texas Supreme Court did not give any real direction to the bench and bar. The result will be a period of uncertainty in Texas conflicts law as the courts begin to establish interpretative guidelines. The situation is, however, characteristic of any transitional period in a changing field of law, and ultimately a satisfactory analysis of the most significant contacts test will evolve. Critics who charge the most significant relationship test allows judicial discretion exceeding proper boundaries neglect to consider the injustices promulgated in the name of uniformity and predictability under the old rule. In abandoning the outdated and harsh dissimilarity doctrine and *lex loci delicti* rule, the supreme court has provided Texas with an opportunity to evaluate rationally the complex conflict of law issues in order that just and fair results may be reached in each case.

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FEDERAL CIVIL PROCEDURE—Class Action—Due Process Requires Notice Before Individual Monetary Claims of Absent Class Members Are Barred by Res Judicata

Johnson v. General Motors Corp.,
598 F.2d 432 (5th Cir. 1979).

In 1971 Herman Johnson, a black employee at the General Motors Assembly Plant in the Lakewood area of Atlanta, Georgia, was promoted from his position as an hourly-paid wage earner to a salaried employee. As a result of a supervisor's criticism, he was demoted back to hourly status in 1972. Johnson filed a complaint with the Equal Employment Opportunity Commission (EEOC),[1] and upon receiving a right-to-sue let-

109. *See* Clarke v. Pennsylvania R.R., 341 F.2d 430, 432 (2d Cir. 1965); Baldwin v. Brown, 202 F. Supp. 49, 50-51 (E.D. Mich. 1962); Lillegraven v. Tengs, 375 P.2d 139, 141 (Alaska 1962).

110. *See* Wilde, *Depacage in the Choice of Tort Law*, 41 S. CAL. L. REV. 329, 330 (1968).

1. *See* Civil Rights Act of 1964, § 703, 42 U.S.C. § 2000e-4 (1976). "This commission

ter[2] brought an action against General Motors under Title VII of the Civil Rights Act of 1964.[3] Johnson instituted a class action suit alleging widespread discriminatory practices, seeking both injunctive and monetary relief. The district court held not only that Johnson's action was barred by res judicata due to a prior class action filed under rule 23(b)(2) of the Federal Rules of Civil Procedure,[4] even though Johnson had no notice of the prior suit, but also that notice was not necessary to bind absent class members in a class action filed under this rule.[5] Johnson appealed to the Fifth Circuit Court of Appeals. Held-*Reversed and remanded.* Although notice is not mandatory to bind absent class members in a rule 23(b)(2) class action seeking only injunctive relief, due process does require notice before individual monetary claims of absent class members may be barred.[6]

When a controversy raises issues of law or fact common to a group of persons who are so numerous that a joinder is impracticable, one or more members of the group may litigate the rights of all others similarly situated through the procedural device of class action.[7] The person bringing or defending a class action must be a member of the class, but need not be authorized by the group on whose behalf he acts.[8] He must, however,

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was created to effectuate the purposes and policies of this title." *Id.*

2. *See id.* § 2000e-5. This section provides that if within thirty days after a charge is filed with the Commission and voluntary compliance with this subchapter is not obtained, the Commission shall notify the aggrieved person that a civil action may be initiated. *See id.* § 2000e-5.

3. *See* Johnson v. General Motors Corp., 598 F.2d 432, 433 (5th Cir. 1979); Civil Rights Act of 1964, § 703, 42 U.S.C. § 2000e (1976).

4. *See* Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972); FED. R. CIV. P. 23(b)(2). In *Rowe* a complaint was filed against General Motors for employment discrimination. No affirmative steps were ever taken to certify the action as a class complaint, the class being identified as "members of the Negro race." The Fifth Circuit Court of Appeals endorsed a proposed decree providing injunctive relief for the class, but no back pay was awarded on remand. Rowe v. General Motors Corp., 457 F.2d 348, 360-61 (5th Cir. 1972).

5. Johnson v. General Motors Corp., 598 F.2d 432, 434 (5th Cir. 1979).

6. *Id.* at 433.

7. FED. R. CIV. P. 23(a); *see, e.g.,* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 363 (1921) (when parties interested in suit are so numerous it would be impossible to make them all parties, equity permits a portion of the parties to represent entire body); Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420, 427 (2d Cir. 1975) (existence of common questions of law or fact is prerequisite to maintenance of class action), *cert. denied,* 429 U.S. 823 (1976); Dubose v. Harris, 434 F. Supp. 227, 230 (D. Conn. 1977) (class suit enables representative to litigate in a single lawsuit legal questions common to a class of persons). *See generally* Wheaton, *Representative Suits Involving Numerous Litigants,* 19 CORNELL L.Q. 399 (1934).

8. FED. R. CIV. P. 23(a); *see, e.g.,* East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977) (plaintiff must be member of class); Sosna v. Iowa, 419 U.S. 393, 403 (1975) (litigant must be member of class which he or she seeks to represent); Camper v.

purport to act on behalf of all members of the class and cannot have a conflict of interest.[9] Class actions in the federal courts are currently governed by rule 23 of the Federal Rules of Civil Procedure.[10] Subdivision (a) of rule 23 states the prerequisites for maintaining a class action: impracticality of joinder, questions of law or fact common to the class, adequate protection of class interests by the representative, and claims or defenses of the representative exemplifying those of the class members.[11]

Further limitation on the use of class actions is found in subdivision (b) of rule 23 wherein the categories of permissible class actions are found.[12] Rule 23(b)(1)(A) protects the interests of a party opposing the class by permitting a class action if multiple suits by or against individual members would create a risk of adjudications establishing inconsistent or incompatible standards of conduct for the opposing party.[13] Subsection 23(b)(1)(B) allows a class suit if a non-class action by or against individual members of a class would substantially impair or impede the ability of nonparty members to protect their interests.[14] Class actions are author-

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Calumet Petrochemicals, Inc., 584 F.2d 70, 71 (5th Cir. 1978) (named plaintiff must be a member of same class, possess same interest, and suffer same injury).

