NEW MEXICO LAW REVIEW

Volume 7
Issue 2 *Summer 1977*

Summer 1977

The Future of Class Actions in New Mexico

Janet R. Braziel

Eddie Castoria

NOTES AND COMMENTS

THE FUTURE OF CLASS ACTIONS IN NEW MEXICO

In June, 1976, the Supreme Court of the State of New Mexico in *Valley Utilities, Inc. v. O'Hare*[1] expressed a feeling of uneasiness with the procedures inherent in the state's class action rule.[2] Within two months that uneasiness culminated in an order revoking adoption of the rule.[3] Since that order was issued without comment, it is not clear whether the dissatisfaction expressed by New Mexico's highest court is directed toward the utility of class actions in general or toward the difficulties of applying the present rule. Permanent enforcement of the order represents a revolution in civil procedure, obliterating the representative action which had its genesis in equity.[4] On the other hand, a temporary "time out" may represent a commendable intention to modernize this action, following the lead of other jurisdictions.

This comment will examine the consequences of the recent actions

1. 89 N.M. 262, 550 P.2d 274 (1976).
2. N.M. Stat. Ann. § 21-1-1(23) (Repl. 1970).
3. That Order states:

> WHEREAS the Court heretofore promulgated and adopted by Order Rule 23(a) & (c) of the Rules of Civil Procedure for the District Courts of the State of New Mexico, which also appears in Replacement Vol. 4 of the New Mexico Statutes 1953 Annotated at § 21-1-1(23)(a)(c); and
>
> WHEREAS the Court now being of the opinion that the Order adopting said rule, insofar as it embraced and accomplished the adoption of said Rule 23(a) & (c), should be revoked and vacated;
>
> NOW, THEREFORE, IT IS CONSIDERED AND ORDERED that the Order of this Court heretofore entered adopting Rules of Civil Procedure for the District Courts of the State of New Mexico, insofar, but only insofar, as it embraced and accomplished the adoption of Rule 23(a) & (c) of said rules, be, and it is hereby, revoked and vacated, and said Rule 23(a) & (c) shall have no application to any suit or action filed in the district courts of the State of New Mexico on or after June 15, 1976.
>
> DATED at Santa Fe, New Mexico this 14th day of June 1976.
>
> s/ LaFel E. Oman, Chief Justice
> s/ John B. McManus, Jr., J.
> s/ Donnan Stephenson, J.
> s/ Samuel Z. Montoya, J.
> s/ Dan Sosa, Jr., J.

15 N.M. St. B. Bull. 1362 (July 22, 1976).

4. *See* Reno, *Notice and Due Process in Federal Class Actions: A Requium for Revised Rule 23?*, 2 Hastings Const. L.Q. 479, 490-91 (1975) [hereinafter cited as "Reno"]; Note, *Rule 23 and Class Action Development*, 12 Washburn L.J. 343, 345-46 (1973) [hereinafter cited as "12 Washburn"].

of the New Mexico Supreme Court. First, the effect of closing state courts altogether to class litigants will be discussed; then, the pitfalls inherent in New Mexico's rule 23 which may have led the New Mexico court to revoke adoption of the rule will be reviewed. Finally, the most commonly adopted alternative—the 1966 revision[5] —will be evaluated to determine whether it is an adequate answer to the questions raised by the New Mexico Supreme Court's actions.

THE EFFECT OF CLOSING STATE COURTS TO CLASS ACTIONS

Assuming *arguendo* that the New Mexico Supreme Court's actions[6] of 1976 reflect a desire to eliminate permanently class actions as a form of action in our state,[7] many potential plaintiffs, in particular, consumer and environmental groups which have made much use of the device in the past,[8] will certainly be denied a forum.

The utility of the class action procedure has been detailed by commentators for many years.[9] Beyond mere utility, however, a recent decision involving federal class actions made it imperative that state courts remain open to the class litigant.[10] Indeed, the thrust of that decision has been to deny access to the federal courts to many

---

5. Fed. R. Civ. P. 23 (1966).

6. Significant changes in the composition of the supreme court have occurred since the July, 1976 order was issued. Since those changes, the court has not had the occasion to deal with these issues. The present court's position is unknown.

