California Law Review

Volume 66 | Issue 1 Article 5

January 1978

Allocation of Identification Costs in Class Actions

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CASE NOTES

Allocation of Identification Costs in Class Actions

In *Sanders v. Levy*[1] the Second Circuit held that class action plaintiffs are not required to pay for computer programming needed to prepare a list of names and addresses of class members to be used in meeting the requirement of individual notice established by the Supreme Court in *Eisen v. Carlisle & Jacquelin*.[2] Allocation of the cost was held to be governed by the flexible provisions of the rules of discovery rather than by the notice provision of rule 23(c)(2) of the Federal Rules of Civil Procedure,[3] which, as interpreted in *Eisen*, would have required that the plaintiffs pay.[4] Under rule 34, the district court can, in its discretion, require the defendant to devise a computer program at its own expense in order to derive the names and addresses of the class members and assemble them into a list.[5]

The court's decision to treat the costs of preparing the member list as a problem of discovery accords with the current interpretation of the scope of rule 26. Equally important, it is consistent with the essential premises of *Eisen's* own rule against cost shifting. The legislative history of rule 34 supports the court's choice of that rule to govern the allocation of costs. The court's articulated standard for the allocation of costs under rule 26(c), however, appears to be mistaken in tone and rationale. Elaboration of a standard more in accord with the policies of rule 34 itself suggests that the allocation of costs approved in *Sanders* tested the limits of the lower court's discretion.

1. 558 F.2d 636 (2d Cir. 1976), *cert. granted sub nom.* Oppenheimer Fund, Inc. v. Sanders, 46 U.S.L.W. 3284 (U.S. Oct. 31, 1977).

2. 417 U.S. 156 (1974). *Eisen* requires class action plaintiffs to pay the cost of the individual notice to class members required by rule 23(c)(2) of the Federal Rules of Civil Procedure. *Id.* at 177-79.

3. FED. R. CIV. P. 23(c)(2) provides in pertinent part: "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."

4. 417 U.S. at 178-79.

5. 558 F.2d 636, 649.

I
CASE AND DECISION

Plaintiffs brought suit against Oppenheimer Fund, Inc., an "open-end" investment fund,[6] Oppenheimer Management Corporation, the Fund's investment advisor, and individual directors of the Fund. The complaint alleged that defendants had overvalued certain "restricted" securities[7] purchased by the Fund, thereby inflating both the price of shares purchased by plaintiffs and the size of the fee paid to Oppenheimer Management. The fee was based on the net asset value of the Fund's portfolio. The defendants had failed to state in Fund prospectuses that restricted securities had been purchased and to disclose the risks inherent in such investments. The plaintiffs contended that these acts violated federal securities laws.[8] The proposed class, numbering approximately 121,000, consisted of all purchasers of shares in the Fund during the period from March 15, 1968 to April 24, 1970.[9] Of these, about 103,000 were still shareholders at the time of the suit. The remaining 18,000 had disposed of their shares. No source existed from which the identity of the class members could be inexpensively determined. This data was available, however, on computer tapes held by the defendant's transfer agent. The estimated cost of reprogramming the transfer agent's computer to compile a complete class list was approximately $16,000.[10] Plaintiffs therefore proposed that the class be modified to exclude those purchasers who were no longer shareholders in the Fund.[11] If the modification were allowed, notice could be inserted into the Fund's regular shareholder mailing,[12] eliminating the substantial costs of identification and minimizing those of notice.

Defendants objected to the plaintiffs' proposal on two grounds. First, the proposed reduction would arbitrarily exclude some 18,000 persons from the class, limiting the res judicata effect of any judgment for defendants.

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6. An "open-end" fund is defined as a "management company which is offering for sale or has outstanding any redeemable security of which it is the issuer." Investment Co. Act of 1940 § 5(a)(1), 15 U.S.C. § 80a-5(a)(1) (1970).

7. A restricted security is one obtained "directly or indirectly from an issuer . . . in a transaction or chain of transactions not involving any public offering." SEC Securities Act Release No. 5223 (Jan. 11, 1972).

8. Sanders v. Levy, 20 FED. RULES SERV. 2d 1218, 1219 (S.D.N.Y. 1975). The statutes invoked by the plaintiffs were sections 10 and 11 of the Securities Act of 1933, 15 U.S.C. §§ 77j & 77k (1970) (regulating disclosure in prospectus and registration statements), and section 9(a)(4) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i(a)(4) (1970) (forbidding manipulation of security prices).