9. *See, e.g.*, Sosna v. Iowa, 419 U.S. 393, 403 (1975) (unlikely class members' interests conflicted with those of representative); Jones v. Diamond, 594 F.2d 997, 1005 (5th Cir. 1979) (sufficient homogeneity of interests); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247-48 (3d Cir. 1975) (representative did not have interests antagonistic to those of present employees). *But see* Hansberry v. Lee, 311 U.S. 32, 44 (1940) (dual and potentially conflicting interests made impossible for plaintiff to protect rights of absent parties).

10. American Pipe & Const. Co. v. Utah, 414 U.S. 538, 540 (1974) (provisions of rule 23 regulating class actions in the federal court); EEOC v. General Tel. Co., 599 F.2d 322, 327 (9th Cir. 1979) (federal rules govern the procedure in the United States District Courts).

11. FED. R. CIV. P. 23.

12. *See id.* 23(b).

13. *See id.* 23(b)(1)(A). Rule 23(b)(1)(A) reads in pertinent part: "prosecution of separate actions . . . would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class . . . ." *Id.; see, e.g.*, Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366-67 (1921) (to avoid conflicting judgments and have effective decree, all members of the class must be bound by one decree); Cullen v. New York State Civil Serv. Comm'n, 435 F. Supp. 546, 561 (E.D. N.Y.) (substantial risk that if questions present are litigated separately, inconsistent adjudications would result in subjecting opposing party to incompatible standards), *appeal dismissed*, 566 F.2d 856 (2d Cir. 1977); Gary-Northwest Ind. Women's Servs., Inc. v. Bowen, 421 F. Supp. 734, 735 (N.D. Ind. 1976) (inconsistent adjudications likely to result from individual actions), *aff'd mem.*, 429 U.S. 1067 (1977). *See generally* 3B MOORE'S FEDERAL PRACTICE ¶ 23.11(2) (2d ed. 1979).

14. *See* FED. R. CIV. P. 23(b)(1)(B). Rule 23(b)(1)(B) provides in pertinent part: "the prosecution of separate actions . . . with respect to individual members . . . which would as a practical matter be dispositive of the interests of the other members not parties . . . or substantially impair or impede their ability to protect their interests . . . ." *Id.; see, e.g.*, Smith v. Swormstedt, 57 U.S. 288, 303 (1853) (constantly occurring changes necessitates one class suit); Mungin v. Florida E. Coast Ry., 318 F. Supp. 720, 730 (M.D. Fla. 1970) (possibil-

ized under subsection 23(b)(2) when a party opposing the class has acted on grounds applicable to the whole class, which action calls for relief of an injunctive or corresponding declaratory nature.[15] Although 23(b)(2) does not mention action for damages[16] some courts have interpreted the section as allowing monetary relief if the predominant purpose of the suit is injunctive relief.[17] A court may authorize a class action under rule 23(b)(3) in situations when class action is not called for as clearly as those described in 23(b)(1) and 23(b)(2), but when it may nevertheless be judicially convenient and desirable given the particular facts.[18] The major prerequisite for maintaining a rule 23(b)(3) action requires questions of law or fact common to the class predominate over the questions affecting only individual members.[19] As a further consideration, the court should

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ity of inconsistent or varying judgments affecting rights of individuals), *aff'd per curiam*, 441 F.2d 728 (5th Cir. 1971); Technograph Printed Circuits, Ltd. v. Methode Elecs., Inc., 285 F. Supp. 714, 722 (N.D. Ill. 1968) (individual members likely to receive inconsistent results on common issues if suits are adjudicated separately).

15. *See* FED. R. CIV. P. 23(b)(2). The rule provides in pertinent part: "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . ." *Id.*; *see, e.g.*, Bailey v. Patterson, 323 F.2d 201, 206 (5th Cir. 1963) (suit to enjoin discrimination on common carriers), *cert. denied*, 377 U.S. 972 (1964); Potts v. Flax, 313 F.2d 284, 289 (5th Cir. 1963) (school discrimination on behalf of negro children); Green v. School Bd., 304 F.2d 118, 123 (4th Cir. 1962) (action to require city school board to grant transfers of negro children from negro to white schools).

16. *See generally* FED. R. CIV. P. 23(b)(2).

17. *See, e.g.*, Marshall v. Kirkland, 602 F.2d 1282, 1295 (8th Cir. 1979) (relief in form of back pay does not preclude certification under 23(b)(2)); EEOC v. General Tel. Co., 599 F.2d 322, 334 (9th Cir. 1979) (back pay properly certified under rule 23(b)(2)); Sperry Rand Corp. v. Larson, 554 F.2d 868, 875 (8th Cir. 1977) (back pay will not prevent certification under rule 23(b)(2)).