7. New Mexico also has a statutory representative action under N.M. Stat. Ann. § 21-6-1 (Repl. 1970), which states:

> When the question involved in a cause of action is one of common or general interest to many persons, or where the parties are numerous and it is impracticable to bring them all before the court one [1] or more may sue or defend for the benefit of the whole number of persons so interested in said cause of action.

The validity of this section is highly suspect. First, it represents a legislative infringement on the procedural rule-making powers of the judiciary. Second, it is unlikely that any court would entertain an action brought under this section in light of the Supreme Court's Order.

8. Note that an amicus curiae brief was filed in *Valley Utilities* by the Consumer Protection Division of the Office of the Attorney General for the State of New Mexico. *See also* Note, *The Products Liability Class Suit: Preventive Relief for the Consumer,* 27 S.C.L. Rev. 229 (1975); Biderman, *Consumer Class Action under the New Mexico Unfair Practices Act,* 4 N.M.L. Rev. 49 (1973); Rosenberg, *Class Action for Consumer Protection,* 7 Harv. Civ. Rights—Civ. Lib. L. Rev. 601 (1972).

9. *See, e.g.,* Comment, *Class Actions in Illinois: A Viable Alternative to Federal Rule 23?,* 8 J. Marshall J. Prac. & Proc. 113, 115 (1974) [hereinafter cited as 8 J. Marshall]; 12 Washburn, *supra* note 4; Kalven & Rosenfield, *The Contemporary Function of the Class Suit,* 8 U. Chi. L. Rev. 684, 684-85 (1941) [hereinafter cited as Kalven].

10. Zahn v. International Paper Co., 414 U.S. 291 (1973). *See also* Snyder v. Harris, 394 U.S. 332, 341 (1969), where the court recognized that actions based on separate and distinct claims can "often be most appropriately tried in state courts."

class litigants in order to reduce the backlog in those courts in the expectation that the states would necessarily provide a forum.[11]

The most significant decision in this area was handed down by the Supreme Court of the United States in 1973, in the case of *Zahn v. International Paper Co.*[12] Before *Zahn*, it had long been the rule that named plaintiffs in a class suit involving separate and distinct claims must each meet the requisite amount in controversy for jurisdictional purposes (i.e., $10,000).[13] In *Snyder v. Harris*,[14] none of the named plaintiffs met that requirement. They argued that the nonaggregation restriction enforced since 1911 should be reconsidered in light of the rationale underlying the 1966 amendment to Rule 23. The Court rejected this argument, basing its decision on past interpretations of the jurisdictional amount section.

The *Zahn* case, however, presented a slightly different, but potentially more significant problem. There, the named plaintiffs, suing a single defendant in a nuisance action for polluting a lake in which they owned riparian rights, each met the $10,000 requirement. Some of the unnamed plaintiffs did not. The Court, relying on *Snyder*, held that all plaintiffs, named and unnamed, must individually meet the jurisdictional amount, or the case would not be heard as a class action.

The *Zahn* decision has thus effectively relegated many potential class actions to the state courts. Justice Brennan, in his dissenting opinion, noted the practical effect this would have in states like New Mexico which do not have class action procedures:

> [I]f the State does not provide [a class action procedure], litigation of the claims of class members who . . . lack the jurisdictional amount . . . will produce a multitude of suits. And the chief influence mitigating that flood—the fact that many of these landowners' claims are likely to be worthless because the cost of asserting them on a case-by-case basis will exceed their value—will do no judicial system credit.[15]

Unless New Mexico adopts a new, more viable class action procedure, Justice Brennan's prediction may unfortunately come true.