9. 558 F.2d at 638, 641.

10. *Id.* at 638.

11. *Id.* at 641.

12. Inclusion of notice in regular mailings by defendants to class members (*e.g.*, shareholders), when done at plaintiff's expense, is a method of reducing notice costs that is not foreclosed by *Eisen*. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1009 n.5 (2d Cir. 1973) (*Eisen III*); Popkin v. Wheelabrator-Frye, 20 FED. RULES SERV. 2d 125, 128 (S.D.N.Y. 1975).

Second, any notice included in regular mailings would also reach some 70,000 present shareholders not members of the class, thus creating a potential adverse effect on the Fund's business relations.[13]

The district court found that the class as originally proposed satisfied the requirements for certification under rule 23. The court rejected the plaintiffs' proposed modification of the class, and ordered that notice be given to all class members by a separate mailing at plaintiffs' expense. The court ruled, however, that the cost of identifying class members was "the responsibility of defendants."[14] The court justified this allocation on the grounds that the expense was "relatively modest" and that defendants had sought the class definition that required the notice costs.[15] The opinion made no reference to the discovery rules.

The original panel of the court of appeals reversed, finding that the costs of identification were costs of notice within the meaning of *Eisen*,[16] and hence the responsibility of plaintiffs. The court stated that "the cost of obtaining the name and address to be affixed to the envelope does not differ in kind from the cost of printing the notice and of procuring, stuffing, and posting the envelopes."[17] On rehearing *en banc*, however, the Second Circuit affirmed the district court.

The court found that although identification and listing of class members was a prerequisite to the sending of the required individual notice, allocation of the cost of identification was not governed by *Eisen*. The effort to shift the cost of notice in *Eisen*, Judge Hays argued, had failed because rule 23 provided no authority for such an allocation.[18] In contrast, the rules of discovery gave the district court in *Sanders* clear authority to order that

13. 558 F.2d at 641.

14. Sanders v. Levy, 20 FED. RULES SERV. 2d 1218, 1221 (S.D.N.Y. 1975).

15. *Id.*

16. 558 F.2d 636, 638-42. The panel rejected plaintiffs' argument that the case fell within an exception to the *Eisen* rule, because a possible fiduciary relationship existed between the Fund and its shareholders. The *Eisen* Court limited its holding on allocation of costs to situations "where, as here, the relationship between the parties is truly adversary." 417 U.S. 156, 178-79. It expressed no opinion on the allocation of the cost of notice "where a fiduciary duty pre-existed between the plaintiff and defendant, as in a shareholder derivative suit." *Id.* at 178 & n.15, (1974); *see* Dolgow v. Anderson, 43 F.R.D. 472. 498-99 (E.D.N.Y. 1968). Lower courts have recognized this exception, but have been reluctant to shift costs under it. *See, e.g.*, Popkin v. Wheelabrator-Frye, 20 FED. RULES SERV. 2d 125, 128 (S.D.N.Y. 1975) (finding a fiduciary duty in an action under rule 23(b)(3) but refusing to shift notice costs to defendant); Madonick v. Denison Mines, 63 F.R.D. 657, 660 (S.D.N.Y. 1974) (finding no fiduciary duty).

Judge Palmieri was willing to assume that the Fund had a fiduciary duty to the plaintiffs. Since no damages were sought from the Fund, however, its interest in the litigation was too remote to permit allocation of notification costs. With regard to the other defendants, he continued, a showing that a fiduciary duty existed "would be insufficient in our opinion to warrant imposition of notification costs on them on the facts of this case." 558 F.2d at 640. No specific facts were cited in support of this conclusion. The *en banc* majority did not consider this issue.