18. *See* Bennett v. Gravelle, 323 F. Supp. 203, 218 (D. Md. 1971) (court must determine if actual interests of parties will be better served by concluding all matters in one common class suit); Carpenter v. Hall, 311 F.Supp. 1099, 1112 (S.D. Tex. 1970) (class action to avoid duplication of efforts and inconsistent rulings); FED. R. CIV. P. 23(b)(3). *See generally* C. WRIGHT, LAW OF FEDERAL COURTS (3d ed. 1976) (factors considered by court in determining advisability of allowing a (b)(3) action).

19. *See, e.g.*, Gold Strike Stamp Co. v. Christensen, 436 F.2d 791, 798 (10th Cir. 1970) (questions on the effect of competition between food retailers and service stations by alleged price discrimination predominated over individual questions of damages); Mader v. Armel, 402 F.2d 158, 161-62 (6th Cir. 1968) (in action for violation of anti-fraud proxy statement containing misrepresentation and material omissions mailed to all shareholders indicated a common course of conduct against investors), *cert. denied*, 394 U.S. 930 (1968); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 566 (2d Cir. 1968) (although proposed class members had different motives for entering odd-lot market, anti-trust violations involved predominantly common questions), *rev'd*, 479 F.2d 1005 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974). *But see* Kline v. Coldwell, Banker & Co., 508 F.2d 226, 235 (9th Cir. 1974) (problems of individual damages preclude finding that class action is superior to other available methods).

find the 23(b)(3) procedure superior to other available methods.[20]

The class action procedures as prescribed by rule 23 of the Federal Rules of Civil Procedure provide for two types of prejudgment notice to class members: mandatory notice when an action is certified as a (b)(3) action,[21] and discretionary notice when an action is maintained under subsection (b)(1) or (b)(2).[22] The purpose of including notice requirements in rule 23 is to fulfill the requirements of due process without reducing the utility of a representative action.[23]

At a minimum, due process requires notice and an opportuity to be heard before a person may be deprived of life, liberty, or property.[24] The right to be heard has little value unless one is informed that an action is pending and can choose for himself to become a party to the action.[25] Participation becomes a secondary consideration, however, when in a representative action the desirability of achieving economies of time, effort, and expense become major considerations.[26] In rule 23 the dichotomy of

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20. *See* Gold Strike Stamp Co. v. Christensen, 436 F.2d 791, 798 (10th Cir. 1970) (size, manageability, and desirability of concentrating litigation in Utah class action is superior to other available methods); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 566 (2d Cir. 1968) (since separate suits impracticable, class action only feasible way to litigate claims), *rev'd*, 479 F.2d 1005 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974).

21. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974); *In re* Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088, 1097 (5th Cir. 1977); Sanders v. Levy, 558 F.2d 636, 639 (2d Cir. 1976), *rev'd on other grounds*, 437 U.S. 340 (1978); FED. R. CIV. P. 23(c)(2). "In a class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." FED. R. CIV. P. 23(c)(2).

22. *See* Sosna v. Iowa, 419 U.S. 393, 403 (1975) (notice requirements of (b)(3) action not present in a (b)(2) action); Larionoff v. United States, 533 F.2d 1167, 1186 (D.C. Cir. 1976) (notice not required in 23(b)(2) or (b)(1)), *aff'd*, 431 U.S. 864 (1979); Ives v. W. T. Grant Co., 522 F.2d 749, 764 (2d Cir. 1975) (notice not required in a 23(b)(2) injunctive class action); FED. R. CIV. P. 23(d)(2). This subsection reads in pertinent part: "the court may make appropriate orders requiring that notice be given in such manner as court may direct to some or all members . . . ." FED. R. CIV. P. 23(d)(2).

23. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974) (notice fulfills requirements of due process for class action); *see* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (notice fundamental requirement of due process); Hansberry v. Lee, 311 U.S. 32, 40 (1940) (litigant must be afforded notice as is requisite of due process); *Advisory Committee's Note, Proposed Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 73, 107 (1966) (notice satisfies requirements of due process). *See generally* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 356-400 (1967).

24. *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Milliken v. Meyer, 311 U.S. 457, 463 (1940); Western Life Indem. Co. v. Rupp, 235 U.S. 261, 273 (1914).

25. *See* Mullane v. Central Hanover & Trust Co., 339 U.S. 306, 314 (1950).

26. *See* Hansberry v. Lee, 311 U.S. 32, 41 (1940) (class members adequately represented); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 249 (3d Cir. 1975) (purpose behind

notice requirements accommodates the differences in class cohesiveness.[27] The class in a (b)(1) or (b)(2) action tends to be a more cohesive group having similar interests in the purpose of the litigation.[28] Members of a (b)(1) or (b)(2) class are related in interest since they seek common relief or assert the same claims or defenses.[29] Since all members of the class have similar claims, the merits of which may be disposed of in one action, it is fair to bind all these members without notice because the interest of nonparticipating members in pursuing their own actions is limited.[30]

Subsection (b)(3) actions, on the contrary, involve the "several" rights of individual class members affected by a common question of law or fact.[31] The (b)(3) members are considered a class because they are assert-

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class action outweighs unfairness), *vacated on other grounds*, 424 U.S. 737 (1976). The purposes of the class action are to achieve economies of time, effort, and expense. *See* Dubose v. Harris, 434 F. Supp. 227, 230 (D. Conn. 1977); Buford v. American Fin. Co., 333 F. Supp. 1243, 1249 (N.D. Ga. 1971).