---

11. *See* Note, *Expanding the Impact of State Court Class Action Adjudication to Provide an Effective Forum for Consumers*, 18 U.C.L.A. L. Rev. 1002, 1007 (1971); 8 J. Marshall, *supra* note 9, at 113.

12. 414 U.S. 291 (1973).

13. 28 U.S.C. § 1332(a) (1970).

14. 394 U.S. 332 (1969). For a further discussion of these cases, *see* Horan, *Class Actions: Current Developments*, 18 Tr. L. Guide 430, 432 (1975).

15. 414 U.S. 291, 308 (1973) (dissenting opinion). For further criticism of this decision, see Comment, *Federal Procedure: The Class Action—A Social Weapon Disarmed*, 26 U. Fla. L. Rev. 642 (1974).

PROBLEMS UNDER THE FORMER RULE

Assuming that the supreme court does not contemplate a continuing proscription on class actions in New Mexico, it must determine what steps should be taken to modernize the class suit. To that end, preliminary discussion of the former New Mexico rule and the problems it presented follows.

Prior to the July, 1976 order, New Mexico used the 1938 version of Rule 23 of the Federal Rules of Civil Procedure.[16] That version classified actions according to the nature of the right involved. These actions came to be labeled "true," "hybrid" or "spurious."[17] Thus a right held jointly or commonly gave rise to a true class action; several rights in a specific property, to a hybrid action; and several rights involving common questions of law or fact seeking a common relief, to a spurious action.[18] There were requirements of numerosity and adequacy of representation as well.[19] Although the rule did not so state on its face, the members of the true class action were bound by a class judgment, members of a hybrid class only to the extent of the property involved, and members of a spurious class only as to those present before the court prior to judgment.[20] Notice

16. N.M. Stat. Ann. § 21-1-1(23) (Repl. 1970).

> (a) **Representation.** If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one [1] or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
>
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.
>
> * * *
>
> (c) **Dismissal or compromise.** A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraph (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

17. Although not a part of the rule on its face, these terms, favored by the progenitor of the rule, Professor Moore, have become synonymous with it. *See* Note, *Proposed Rule 23: Class Actions Reclassified,* 51 Va. L. Rev. 629, 630 (1965) [hereinafter cited as 51 Va. L. Rev.]; Keeffe, Levy & Donovon, *Lee Defeats Ben Hur,* 33 Cornell L.Q. 327, 330 (1948) [hereinafter cited as Keeffe]; Kalven, *supra* note 9 at 702-04.

18. 51 Va. L. Rev., *supra* note 17 at 631.

19. N.M. Stat. Ann. § 21-1-1(23)(a) (Repl. 1970).

20. 51 Va. L. Rev., *supra* note 17 at 632-33. *See also* Note, *Class Actions–Federal Rule 23 Amended,* 31 Albany L. Rev. 127, 128-29 (1967); Kalven, *supra* note 9 at 706-07.

of compromise or dismissal was required in the true class action, but it was left to the discretion of the court in hybrid and spurious actions.[21] The rule required no notice to class members of the instigation of the action.

Several key problems with the former rule are illustrated in the *Valley Utilities* case. There, five individual plaintiffs and the Adobe Acres Improvement Association brought suit on behalf of themselves and 475 residents of the Adobe Acres Subdivision in Albuquerque. The suit alleged that Valley, an independent supplier of water, had failed to supply them with water meeting minimal quality standards. The Bernalillo County District Court held that the 272 user-residents who were Association members constituted a true class, while the remaining nonmember-residents were a spurious class. At trial, the jury awarded damages in the amount of $1000 to each class member.

The court entered a final judgment for the 272 members of the true class, without requiring them to intervene or be notified of the judgment. In its discretion, the court held open the judgment for the spurious class members for a period of 60 days, and ordered that a notice be sent to them apprising them of the judgment and their right to intervene.

Valley appealed to the court of appeals, which held, at Valley's request, that the trial court should have designated *all* plaintiffs as a spurious class. The court remanded the case to the trial court with the requirement that nonparticipating Association members be directed to intervene in the same manner as nonmembers, if they desired to share in the judgment.