17. Sanders v. Levy, 558 F.2d 636, 642 (2d Cir. 1976).

18. *Id.* at 648, *citing* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974).

the defendants bear identification costs. The court reasoned that because the issue of adequacy of notice might arise during the litigation, the needed information was "relevant to the subject matter" of the action and hence discoverable under Federal Rule of Civil Procedure 26.[19]

The court then found that the request was governed by rule 34(a)(1), rather than by the option to produce business records provided for in rule 33(c)[20] which, the defendants contended, would have allowed them to shift the cost of discovery to the respondents. Language added to rule 34 in 1970 specifically included "data compilations" among those documents that must be produced.[21] The majority inferred from this language that rule 34 was "specifically applicable" to computer discovery.[22] The rule's further requirement that data be in "reasonably usable" form, the court continued, showed that the procedure for presentation of raw data permitted by rule 33(c) was inapplicable.[23] Finally, the choice of rule 34 allowed courts to reallocate the costs of discovery under the broad discretionary powers granted by rule 26(c)[24] rather than the "rigid principle" of rule 33(c).[25]

The court held that the trial court's decision to allocate the cost of notice to plaintiffs under rules 34 and 26(c) was not an abuse of discretion. Since the list was one that the Fund "might reasonably have been expected to be required to make available for public examination or for use in the judicial process" it was "not unfair" to require the defendants to pay for discovery under rule 34.[26] Nor did rule 26(c) require reallocation of the cost to avoid undue burden and expense. Given the magnitude of defendant's business operations and the extensive computerization of the Fund's recordkeeping, the burden of producing the member list was "not excessive." Moreover, it was at defendants' insistence that the class had been defined so as to require the additional identification cost.[27] The decision was "without prejudice to a claim by the defendant fund for discretionary

19. *Id.*

20. Rule 33(c) provides as follows:

Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

FED. R. CIV. P. 33(c).

21. The added language expanded the definition of discoverable documents to include "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form." FED. R. CIV. P. 34(a)(1).

22. Sanders v. Levy, 558 F.2d 636, 649 (2d Cir. 1976).

23. *Id.* at 649.

24. FED. R. CIV. P. 26(c).

25. 558 F.2d at 650.

26. *Id.* at 649.

27. *Id.* at 650.

taxation of the cost of discovery against plaintiffs, should the plaintiffs ultimately lose."[28]

Judge Mulligan, who had voted with the panel majority, dissented on two grounds. First, he argued, "notification posits identification, which is an inseparable part of the process."[29] Since the two activities were not logically distinguishable under the *Eisen* rule, both should be treated as costs of notice, taxable to plaintiffs. Second, the dissenters objected to the allocation of costs under the discovery rules. The notion that the cost burden should be weighed against the size and character of the defendant's business operation was contrary to *Eisen*'s clearly expressed intention to avoid defendant financing of class litigation, and would itself lead to an "inflexible" rule, because in a class action "the deeper pocket is invariably in the trousers of the defendant."[30] Further, the taxing of costs unfairly penalized the defendants for opposing a class reduction that the trial court had found to be improper and arbitrary.[31]

II

ANALYSIS

A. *Identification as a Cost of Notice and a Cost of Discovery*

Whether identification of class members is properly treated as a problem of notice under rule 23 or as one governed by the rules of discovery is a question that has been considered only once prior to *Sanders*.[32] In *In re*

28. *Id.* at 651.
29. *Id.* at 652.
30. *Id.* at 654.
31. *Id.* at 654-55.
32. The *Eisen* court did not reach the question. The potentially substantial identification costs in that case were allocated by stipulation to defendant "in the first instance with ultimate costs to abide the event." Record at A185, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), *cited in* Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97, 109 (1975). In practice, defendants have sometimes been required to cooperate in the identification of the class members. "[E]ven though plaintiffs are required to bear the costs of notice, the courts have always required the defendants to cooperate with plaintiffs' counsel, particularly in requiring the defendants to prepare shareholder lists or customer lists which are in effect lists of class members." ILL. INST. FOR CONTINUING LEGAL EDUC., CLASS ACTIONS § 5.21 (1974).