27. *See* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 248-49 (3d Cir. 1975), *vacated on other grounds*, 424 U.S. 737 (1976) ((b)(2) class cohesive by nature, so notice not necessary). In a heterogeneous (b)(3) class, there could be instances when an individual would want to "opt out" and rule 23(c)(2) affords, through notice, this opportunity to every potential member of the (b)(3) class. *Id.* at 249; *see* Larionoff v. United States, 533 F.2d 1167, 1183 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977); Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 412 (2d Cir. 1975). *See generally Advisory Committee's Note, Proposed Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 73, 106 (1966).

28. *See, e.g.*, Larionoff v. United States, 533 F.2d 1167, 1186 (D.C. Cir. 1976) (members of a (b)(1) class more unified and probably have little individual interest in controlling own litigation), *aff'd*, 431 U.S. 864 (1977); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 878 (5th Cir. 1975) ((b)(2) class defined as cohesive), *cert. denied*, 425 U.S. 944 (1976); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 248 (3d Cir. 1975) (a (b)(2) class cohesive as to claims tried), *vacated on other grounds*, 424 U.S. 737 (1976). *See generally* 3B MOORE'S FEDERAL PRACTICE ¶ 23.31(1) (2d ed. 1979).

29. *See* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 248 (3d Cir. 1975) ((b)(2) class cohesive as to claims tried), *vacated on other grounds*, 424 U.S. 737 (1976); Brown v. Weinberger, 417 F. Supp. 1215, 1218 (D.D.C. 1976) (no conflicts of interest present within the class); Brown v. Tahoe Regional Planning Agency, 385 F. Supp. 1128, 1129 (D. Nev. 1973) (a common interest to enforce single right).

30. *See* Larionoff v. United States, 533 F.2d 1167, 1186 (D.C. Cir. 1976) (little interest in directing own litigation so no notice is required), *aff'd*, 431 U.S. 864 (1977); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 256 (3d Cir. 1975) ((b)(2) class homogeneous without conflicting interests between members), *vacated on other grounds*, 424 U.S. 737 (1976); Lewis v. Philip Morris, Inc., 419 F. Supp. 345, 352 (E.D. Va. 1976) (notice would add little to homogeneous (b)(2) group). *See generally* Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 315 (1973); *Advisory Committee's Note, Proposed Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 73, 106 (1966).

31. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974) (must be given opportunity to preserve his individual right to press his claim separately); Larionoff v. United States, 533 F.2d 1167, 1186 (D.C. Cir. 1976) (members of a (b)(3) class are less unified with less interest on part of individual members in controlling and directing their own separate litigations), *aff'd*, 431 U.S. 864 (1977); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 249 (3d

ing one or more common issues.[32] Typically, there is no continuous relationship among members of the class, and they often are interested in different remedial objectives.[33] In a heterogeneous (b)(3) class there are many instances when particular class members would want to "opt out" so as not to be bound by the judgment.[34] To respect those individual interests rule 23 allows a member to exclude himself from the class.[35] Mandatory notice sent to a (b)(3) class member serves to facilitate the "opt out" provision by informing the member of the right to exclude himself from the action.[36] If the class member gives notice that he chooses to "opt out," he is not bound by the judgment and may litigate his claims individually.[37]

Notice is not only a due process requirement, but is also an issue in the determination of the res judicata effect of a judgment.[38] The doctrine of res judicata provides that a final judgment is conclusive of the cause of action and of the facts or issues litigated.[39] The application of this doctrine rests on the principle that if a party has litigated or had an opportunity to litigate the same matter in a former action, he should not be per-

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Cir. 1975) (individual interests of (b)(3) members respected by issuance of notice and opportunity to "opt out"), *vacated on other grounds*, 424 U.S. 737 (1976).

32. *See* Bennett v. Gravelle, 323 F. Supp. 203, 218 (D. Md. 1971) (asserting common legal grievance), *cert. dism'd*, 407 U.S. 917 (1972).

33. *See id.* at 218-19 (relief may vary). *See generally* Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 315 (1973); Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 637 (1971).

34. *See* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 249 (3d Cir. 1975), *vacated on other grounds*, 424 U.S. 737 (1976).

35. *See* FED. R. CIV. P. 23(c)(2).

36. *Id.*; *see, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974); Larionoff v. United States, 533 F.2d 1167, 1183 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 249-50 (3d Cir. 1975), *vacated on other grounds*, 424 U.S. 737 (1976). *See generally Developments in the Law-Class Actions*, 89 HARV. L. REV. 1318, 1402-16 (1976); Comment, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23*, 123 U. PA. L. REV. 1217 (1975).

37. FED. R. CIV. P. 23(c)(2); *see, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974); Larionoff v. United States, 533 F.2d 1167, 1183 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 249-50 (3d Cir. 1975), *vacated on other grounds*, 424 U.S. 737 (1976).

38. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). If any proceeding is to be afforded finality, notice reasonably calculated to appraise interested parties of the pending action must be given. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 174 (1974); Jones v. Diamond, 594 F.2d 997, 1023 (5th Cir. 1979); Bogard v. Cook, 586 F.2d 399, 408 (5th Cir. 1978), *cert. denied*, 100 S. Ct. 173 (1979).