The supreme court agreed with the court of appeal's designation of the class as spurious, but denied the post-judgment intervention procedures permitted by the lower courts. The court concluded, "... [T]he only parties entitled to judgment in this action were those who entered the lawsuit prior to the verdict by the jury."[22]

The *Valley Utilities* courts experienced one of the classical difficulties associated with former Rule 23—"pigeon-holing" the class.[23] The plaintiffs and the district court labeled the action a combination of true and spurious. The court of appeals and supreme court held the action to be spurious only. The same problem has left other courts befuddled. For example, in *Deckert v. Independence Shares Corp.*,[24] the problem of classification was so significant that no two

21. N.M. Stat. Ann. § 21-1-1(23)(c) (Repl. 1970).
22. Valley Utilities, Inc. v. O'Hare, 89 N.M. 262, 264, 550 P.2d 274, 276 (1976).
23. 51 Va. L. Rev., *supra* note 17 at 633.
24. 27 F. Supp. 763 (D. E.D. Pa. 1939), *rev'd*, 108 F.2d 51 (3d Cir. 1939), *rev'd and*

consecutive courts could agree whether the class was hybrid, spurious, or for that matter, a proper class suit at all. The confusion stems from the jural relations classifications developed by Professor Moore, the labyrinthian quality of which is amusingly recounted in the following passage:

> That the courts themselves have been unable to differentiate clearly between the various classifications of class suits as outlined by Moore is well illustrated by the opinion of Judge Goodrich of the Third Circuit Court of Appeals in the case of Pentland v. Drago Corp., 152 F.2d 851 (C.C.A.3d 1945) . . . .
>
> Judge Goodrich starts off by stating, with apparent approval, the Judgments Restatement's illustration of what he terms a true class suit, namely, that of a taxpayer "who sues county tax assessors on behalf of himself and all other taxpayers alleging that his assessment is invalid because a wrong method of assessment was used." He then goes on to state that Moore gives an "explicit answer" as to when we have a "true" class action. Yet Moore, upon whom Judge Goodrich relies, places the taxpayer suit in the "spurious" category. . . . In other words, Moore and the Restatement disagree and Judge Goodrich seems to cite both with complete confidence.
>
> The result of such confusion is that neither parties nor their attorneys can determine in advance of a court decision in their case into which category their action is to be placed.[25]

This situation is no longer amusing, however, when one considers the enormous consequences which flow from the pigeon-holing exercise. The category into which a class member is placed is determinative of whether he is bound by an unfavorable judgment or may share in a favorable one, and whether he must intervene to do so. Indeed, the plaintiffs in *Valley Utilities* found themselves caught in this dilemna. On the assumption that Association members constituted a true class, represented by the Association, member-plaintiffs assumed that they would share in the favorable judgment without individually entering into the suit. To their dismay, when the appellate courts changed their classification to spurious, Association members who were not named and who had not intervened before the verdict were precluded from recovery even though they had clearly, on the evidence, been damaged by defendant Valley.[26] This result seems unduly harsh, based as it is on a change in classification at the post-judgment, appellate level, where the class litigant is effectively

remanded 311 U.S. 282 (1940), 39 F. Supp. 592 (D. E.D. Pa. 1941), *rev'd and remanded* 123 F.2d 979 (3d Cir. 1941).

25. Keeffe, *supra* note 17 at 335, n. 22.

26. 89 N.M. 262, 550 P.2d 274.

precluded from fulfilling a new set of procedural requirements laid down by the court.

Once it was finally determined that all plaintiffs were members of a spurious class, the supreme court addressed the issue which was dispositive in this action—that point in the litigation at which spurious class members must intervene in order to share in the judgment. This question arose, as noted above,[27] because of the lower courts' decisions to hold the final judgment open for post-verdict intervention. The supreme court disapproved of this procedure, stating: "However, we will not in the name of 'efficiency' approve of a procedure which invites nonparticipating parties to share in the spoils of a judgment obtained by others even though those absent parties will not be bound by the judgment if they decide to bring another action rather than intervene."[28] The court was clearly persuaded that notions of fairness require the class member to agree to be bound while the outcome of the litigation is still up in the air.