As a standard practice plaintiffs are required to submit a proposed list of class members, while defendants are allowed the option of submitting a counterlist. Professional Adjusting Systems, Inc. v. General Adjustment Bureau, Inc., 64 F.R.D. 35, 41 (S.D.N.Y. 1974); B & B Inv. Club v. Kleinert's, Inc., 62 F.R.D. 140, 145-46 (E.D. Pa. 1974) (plaintiffs to submit a "proposal on how to identify the class members"); Weiss v. Tenney Corp., 47 F.R.D. 283, 294 (S.D.N.Y. 1969); Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673, 684 (N.D. Ind. 1966). The names of class members must often be obtained from the records of the defendant. *See* Tober v. Charnita, Inc., 58 F.R.D. 74, 86 (M.D. Pa. 1973); *In re* Cohen's.Will, 51 F.R.D. 167, 175 (S.D.N.Y. 1970); Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 318 n.19 (1973) and cases cited therein. Several courts have expressly ordered defendants to supply this type of information. *See In re* Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088, 1098 (5th Cir. 1977); Appleton Elec. Co. v. Advance-United Expressways, 494 F.2d 126, 132 (7th Cir. 1974); *In re* Franklin Nat'l. Bank Sec. Litigation, 73 F.R.D. 25, 29 (E.D.N.Y. 1976); Chevalier v. Baird Sav. Ass'n, 72 F.R.D. 140, 147-48 (E.D. Pa. 1976); Herbst v. I.T.T. Corp., 65 F.R.D. 13, 20 (D. Conn. 1973); Lamb v. United Security Life Co., 59 F.R.D.

Nissan Motor Corp. Antitrust Litigation,[33] the Fifth Circuit held that the discovery rules are not applicable. The court conceded that the principles developed under those rules might often be relevant to the allocation of costs. Reliance on the rules was deemed unnecessary, however, because rule 23(d) provides the district courts with sufficient authority to administer the notice requirement of rule 23(c)(2). Under the latter provision, a plaintiff is required to notify only those class members identifiable through reasonable effort. The *Nissan* court found that, in determining what effort is reasonable, a trial judge must consider the relative abilities of the parties to furnish identification. Those identification costs that are reasonable, the court argued, are part and parcel of the notification process under rule 23(c)(2). It declined, however, to decide whether *Eisen* requires plaintiffs to bear the sole responsibility of producing member lists in all cases.

As between the reasoning of *Nissan* and *Sanders*, the latter appears more consistent with the current view of the scope of discovery. Rule 26(b) provides that information is discoverable if it is "relevant to the subject matter involved in the pending action."[34] With the Supreme Court's encouragement,[35] the relevancy test has in recent years been broadly interpreted, and is not limited to the merits of the claim or defense of the discovering party, or to issues raised in the pleadings.[36] Privileged matters aside, it is now difficult to cite a request for information, vital to the prosecution of an action and available only to the adverse party, that has been held to be beyond the scope of discovery.[37]

25, 43 (S.D. Iowa 1972); Battle v. Municipal Hous. Auth., 53 F.R.D. 423, 426 (S.D.N.Y. 1971); Korn v. Franchard Corp., 50 F.R.D. 57 (S.D.N.Y. 1970), *rev'd on other grounds*, 456 F.2d 1206 (2d Cir. 1972); Berland v. Mack, 48 F.R.D. 121, 133 (S.D.N.Y. 1969); Contract Buyers League v. F & F Inv., 48 F.R.D. 7, 15 (N.D. Ill. 1969); Herbst v. Able, 47 F.R.D. 11, 17-18 (S.D.N.Y. 1969). In each of these cases the court directed defendants to furnish the list incident to a general order that notice be given. *But see In re* Sugar Indus. Antitrust Litigation, 73 F.R.D. 322, 360 (E.D. Pa. 1976), a post-*Eisen* decision that expressly placed on plaintiff's shoulders the responsibility of exerting reasonable effort, "at their own expense," to identify class members. The pre-*Eisen* cases are weaker precedent for the *Sanders* result, since the trial courts may well have ordered identification at defendant's expense as an ad hoc method of allocating "notice costs." *See* Berland v. Mack, 48 F.R.D. 121, 133 (S.D.N.Y. 1969).

A few cases suggest that the discovery was the mechanism used to obtain the information. *See* Tober v. Charnita, Inc., 58 F.R.D. 74, 86 (M.D. Pa. 1973); Guy v. Abdulla, 57 F.R.D. 14, 18 (D. Ohio 1972). *See also* Kinney Shoe Corp. v. Vorhes, No. 75-2242, slip op. at 2417 (9th Cir. Oct. 25, 1977), a class action brought under section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b) (Supp. V 1975). Because the action was not brought under rule 23, the court reversed an order directing individual notice, but only vacated an order that defendants furnish an employee list, in view of the trial court's "broad, discretionary power to control discovery."