39. *See, e.g.*, Sea-Land Serv., Inc. v. Gaudet, 414 U.S. 573, 578-79 (1974); Russell v. United States, 592 F.2d 1069, 1071-72 (9th Cir. 1979); Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027, 1029 (E.D. N.C. 1978). *See generally* Von Moschzisker, *Res Judicata*, 38 YALE L.J. 299 (1929).

mitted to relitigate the same issues.[40] *Mullane v. Central Hanover Bank & Trust Co.*[41] is a leading case with respect to notice requirements and the impact of res judicata in a representative action.[42] The *Mullane* Court held interests of absent parties could not be concluded unless the absent parties were given the opportunity to be heard.[43] Thus, as a general rule, a party cannot be bound or estopped by the results of a judicial proceeding to which he is not a party.[44]

An exception to this general rule was created in *Hansberry v. Lee*[45] when the Supreme Court held a judgment in a class action was binding on absent members.[46] This exception is incorporated in rule 23.[47] Inherent in rule 23 is the notion that members of a class under subsection (b)(3) are not to be bound by the class judgment unless they have been given notice and an opportunity to be heard.[48] No similar protection is demanded by the rule, however, for members of a class action maintained under subsection (b)(1) or (b)(2).[49] This disparity has invited much atten-

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40. *See, e.g.*, Sea-Land Serv., Inc. v. Gaudet, 414 U.S. 573, 578-79 (1974); Russell v. United States, 592 F.2d 1069, 1071-72 (9th Cir. 1979); Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027, 1029 (E.D. N.C. 1978).

41. 339 U.S. 306 (1950).

42. *See id.* at 319-20. The Court invalidated a New York banking law that permitted judicial settlement without providing individual notice to known beneficiaries of the trusts involved. *Id.* at 319-20.

43. *See id.* at 320.

44. *See id.* at 313-14; Hansberry v. Lee, 311 U.S. 32, 40 (1940).

45. 311 U.S. 32 (1940).

46. *Id.* at 41.

47. FED. R. CIV. P. 23(c)(3); *see, e.g.*, United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 878 (5th Cir. 1975) (no specific notice requirements), *cert. denied*, 425 U.S. 944 (1976); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 249 (3d Cir. 1975) (judgment will bind all members), *vacated on other grounds*, 424 U.S. 737 (1976); *In re* Four Seasons Sec. Law Litigation, 502 F.2d 834, 843 (10th Cir. 1974) (merit of binding absent class members is finality of judgments), *cert. denied*, 419 U.S. 1034 (1974). *See generally* Note, *Binding Effect of Class Actions*, 67 HARV. L. REV. 1059 (1954).

48. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173-74 (1974) (notice must be given to bind a (b)(3) member); Larionoff v. United States, 533 F.2d 1167, 1183 (D.C. Cir. 1976) (notice to absent (b)(3) members of opportunity to "opt out" is mandated by the rule), *aff'd*, 431 U.S. 864 (1977); Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 412 (2d Cir. 1975) (notice provided to (b)(3) members so they are aware of their choice to remain a class member).

49. *See, e.g.*, Robertson v. National Basketball Ass'n, 556 F.2d 682, 686 (2d Cir. 1977) (due process not violated by lack of "opt out" right in (b)(1) settlement); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 878 (5th Cir. 1975) ((b)(2) class by definition more cohesive and hence bound by "superior res judicata effect"), *cert. denied*, 425 U.S. 944 (1976); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 248 (3d Cir. 1975) (because of cohesive nature of (b)(2) class, "opt out" not necessary), *vacated on other grounds*, 424 U.S. 737 (1976). "The judgment in an action maintained as a class action under (b)(1) or (b)(2) . . . shall include . . . those whom the courts find to be members of the class." FED. R. CIV. P.

tion by the courts and commentators who disagree whether the safeguards provided in rule 23 are adequate to protect the interests of absent parties in a (b)(1) or (b)(2) class action.[50]

The issue of whether due process requires notice and an opportunity to be heard in all class actions was first addressed by the federal courts in *Eisen v. Carlisle & Jacquelin.*[51] Although the Second Circuit in dicta of *Eisen* suggested due process required notice in all class actions,[52] the Supreme Court upon review of the case limited its decision to subsection (b)(3) class actions.[53] The Court discussed due process requirements,[54] but restricted its ruling to a literal interpretation of rule 23, holding that individual notice is mandatory for all identifiable members of (b)(3) actions.[55] In *Sosna v. Iowa*[56] the Court further limited *Eisen* by implying notice is not required as a matter of due process in (b)(1) and (b)(2) actions.[57] The *Sosna* Court indicated the notice problems associated with a rule 23(b)(3) class action did not exist since the suit sought injunctive and declaratory relief, rather than monetary relief.[58] A majority of lower courts cite the *Eisen* and *Sosna* Supreme Court opinions as authority for denying notice to members in all (b)(1) or (b)(2) class actions.[59] These

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23(c)(3).

50. *See, e.g.*, Schrader v. Selective Serv. Sys., 470 F.2d 73, 75 (7th Cir.), *cert. denied*, 409 U.S. 1085 (1972); Zeilstra v. Tarr, 466 F.2d 111, 113 (6th Cir. 1972); Richmond Black Police Officers Ass'n v. Richmond, 386 F. Supp. 151, 158 (E.D. Va. 1974). *But see, e.g.*, Katz v. Carte Blanche Corp., 496 F.2d 747, 756 (3d Cir.) (notice not required in (b)(1) and (b)(2) actions), *cert. denied*, 419 U.S. 885 (1974); Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972) (notice not given); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969) (notice discretionary and not needed). *See generally* Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97 (1974); Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426 (1973).

51. 391 F.2d 555 (2d Cir. 1968), *rev'd*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974). Petitioner brought a class action on behalf of himself and all odd lot traders on the New York Stock Exchange charging respondent with violating the antitrust and securities laws. *Id.* at 559.

52. *See id.* at 564-65.

53. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974).

54. *See id.* at 173-74 (notice requirements in rule 23 are designed to fulfill due process requirements).