Other courts have reached the opposite result based on the rationale that to do otherwise would emasculate spurious class actions.[29] One of the primary reasons for the use of the class action form is to relieve the plaintiff, defendant and courts from the burden of litigating a potentially endless stream of claims arising from identical facts, and instead permit all claims to be disposed of in one action. To this end, it is in everyone's best interest that as many parties as possible, within the limits of due process, be bound by the judgment. Denial of the right of post-verdict intervention does not comport with the thrust of this policy. As the court of appeals in *Valley Utilities* succinctly put it:

> [W]e do not understand why the defendant would want the result otherwise. If we were to deny the absent members' right to intervene, the defendant would be faced with separate suits by each of them, with the result foreordained.[30]

However, this desirable binding effect cannot be mutual under former Rule 23 as the supreme court would have it, because the lack of notice provisions in the rule deprive a class member of due process if the result is unfavorable.

The opting-in requirement of former Rule 23, as interpreted by the court in *Valley Utilities,* would seem to inhibit the representative

27. *See* text accompanying notes 21 & 22 *supra.*

28. 89 N.M. at 264, 550 P.2d at 276.

29. *See* Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1962), *cert. dismissed* 371 U.S. 801 (1963); York v. Guaranty Trust Co., 143 F.2d 503 (2nd Cir. 1944). *See also* 51 Va. L. Rev., *supra* note 17 at 649; Kalven, *supra* note 9 at 695, 699-701.

30. O'Hare v. Valley Utilities, Inc., 89 N.M. 105, 111, 547 P.2d 1147, 1153 (1976).

character of the spurious class action more than is functionally necessary. The court's requirement that class members take affirmative steps to intervene at the inception of the action was based on notions of "fairness,"[31] and goes further than due process would mandate. As the court was well aware, this makes the spurious class action little more than a device for permissive joinder,[32] already available under Rule 20.[33] The inconsistency embodied in this view was aptly illustrated in the following passage:

> But if other members of the class must become parties of record before the trial, the rule is reduced to saying that, where it is impracticable to bring all parties before the Court they must nevertheless be brought before the Court.[34]

In addition, the opt-in requirement forces class members who do not receive notice, fail to understand its full import, or neglect to file timely intervention to bring numerous later actions, in which the defendant will be estopped from denying liability.[35] The "foreordained result" of this procedure has been stated thus:

> The District Court has just decided that the Defendant is liable to those in these same legal positions as the Plaintiffs. The Defendant in resisting participation must contend not that he is not liable to the others, but that each must harass him with a separate suit, and ultimately, that justice has been made too quick, too convenient, too exact and too complete.[36]

The foregoing discussion of the problems encountered by the courts in applying former Rule 23, coupled with the restrictions on class access to federal courts, demonstrate the need for an effective class action rule. The majority of jurisdictions have addressed this problem by adopting the 1966 amendment to Rule 23 of the Federal Rules of Civil Procedure,[37] which was drafted in response to several

---

31. Valley Utilities, Inc. v. O'Hare, 89 N.M. 262, 264, 550 P.2d 274, 276 (1976).
32. *Id.*
33. N.M. Stat. Ann. § 21-1-1(20) (Repl. 1970).
34. Kalven, *supra* note 9 at 699.
35. *See* Union Carbide & Carbon Corp v. Nisley, 300 F.2d 561, 589 (10th Cir. 1962), *cert. dismissed,* 371 U.S. 801 (1963).
36. Kalven, *supra* note 9 at 701.
37. Fed. R. Civ. P. 23:

> (a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

of these problems. However, as Professor Kaplan, Reporter of the 1966 Rules Committee, observed: "[W]e must await the experience of 25 years at least before we can know all the good and ill stored in