33. 552 F.2d 1088, 1102 (5th Cir. 1977).

34. FED. R. CIV. P. 26(b)(1).

35. *See* Hickman v. Taylor, 329 U.S. 495, 507 (1947).

36. *See, e.g.*, Kaiser-Frazer Corp. v. Otis & Co., 11 F.R.D. 50, 53 (S.D.N.Y. 1951) (Weinfeld, J.); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2008, at 41 (1970) [hereinafter cited as 8 WRIGHT & MILLER].

37. "[I]t is not too strong to say that a request for discovery should be considered relevant if there is *any possibility* that the information sought may be relevant to the subject matter of the action. *Id.* at 478 n. 23.

The concept of relevance has expanded to include procedural and jurisdictional issues.[38] Thus, although no case squarely holds that class member lists to be used solely for notification are discoverable, such lists can be discovered when needed to determine whether the requirements for the maintenance of a class action specified in rule 23 have been satisfied.[39] For example, member lists have been used to make the required showing that the class is so numerous that joinder is impracticable.[40]

The rationale for member list discoverability relied on in *Sanders* is in accord with these decisions. *Eisen* itself, by requiring individual notice in a rule 23(b)(3) class action, raises as an issue in all such litigation whether the required notice has properly been sent. At the very least, the plaintiff must allege that adequate notice has been given, and if challenged by defendant, a showing of adequacy is required. The member list may well be relevant and admissible in evidence to resolve this issue. Allowing discovery of lists for purposes of notice is therefore appropriate.[41]

This conclusion effectively disposes of the argument, advanced by the panel majority, that the cost of meeting the request was a "cost of notice" that must be borne by plaintiffs.[42] In economic terms it is true that because the request for the list of purchasers would not have been made except for *Eisen*'s notice requirement, the cost of reprogramming is a cost of notice. But the rationale of *Eisen* does not require that all economic costs of notice be charged to plaintiff. The *Eisen* Court's holding that plaintiff must bear in the first instance the costs of preparation and mailing rested on the absence of authority for cost shifting under rule 23.[43] Lacking such authority, the

38. *See* Note, *The Use of Discovery to Obtain Jurisdictional Facts*, 59 VA. L. REV. 533 (1973).

39. *See* Annot., 24 A.L.R.FED. 872 (1975).

40. *Id.* at 880.

41. Discovery of member lists should also be possible under rule 26(b), which specifies as relevant "the identity and location of persons having knowledge of any discoverable matter." FED. R. CIV. P. 26(b)(1). The fact that defendants have obtained discovery from absent class members, Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972), implicitly confirms the soundness of this rationale. *See generally* Comment, *Party Discovery Techniques: A Threat to Underlying Federal Policies*, 68 NW. U. L. REV. 1063 (1974); Note, *Requests for Information in Class Actions*, 83 YALE L.J. 602 (1974).

The large number of persons involved in such a discovery request should not be an obstacle. *See* McKeon v. Highway Truck Driver & Helpers Local 107, 28 F.R.D. 592, 594 (D. Del. 1961) (list of more than 600 union stewards (not class members) procured on a "location of witnesses" rationale); *cf.* National Util. Serv., Inc. v. Northwestern Steel & Wire Co., 426 F.2d 222, 227 (7th Cir. 1970) (broad request to disclose all employees was denied in the absence of a showing "of any reasonable possibility that these individuals could provide material information").

The availability of alternate grounds for obtaining class member lists may often provide opportunities for evasion of a holding that such lists may not be obtained for purposes of notification.

42. Sanders v. Levy, 558 F.2d 636 at 642.

43. "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." 417 U.S. at 177. "In the absence of any support under Rule 23, petitioner's attempt to impose the cost of notice on respondents must fail." *Id.* at 178.

Court applied the principle, derived from rule 23, but generally valid throughout the American law of procedure, that absent some basis in legislation or judicial policy for shifting of costs, a party must ordinarily bear the full burden of preparing its own suit in the first instance.[44] That rule, in turn, rests upon both the common law policy of judicial economy, which generally disfavors piecemeal and potentially unjustified intervention to shift costs, and on the economic assumption that requiring a party to pay for the preparation of its own case will encourage efficient prosecution of the action and discourage nonmeritorious claims.