55. *See id.* at 173. Rule 23(c)(2) provides that in any class action maintained under (b)(3) notice is mandatory. *See* FED. R. CIV. P. 23(c)(2).

56. 419 U.S. 393 (1975). The appellant brought a class action suit against the State of Iowa asserting Iowa's duration residence requirements for divorce violated the federal Constitution on equal protection and due process grounds and sought injunctive relief. *See id.* at 395-96.

57. *Id.* at 397 n.4.

58. *See id.* at 397 n.4.

59. *See, e.g.*, Ives v. W. T. Grant Co., 522 F.2d 749, 764 (2d Cir. 1975) (notice not required in a 23(b)(2) class action); United States v. Allegheny-Ludlum Indus., Inc., 517

courts ignore the due process language in *Eisen* and choose to adhere to the literal interpretation of rule 23.[60]

The debate over notice requirments in a class action has increased due to recent cases allowing monetary remedies as incidental to injunctive relief in a (b)(1) or (b)(2) action.[61] According to *Ellison v. Rock Hill Printing & Finishing Co.*[62] if a class action is brought under rule 23(b)(2) for injunctive and monetary relief, notice is mandatory if the ruling is to be res judicata on future claims against the defendant.[63] It has been further held that some form of notice may be necessary in order to bind absent class members in connection with back pay awards.[64] *Bogard v. Cook*[65] has expanded the necessity of mandatory notice by requiring sufficient notice to alert class members of the possibility of seeking individual money damages for personal wrongs.[66] The court ruled the principles of res judicata are modifable, and if Bogard's individual claims are of sufficient gravity, due process requires they not be extinguished by his class status in a prior suit.[67]

In *Johnson v. General Motors Corp.*[68] the Fifth Circuit Court of Appeals determined a monetary claim arising from discriminatory actions was not barred by the injunctive relief granted in a previous case involving the same discriminatory practices.[69] Although notice in (b)(2) actions is not made mandatory by rule 23, the court reasoned this does not mean every (b)(2) action will automatically bar all subsequent suits by class

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F.2d 826, 878 (5th Cir. 1975) (members bound without notice), *cert. denied*, 425 U.S. 944 (1976); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 249-50 (3d Cir. 1975) (notice need not be given in (b)(2)), *vacated on other grounds*, 424 U.S. 737 (1976).

60. *See* Mattern v. Weinberger, 519 F.2d 150, 157-58 (3d Cir. 1975), *vacated on other grounds*, 425 U.S. 987 (1976); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 249 (3d Cir. 1975), *vacated on other grounds*, 424 U.S. 737 (1976).

61. *See, e.g.*, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 252-53 (5th Cir. 1974), *cert. denied*, 99 S. Ct. 1020 (1979); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1365 (5th Cir. 1974); Sabala v. Western Gillette, Inc., 371 F. Supp. 385, 391 (S.D. Tex. 1974), *aff'd in part, rev'd in part*, 516 F.2d 1251 (5th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977).

62. 64 F.R.D. 415 (D. S.C. 1974).

63. *Id.* at 417.

64. *See* United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 878 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); Pettway v. American Cast Iron Co., 494 F.2d 211, 257 (5th Cir. 1974), *cert. denied*, 99 S. Ct. 1020 (1979).

65. 586 F.2d 399 (5th Cir. 1978), *cert. denied*, 100 S. Ct. 173 (1979).

66. *Id.* at 408-09.

67. *Id.* at 408.

68. 598 F.2d 432 (5th Cir. 1979).

69. *Id.* at 436; *see* Rowe v. General Motors Corp., 457 F.2d 348, 351, 359 (5th Cir. 1972). Rowe brought a class action suit claiming racial discrimination in procedures used to promote hourly-paid employees in G.M.'s Atlanta plant. The court held General Motors had discriminated and granted injunctive relief. *Id.* at 351, 359.

members.[70] The court held a bar to monetary claims must be consonant with due process[71] and notice provisions must also meet minimum requirements of due process.[72] Although notice is not required in all representative suits in order to bind absent class members,[73] the *Johnson* court created an exception based on due process if monetary claims are involved.[74]

Due to the evaluation of substantive law governing suits based on discrimination, monetary relief is now allowed in an action for predominantly injunctive relief.[75] Whether notice should be required in these actions demands consideration of the relationship of the parties[76] and the character of relief sought.[77] The addition of monetary relief alters an individual member's interest in the subject matter and creates a distinctive remedy for each member. Class members will have varying remedial objectives since each member may be entitled to different amounts of back pay.[78]

These changes prompted the *Johnson* court to base its decision concerning the res judicata effect of a prior suit upon due process standards applicable to (b)(3) actions, since back pay claims raise all the traditional (b)(3) problems.[79] Prior to the development of (b)(2) actions involving

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70. Johnson v. General Motors Corp., 598 F.2d 432, 436-37 (5th Cir. 1979).

71. *Id.* at 436. The court opined notice and an opportunity to be heard are due process requirements. *Id.* at 437.

72. *Id.* at 438. The court requires some form of notice of the pending action which informs the party of his right to litigate damage claims. *Id.* at 438.

73. *Id.* at 437-38. The notice requirements applicable to rule 23(b)(2) class actions presupposes these suits will only seek injunctive or declaratory relief. *Id.* at 437.

74. *Id.* at 437. The court suggests due process interests of an absent member may not be adequately protected when other than equitable relief is sought. *See id.* at 437-38.