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) **Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

(1) 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. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

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

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) **Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the

the promise of the new Rule."[38] As New Mexico now prepares to select its rule, ten of Professor Kaplan's 25 years have passed, making available to our state the first wave of praise and criticism by the courts and commentators. While it is not within the scope of this Comment to discuss in any detail these criticisms, they will be noted in discussion of the changes the new rule has brought.[39]

THE 1966 REVISED RULE 23

The 1966 amendment presents several innovations in class action procedure. Moore's jural relations classifications were abandoned in favor of classifications which turn on the practical effect that a class adjudication will have on representatives, absentees and opposing parties.[40] It specifies the binding effects of a class judgment;[41] in doing so, it provides that members of what was formerly a spurious class are bound, unless they affirmatively choose *not* to be.[42] By specifying notice requirements, it incorporates both the demands of due process and notions of fairness. Finally, the new rule places great reliance on the discretion of the trial judge throughout the class action proceeding, providing him with detailed guidelines.

---

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 of 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.

(e) **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.

38. Conversation between Judge Frankel and Professor Kaplan, *quoted in* Frankel, *Amended Rule 23 from a Judge's View*, 32 ABA Antitrust L.J. 295, 302 (1966) [hereinafter cited as Frankel].

39. Some amendments and clarifications of the new rule, in light of the insights gained from Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), are suggested in a recent article, Jacobs & Cherkasky, *The Effects of Eisen IV and Proposed Amendments of Federal Rule 23*, 12 U. S.D. L. Rev. 1, 31-38 (1974). For other suggested changes, *see* Reno, *supra* note 4 at 511-15; Note, *Amending Rule 23 in Response to Eisen v. Carlisle & Jacquelin*, 53 N.C. L. Rev. 409 (1974).

40. *See* 51 Va. L. Rev., *supra* note 16 at 642.

41. Fed. R. Civ. P. 23(c)(2).

42. *Id.*

The *Valley Utilities* case demonstrates the difficulties courts face in pigeon-holing class litigants in accordance with whether their rights are joint, common or several. As noted above, the singular yet highly significant consequence of this classification is to determine who will be bound by the judgment and the procedures to be followed, without regard to the necessity or equity of doing so in a particular situation. The new rule avoids this anomoly by focusing on the effect that a class determination would have on all parties, i.e., deciding who, in equity, *ought* to be bound. The drafters of the 1966 amendment singled out three situations in which treatment as a class seemed most appropriate.[43] Thus, where an opposing party is faced with numerous claims the outcome of which might direct him to pursue conflicting courses of action with the various parties, the drafters felt this ambiguity could be disposed of by adjudicating the claims in one suit which binds all persons who fit within the description of the class.

In subsection (b)(3) of the new rule, use of the class action procedure is allowed in situations other than those detailed, where there is a common question of law or fact, in the name of convenience and economy. This is permitted, in contrast to the former rule, only where the court in its discretion determines that the rights of absent parties are adequately safeguarded. To that end, the rule directs the court to determine that a class action is superior to other available methods, and that the common questions predominate over individual differences.[44] Viewing the facts of the *Valley Utilities* case from this effect-oriented approach, it seems clear that all 475 plaintiffs shared a common question of fact—Valley's liability for supplying substandard water—and thus would have been classified a (b)(3) action under the new rule.[45]

The new rule obviates the necessity for the protracted discussion of one-way intervention carried on by the *Valley Utilities* courts. Because the former rule required class members to opt-in, it was obviously necessary to determine when they must do so. Since the new rule binds a class member unless he "opts-out," questions of intervention and its timing become irrelevant. While at first blush it