As the court noted in *Sanders*, the fact that class lists are "relevant" under rule 26(b) provides the lower courts with the formal authority to allocate costs that was found to be lacking in *Eisen*.[45] Moreover, the power of the court under the discovery rules to allocate costs of discovery to the responding party is fundamentally consistent with the *Eisen* decision's refusal to shift the cost of notice. When a party controls information that has been requested by an opponent, special knowledge of his own recordkeeping system may in many cases allow the responding party to perform the mechanical task of production more efficiently than the opponent.[46] Requiring this party to bear the cost in such instances encourages this efficient behavior, and avoids the cost of judicial intervention as well. Allowing the cost burden to remain on the responding party fosters both of *Eisen*'s underlying goals of judicial economy and efficient conduct of the litigation, despite the fact that it is technically a cost of preparing the moving party's case.[47]

B. Allocation of Identification Costs Under the Discovery Rules

The second set of problems faced by the court required it to choose the appropriate rule to govern the discovery of computer records, and to establish a standard for cost shifting under that rule. On the surface, the first question is a troubling one. Of all the discovery rules, only rule 34 addresses itself directly to computer recordkeeping. But it appears to focus on the production of finished products—documents already in existence and preprogrammed data. The extensive reprogramming required to produce a list of the Fund's shareholders appears much more closely analogous to the research in documents contemplated in rule 33(c). Closer study, however, suggests that the court's choice was correct. Both the drafters of the rule and

44. *Id.* at 178-79. Costs are generally taxed to the losing party only at the close of the litigation. FED. R. CIV. P. 54(d).

45. 558 F.2d at 648.

46. This principle is apparent in the structure of several discovery rules. See text accompanying notes 49-54 *infra*.

47. This initial allocation is further justified on the assumption that discovery costs of the responding party are not sharply disproportionate to those incurred by the opposition or to the financial resources of the respondent. When this assumption fails, the court has power to prevent "undue burden or expense." FED. R. CIV. P. 26(c).

the leading commentators clearly anticipated that the requests handled under it would include many requiring extensive planning and research. The Advisory Committee stated that to meet the requirement that data compilations be in "reasonably usable form" the respondent may be "required to use his [computer] devices."[48] A leading commentator has suggested that in many cases the discovering party will have "to engage in fairly sophisticated electronic manipulation and analysis of his computer system."[49] While both sources recognize that the cost of discovery will often be a problem, they evidence a clear intention that such problems be handled under rule 26(c).[50]

The majority's articulation of the standard for cost shifting under rule 34 and rule 26(c), however, appears to have been distorted by its strenuous attempt to demonstrate the inapplicability of rule 33 and that rule's policy that the responding party can shift the costs of data compilation when it can show that the discovering party is equally competent to conduct the inquiry.[51] As a formal matter, the court's determination that rule 34 governed was sufficient to free it from the express command of rule 33. But the court further argued that the lack of an express cost shifting provision under rule 34 demonstrated a rejection of the "rigid principle" of rule 33(c).[52] In its place, the court adopted a broad standard of fairness and reasonableness. Under that standard, a trial court can consider the foreseeability of the discovery request at issue, the size and degree of computerization of respondent's business, and whether the legal ruling that made the discovery necessary was both discretionary and in the respondent's favor.

The practical effect of the court's approach is striking. It appears that if a party using a manual recording system receives a request for a class list requiring a substantial expenditure of time and funds, the obligation can be fulfilled under rule 33(c) by making the relevant records available to the discovering party, provided only that the burden of that research is "substantially the same" for the discovering party. In contrast, a party who relies on computer recordkeeping can be required to research and pay for a broad range of equally burdensome requests without regard for the technical sophistication and resources of an opponent. Rejection of the policies of rule 33(c) as part of a standard for cost shifting under rule 26(c) is inconsistent with the history of both rules, since rule 33(c) itself codifies a court-made standard formulated under the direct predecessor of rule 26(c).[53] Equally important, this sharp distinction appears to be inconsistent with the express policies of rules 33 and 34—and of the discovery rules generally.

48. Advisory Comm. Note, 48 F.R.D. 487, 527 (1970).

49. 8 WRIGHT & MILLER, *supra* note 36, § 2218, at 659.

50. 48 F.R.D. at 527, 8 WRIGHT & MILLER, *supra* note 36, § 2218, at 659.