75. *See, e.g.,* Franks v. Bowman Transp. Co., 424 U.S. 747, 755 (1976) (members of class entitled to back pay); Albemarle Paper Co. v. Moody, 422 U.S. 405, 412 (1975) (remedy court may invoke); Marshall v. Kirkland, 602 F.2d 1282, 1295 (8th Cir. 1979) (majority of federal courts hold back pay will not preclude (b)(2) certification).

76. Courts considered cohesiveness and degree of individual interests of class members as determinative of whether notice should be sent. *Compare* United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 878 (5th Cir. 1975) ((b)(2) cohesive, so no notice required), *cert. denied,* 425 U.S. 944 (1976) *with* Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 412 (2d Cir. 1975) (heterogeneous (b)(3) class, so notice must be sent).

77. *See* Sosna v. Iowa, 419 U.S. 393, 397 n.4 (1975) (because injunctive relief sought, no notice required); Bogard v. Cook, 586 F.2d 399, 408-09 (5th Cir. 1978) (if monetary relief sought in (b)(2) action notice is required), *cert. denied,* 100 S. Ct. 173 (1979).

78. *See, e.g.,* Franks v. Bowman Transp. Co., 424 U.S. 747, 755 (1976); Marshall v. Kirkland, 602 F.2d 1282, 1296 n.10 (8th Cir. 1979); Bogard v. Cook, 586 F.2d 399, 409 (5th Cir. 1978), *cert. denied,* 100 S. Ct. 173 (1979).

79. *See, e.g.,* Johnson v. General Motors Corp., 598 F.2d 432, 437-38 (5th Cir. 1979); Bolton v. Murray Envelope Corp., 553 F.2d 881, 885 (5th Cir. 1977); Arkansas Educ. Ass'n v. Board of Educ., 446 F.2d 763, 770 (8th Cir. 1971).

monetary claims, a majority of courts held notice to absent (b)(2) class members was not an absolute requisite of due process because of lack of separable interests within the class.[80] The addition of monetary claims to a (b)(2) action indicates class cohesiveness is no longer essential to a (b)(2) action.[81] The possibility of a back pay award creates an individual claim for the (b)(2) member separate from the group claim of discrimination.[82]

As in a (b)(3) action, the (b)(2) member may have a substantial overriding interest in pursuing this claim on his own.[83] The *Johnson* court recognizes, as it did in *Bogard*, the (b)(2) member's increased interest in controlling the litigation of the back pay claim,[84] reasoning this interest must be respected as in a (b)(3) action.[85] Notice problems do not exist when purely injunctive relief is sought.[86] If monetary claims are involved in a (b)(2) action, notice must meet standards applicable to (b)(3) actions.[87] Since there is no practical difference between a (b)(3) class and a (b)(2) class requesting monetary relief, due process requires the issuance of notice to (b)(2) as well as (b)(3) class members.[88]

The *Johnson* decision suggests a further complication of rule 23: the "opt out" provisions. Rule 23(c)(2) requires that notice of the right to "opt out" be given to (b)(3) class members.[89] *Johnson* suggests courts will

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80. *See* Johnson v. General Motors Corp., 598 F.2d 432, 436-37 (5th Cir. 1979).

81. *See* Mattern v. Weinberger, 519 F.2d 150, 157-58 (3d Cir. 1975), *vacated on other grounds*, 425 U.S. 987 (1976); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 249 (3d Cir. 1975), *vacated on other grounds*, 424 U.S. 737 (1976).

82. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 755 (1976); Marshall v. Kirkland, 602 F.2d 1282, 1296 n.10 (8th Cir. 1979); Johnson v. General Motors Corp., 598 F.2d 432, 438 (5th Cir. 1979).

83. *See* Larionoff v. United States, 533 F.2d 1167, 1183 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977); Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 412 (2d Cir. 1975); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 248-49 (3d Cir. 1975), *vacated on other grounds*, 424 U.S. 737 (1976).

84. *Compare* Johnson v. General Motors Corp., 598 F.2d 432, 438 (5th Cir. 1979) *with* Marshall v. Kirkland, 602 F.2d 1282, 1295 (8th Cir. 1979) *and* Bogard v. Cook, 586 F.2d 399, 409 (5th Cir. 1978).

85. Johnson v. General Motors Corp., 598 F.2d 432, 438 (5th Cir. 1979).

86. *See* Sosna v. Iowa, 419 U.S. 393, 397 n.4 (1975); Jones v. Diamond, 594 F.2d 997, 1022 (5th Cir. 1979).

87. *See, e.g.*, Sosna v. Iowa, 419 U.S. 393, 397 n.4 (1975); Marshall v. Kirkland, 602 F.2d 1282, 1298 n.12 (8th Cir. 1979); Johnson v. General Motors Corp., 598 F.2d 432, 438 (5th Cir. 1979); Sperry Rand Corp. v. Larson, 554 F.2d 868, 876 (8th Cir. 1977).

88. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974) (individual's right to exclude himself must be protected); Ives v. W. T. Grant Co., 522 F.2d 749, 764 (2d Cir. 1975) (notice not required in 23(b)(2) injunctive class action); Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 412 (2d Cir. 1975) (notice provided to protect individual members).