43. Fed. R. Civ. P. 23(b)(1)(A)(B), (b)(2).

44. Fed. R. Civ. P. 23(b)(3).

45. The Valley Utilities plaintiffs sought only compensatory damages. It was abundantly clear at the outset of the litigation that a damage verdict for class plaintiffs could have no practical effect on the rights or interests of non-class water consumers with respect to Valley Utilities, Inc. ((b)(1)(B) action). Valley Utilities, Inc. could not be subjected to inconsistent judgments with respect to the various members of the class, since any remedy flowing from the facts would not conflict with an award of damages ((b)(1)(A) action). Finally a b(2) action is inapposite since plaintiffs did not request injunctive or declatory relief.

might seem unusual to bind parties who have not taken affirmative steps to enter the suit, the procedure reflects a realistic view of the average class member:

> The reasoning . . . relates to the fundamental conception . . . of classes comprised of little people, who don't normally have much dealing with lawyers or with legal formalities. . . . As [the Advisory Committee] saw it, the likelihood is that this guy will routinely ignore, or at least fail to respond to, the notices contemplated under (c)(2). On that premise, the vote went the way we see, to the effect that a non-response means inclusion rather than exclusion.[46]

This view has been criticized by others:

> Failure to opt-out cannot be interpreted as interest in the class action. This is shown by the fact that in settled cases, where members of the class get an automatic recovery by responding, most of those who do not opt-out do not bother to file claims. The result, therefore, is not the consolidation of many viable claims in a single simplified lawsuit, but rather the generation of claims for people who have no interest in pursuing them.[47]

By choosing to recognize the former rationale, the new rule better effectuates one of the underlying premises of class actions–avoiding multiplicity of litigation. Obviously, the more inclusive the class, the better this result will be reached.

Due process requires timely notice to absent members of a (b)(3) class and as a natural corollary to the opt-out provision of (c)(2).[48] That mandate is met in (c)(2), which states in relevant part:

> (c) * * *
>
> (2) In any class action maintained under subdivision (b)(3), the Court *shall* direct to the members of the class the best notice practicable, including individual notice to all members who can be identified through reasonable effort. (Emphasis added)[49]

46. Frankel, *supra* note 36 at 299. *See also* Berland v. Mack, 48 F.R.D. 121, 129 (D. S.D. N.Y. 1969).

47. Simon, *Class Actions–Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 377-78 (1972).

48. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). Although subsection (c)(2) requires notice only in (b)(3) actions on its face, some courts faced with the question of notice in (b)(1) and (b)(2) actions have held this to be a due process requirement. *See* Schrader v. Selective Serv. Sys., 470 F.2d 73 (7th Cir.), *cert. denied*, 409 U.S. 1085 (1972); Ostapowicz v. Johnson Bronze Co., 54 F.R.D. 465 (D. W.D. Pa. 1972); Katz v. Carte Blanche Corp., 53 F.R.D. 539 (D. W.D. Pa. 1971); Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2nd Cir. 1968).

It has been suggested that the opt-in procedure of the former rule, combined with adequate notice, might be acceptable in (b)(1) and (b)(2) actions. *See* Labowitz, *Class Actions in the Federal System and in California: Shattering the Impossible Dream*, 23 Buffalo L. Rev. 601, 649 (1974).

49. Fed. R. Civ. P. 23(c)(2).

In addition, notice may be required in the discretion of the trial court in the other actions under subsection (b) of the rule.[50]

The former rule expressly gave the court discretion only with regard to compromise or dismissal of the suit.[51] In other areas, the court became little more than a "judicial umpire with most of the initiative left in the hands of the litigants."[52] The new rule, which stresses the effect of a class judgment on the parties, allows for procedures to be tailored to the needs of the individual case. To accomplish this, the trial judge is afforded a much wider discretion throughout the proceedings. He may determine the scope of the issues to be tried as a class,[53] whether subclasses will be appropriate,[54] and frame any order he deems necessary to insure effective management of the action.[55] In addition, he is specifically directed to exercise that discretion to determine whether a class action should be maintained,[56] particularly with regard to (b)(3) actions.