51. The choice of language is similar to that adopted by Judge Hays in his opinion. 558 F.2d at 649.

52. *Id.* at 650.

53. *See* 8 WRIGHT & MILLER, *supra* note 36, § 2178, at 569 & n.36.

Comparison of the two rules suggests that their cost allocation policies are very similar. It is helpful to begin a comparison with the former rule, where that policy is express. Rule 33 places the initial cost burden of answering each interrogatory on the responding party. Because of greater access to and familiarity with the needed information, the responding party presumably can produce that information more inexpensively than the opponent. Allocation of the cost to the responding party encourages the production of the information, and prevents less well-intentioned litigants from frustrating the discovering party with masses of confusing or irrelevant records.[54] If, however, the responding party can show that its presumptive advantage is small or nonexistent—in the rule's terminology, that the burden of production will be "substantially the same" for the opponent[55]—then the task may be shifted, and with it the cost of production.

Rule 34's computer discovery provision also requires the responding party to bear the task of production and the costs of discovery in the first instance. The Advisory Committee states that this obligation arises "when the data can as a practical matter be made usable by the discovering party *only through respondent's devices*."[56] This important limitation strongly suggests that the initial allocation of cost is primarily justified by the respondent's control of the computer and familiarity with its workings. The responding party's obligation ends when it has provided the information in a "reasonably usable" form.[57] This further limit suggests that another purpose of the rule is to protect less sophisticated discovering parties from confusion and expense in the handling of respondent's computer records, since what is "reasonably usable" in any particular instance will vary greatly in proportion to the technical and financial resources of the discovering party.[58] Even within the relatively narrow scope of this obligation, the cost of production will often be great, and cost shifting under rule 26(c) may often be necessary.[59] A fortiori, when the policies in favor of imposing

54. "A respondent may not impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records." Advisory Comm. Note, 48 F.R.D. 487, 524 (1970).

55. FED. R. CIV. P. 33(c).

56. Advisory Comm. Note, 48 F.R.D. 487, 527 (1970) (emphasis added). The implicit parallel to rule 33(c) has not passed unnoticed. *See* 8 WRIGHT & MILLER, *supra* note 36, § 2178, at 570 n.39.

57. FED. R. CIV. P. 34(a)(1).

58. It is accepted that if the discovering party has ready access to computer programming resources, he can request discovery in forms other than a printout. *See, e.g.*, Ewald, *Discovery and the Computer*, LITIGATION, Spring 1975, at 27, 28-29; 8 WRIGHT & MILLER, *supra* note 38, § 2218, at 658 n.88. Extension of this principle suggests that a court could appropriately require such a party to accept the burden of reprogramming, when he is equally well equipped to bear it.

59. *See* Advisory Comm. Note, 48 F.R.D. 487, 527 (1970). "As problems of this type arise, the courts will have to become increasingly sensitive to problems of expense and the utilization of an opponent's computer assets." 8 WRIGHT & MILLER, *supra* note 36, § 2218, at 659.

that obligation do not apply, substantial cost burdens should not be allowed to rest on the responding party. When a showing has been made that the respondent has no special advantage and that the propounding party is in an equally good position to assemble the needed data, the responding party ought then to be able to meet the imposed burden by producing the relevant raw data, or by providing access to the computer facilities where the data can be obtained. It is apparent that such a cost shifting standard, although derived from rule 34 itself, would closely parallel that of rule 33(c).

Given this analytic framework, it is far from clear that the allocation of costs approved in *Sanders* was within the trial court's discretion. Preparation of the lists would not have been undertaken by the defendant itself. Both the computer and the needed data were in the hands of the defendant's transfer agent, an independent third party. This situation does not appear to have been one where the respondent had substantially better knowledge of, or access to, the computer system. Moreover, the lists sought by the plaintiffs had not been previously compiled, and the expense of preparing them for printout was substantial. Had no other factors been present, application of rule 26(c) to shift the costs of production would therefore have been appropriate.