89. FED. R. CIV. P. 23(c)(2).

have to determine if a (b)(2) member may "opt out" when he receives notice although other courts have held rule 23 does not allow (b)(2) members to exclude themselves from the suit.[90] These decisions are based on reasoning that the "opt out" provision for (b)(3) class members is essential to protect their individual interests and, therefore, similar provisions for the (b)(2) class are unnecessary because it is cohesive as to claims tried in the class action.[91] The elimination of class cohesiveness in a (b)(2) action requesting monetary relief, however, can be used to support the proposition that (b)(2) members should be allowed to "opt out" to pursue their individual claims.[92] If the "opt out" provision has been held essential to protect the interests of individuals in the heterogeneous (b)(3) group, then similar protection should be provided to a heterogeneous (b)(2) class seeking monetary relief.[93]

Rule 23 attempts to balance the utility of the class action against the individual's right to due process by providing flexible notice requirements.[94] The *Johnson* ruling will make this balancing process more difficult for the courts. The cost of giving notice to members of the (b)(2) class seeking monetary relief may be fatal to the action, thereby defeating its utility.[95] In a (b)(3) action the arguments in favor of the utility of a class action, however, are not allowed to outweigh due process stan-

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90. *See, e.g,* Robertson v. National Basketball Ass'n, 556 F.2d 682, 686 (2d Cir. 1977) (due process not violated if no "opt out" right in (b)(1) settlement); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 878 (5th Cir. 1975) ((b)(2) class more cohesive, bound without notice), *cert. denied,* 425 U.S. 944 (1976); La Chapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288 n.7 (5th Cir. 1975) ((b)(2) members may not "opt out").

91. *See* Sperry Rand Corp. v. Larson, 554 F.2d 868, 875 (8th Cir. 1977); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 249 (3d Cir. 1975), *vacated on other grounds,* 424 U.S. 737 (1976).

92. *See* Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 412 (2d Cir. 1975) (members "opt out" to protect individual rights); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 249 (3d Cir. 1975) (members allowed to "opt out" because of the heterogeneous nature).

93. *See* Bogard v. Cook, 586 F.2d 399, 408 (5th Cir. 1978) (res judicata effect modifiable), *cert. denied,* 100 S. Ct. 173 (1979); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 878 (5th Cir. 1975) ((b)(2) class cohesive so notice is not given; if not cohesive then notice is required), *cert. denied,* 425 U.S. 944 (1976); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 257 (5th Cir. 1974) (notice required), *cert. denied,* 99 S. Ct. 1020 (1979).

94. *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 560 (2d Cir. 1968) (class action utilized so small claims of individuals can be resolved at same time), *rev'd on other grounds,* 479 F.2d 1005 (2d Cir. 1973), *vacated on other grounds,* 417 U.S. 156 (1974); Forbes v. Greater Minneapolis Area Bd. of Realtors, 61 F.R.D. 416, 417 (D. Minn. 1973). *See generally* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 355-59 (1978).

95. *See* Redhail v. Zablocki, 418 F. Supp. 1061, 1067 (E.D. Wis. 1976) (notice too expensive); Watson v. Branch County Bank, 380 F. Supp. 945, 959 (W.D. Mich. 1974) (plaintiffs cannot afford to pay for notice to absent class members); Held v. Missouri Pac. R.R., 64 F.R.D. 346, 348 (S.D. Tex. 1974) (court denied class certification because plaintiff could not afford to notify class members).

dards.[96] The same type of individual rights are affected in a (b)(2) action seeking monetary relief as those affected in a (b)(3) action; therefore, the same due process standards should apply despite the possible high cost of giving notice.[97] Courts may still preserve the utility of the (b)(2) action if they are inventive and flexible as to the type of notice given.[98] The major consideration must be that the notice is sufficient to bring the pending action to the attention of the class member.[99]

The notice requirements prescribed by *Johnson* appear harsh, but they will strike a balance between the individual's right to due process and the utility of the class action. Notice will encourage intervention and allow a complete adjudication of the issue in one trial, while providing the individual his constitutional right to be heard. The issuance of adequate notice will diminish the number of collateral attacks on class action judgments and effectively fulfill a major purpose of class actions by binding all class members in one judgment.

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96. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974) (notice in a (b)(3) action is mandatory no matter what the cost); *In re* Nissan Motor Corp., 552 F.2d 1088, 1097 (5th Cir. 1977) (notice is an unambiguous requirement); Sanders v. Levy, 558 F.2d 636, 639 (2d Cir. 1976) (individual notice must be sent), *rev'd on other grounds*, 437 U.S. 340 (1978).

97. *See* Bogard v. Cook, 586 F.2d 399, 408 (5th Cir. 1978), *cert. denied*, 100 S. Ct. 173 (1979); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 878 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 257 (5th Cir. 1974), *cert. denied*, 99 S. Ct. 1020 (1979).

98. *See* Bing v. Roadway Express, Inc., 485 F.2d 441, 448 (5th Cir. 1973) (notice given in such manner as court may direct); Fuyishima v. Board of Educ., 460 F.2d 1355, 1360 (7th Cir. 1972) (notice given through posted or intercom announcements); Collins v. Schoonfield, 344 F. Supp. 257, 263 n.9 (D. Md. 1972) (notice posted in agreed places within the jail); *In re* Antibiotic Antitrust Actions, 333 F. Supp. 278, 290 (S.D. N.Y. 1971) (press releases to supplement mailing notice).

99. *Compare* Environmental Defense Fund, Inc. v. Corps of Eng'rs, 325 F. Supp. 728, 736 (E.D. Ark. 1971) (no particular method, court will pass on the sufficiency of notice) *with* Inmates of Milwaukee County Jail v. Peterson, 51 F.R.D. 540, 542 (E.D. Wis. 1971) (notice would not reach persons the plaintiffs seek to have bound).