The increase in judicial discretion allowed in class actions has received mixed review. Mr. Justice Black dissented to the adoption of the 1966 version precisely because it allowed such wide discretion:

> I particularly think that every member of the Court should examine with great care the amendments relating to class suits. It seems to me that they place too much power in the hands of the trial judges and that the rules might almost as well simply provide that 'class suits can be maintained either for or against particular groups whenever in the discretion of a judge he thinks it is wise.' The power given to the judge to dismiss such suits or to divide them up into groups at will subjects members of classes to dangers that could not follow from carefully prescribed legal standards enacted to control class suits.
>
> In addition, the rules as amended, in my judgment, greatly aggravate the evil of vesting judges with practically uncontrolled power to dismiss with prejudice cases brought by plaintiffs or defenses interposed by defendants. The power to dismiss a plaintiff's case or to render judgments by default against defendants can work great harm to both parties. There are many inherent urges in existence which may subconsciously incline a judge towards disposing of the cases before him without having to go through the burden of a trial.[57]

But a noted scholar, Professor Homburger, has championed this step

50. Fed. R. Civ. P. 23(d)(2).
51. N.M. Stat. Ann. § 21-1-1(23)(c) (Repl. 1970).
52. 51 Va. L. Rev., *supra* note 17 at 650.
53. Fed. R. Civ. P. 23(c)(4)(A).
54. Fed. R. Civ. P. 23(c)(4)(B).
55. Fed. R. Civ. P. 23(d).
56. Fed. R. Civ. P. 23(c)(1).
57. Statement of Mr. Justice Black, 39 F.R.D. 272, 274 (1966).

as quite necessary in light of the complexities the court must face in these suits:

> The management of class actions requires a strong and active court which does not content itself with passing on the propriety of the maintenance of the class action, but is willing to share responsibility with the parties in developing the case. Class actions require a new approach to the functions of the courts and parties, reminiscent of the civil law approach where the judge often participates in the proceedings, guiding and assisting the parties, even at the risk of overinvolvement. In short, the success of the class action may well depend on the willingness and the capability of the court to work with the parties in planning and organizing the trial in the interest of the efficient and fair adjudication of the litigation. The principle of adequacy of representation by the representative parties must be complemented by the principle of adequacy of judicial management in order to justify dispensing with those fundamental rules that guarantee to each party his day in court. . . .[58]

CONCLUSION

If the New Mexico Supreme Court's order of July, 1976 reflects a general antagonism toward the continuing utility of the class action procedure, the small litigant whose claim would not justify the expense of an individual suit would no longer have a realistic hope of recovery. Under these circumstances, such plaintiffs, in particular the consumer, can be cheated with impugnity. If, on the other hand, the order reflects a commitment to revitalize the class action procedure, it should be viewed as a necessary and timely step in the process of judicial reformation. The 1966 amendment represents a substantial improvement over the former rule. Nevertheless, certain aspects of the new rule have already received criticism, and other problems will doubtless emerge in the remaining fifteen of Professor Kaplan's 25 years.

The Supreme Court of New Mexico has constituted an advisory committee on the Rules of Civil Procedure for our state.[59] When this committee focuses upon class action procedures,[60] the 1966 version's emphasis on classification by effect and the provision of adequate notice should be retained. In line with recent federal decisions, the committee might well consider including explicit notice

58. Homburger, *State Class Actions and the Federal Rule,* 71 Colum. L. Rev. 609, 657-58 (1971).

59. Committee on the Rules of Civil Procedure and Rules of Appellate Procedure for Civil Actions, Supreme Court of the State of New Mexico.

60. Action should be taken quickly. The statutes of limitations are running while the committee works, once again creating a potential forum denial.

requirements for all class actions. The committee should further consider whether New Mexico ought to follow the lead of other jurisdictions in regard to the controversial issues of opt-in versus opt-out notice and the extent of judicial discretion. Finally, no matter what specific provisions are chosen, they should reflect a recognition that New Mexico's courts remain a viable forum for the litigants whose claims are too small individually to allow economical use of the courts.

JANET R. BRAZIEL & EDDIE CASTORIA