The court's arguments against reallocation have some merit. Judge Hays argued that defendant's size and the degree of computerization of the business, though not in themselves sufficient to justify allocation of costs, will in many instances be relevant to the determination of what constitutes "undue burden or expense" under rule 26(c).[60] The claim that the defendants should pay because the class was defined at their request is more difficult to assess. If the defendants were in fact entitled to the class definition that was ultimately adopted, then to tax the costs of discovery made necessary by that definition would be wholly inappropriate. The discovery rules must operate neutrally with respect to all such claims of entitlement, whether substantive or procedural. On the other hand, if the class definition was proper but discretionary, as Judge Hays contended,[61] then the court was surely entitled to take that factor into account in its allocation of costs.[62] Even if both factors were appropriately taken into account, a serious question remains whether, taken together, they can justify an allocation of costs otherwise without support in the policies of rule 34.[63]

60. *See, e.g.*, United States v. Imperial Chem. Indus., 8 F.R.D. 551, 553 (S.D.N.Y. 1949).

61. 558 F.2d at 651 & n.5. Class reductions have been permitted in order to coincide with defendant's computer records. *See* Dennis v. Saks & Co., 20 FED. RULES SERV. 2d 994, 999-1000 (S.D.N.Y. 1975). Whether such reductions are in the discretion of the trial court has not yet been determined.

62. The court's discretion to accomodate competing interests under rule 26(c) is exceptionally broad. *See* 8 WRIGHT & MILLER, *supra* note 36, § 2036, at 269 & n.33. Granting the court's discretion, however, one could still question whether the defendant would have freely valued the additional res judicata protection of the larger class definition at $16,000. *See* Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97 (1975).

63. The availability of a mechanism for taxation of costs, alluded to by the *Sanders*

C. *Impact on Class Actions*

It is difficult to predict the impact of the *Sanders* rule upon the volume and quality of class action litigation in the district courts. Because the published opinions do not indicate any clearly established prior practice, pro or con,[64] there is no initial baseline from which to project. Moreover, the frequency of cases in which identification costs are economically significant is unknown. Even if this information were available, the variety and tactical complexity of class action litigation would hamper generalized prediction.

Despite these empirical caveats, examination of the results that would follow from administration of discovery rules in the manner described above suggests that in most cases, outcomes under the *Sanders* rule will not differ greatly from those that follow from mechanical application of the *Eisen* rule. Where the defendant maintains manual records, he will usually be able to shift the cost of identification to the plaintiff under rule 33(c) by producing those records. Where the information is computerized and the defendant has it in preprogrammed form, rule 34(a)(1) will require him to produce it at his own expense. In most cases, however, the cost of printout should be modest, even for large classes. In the remainder of cases, where reprogramming at substantial expense will be required, more sensitive attention to the court's cost shifting power under rule 26(c)[65] can prevent unfairness to the defendant and minimize the impact of the identification process upon the economic calculus of class litigation.

CONCLUSION

The panel majority in *Sanders* thought that the allocation of identification costs raised an issue only under rule 23. The *en banc* majority recognized, however, that a request for a class list, unlike the preparation and mailing of *Eisen* notice, requires that information be provided by the opposing party. Their decision to treat the problem under the discovery rules was consistent with both the scope and the policy of those rules and with the ultimate rationale of *Eisen*. The majority's proposed allocation of costs under rule 34, however, reflects a misunderstanding of the policies behind

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majority, 558 F.2d at 651, does not improve the case for the standard adopted by the court. Some such mechanism is in theory available to all prevailing parties. The discovery rules are therefore presumably designed to operate independently of them. In the specific setting of *Sanders*, the offer of such a reassurance appears particularly unimpressive. The court mentions no evidence that the plaintiff class or their lawyers were capable of satisfying any later judgment for costs. In this context, it is worth noting that the substantial risk that defendants will be unable to recover costs on final jdugment is recognized as a reason for the granting of an interlocutory appeal in class actions where costs are in dispute. "An improper allocation of risk in this case would not have been repaired retrospectively . . . ." Samuel v. University of Pittsburgh, 506 F.2d 355, 359 (3d Cir. 1974).

64. *See* cases cited in notes 32 and 33 *supra*.

65. See text accompanying notes 56-59 *supra*.

that rule. When, as in *Sanders*, the computer data is in the hands of an independent agent, the justification for allocation of costs to the respondent is sharply diminished. Despite the presence of other facts in support of the allocation to the respondent, the *Sanders* result seems a questionable exercise of the district court's discretion. If, however, the *Sanders* approach is administered with greater sensitivity to the policies of rule 34, it probably will not disturb the current pattern of class action practice.

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