The Viability of Class Actions in Environmental Litigation

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The current debate over standing doctrines has focused attention on the procedural techniques available to assist environmentalists in obtaining judicial review of both public and private acts having environmentally degrading effects. This Comment analyzes the usefulness of class actions under rule 23 of the Federal Rules of Civil Procedure in accomplishing this task. After noting some abuses of this procedural device in early environmental actions, the author assesses its viability from the standpoint of both economic theory and practical litigation strategy. Examination of the results of recent environmental class actions indicates the pitfalls that environmental attorneys must avoid in order to maintain class suits successfully. The author concludes by advocating wider use of the class action in environmental suits because of its public policy attributes.

The last few years have witnessed a spectacular growth in environmental litigation in both state and federal courts. As used in this paper, the term "environmental litigation" includes both nuisance-type and public lawsuits which can be maintained by individual, organizational or class plaintiffs. "Nuisance," a catch-all word of ambiguous meaning, refers to interference with rights of enjoyment of land (private nuisance) as well as infringements on the rights of the community at large, which may include everything from the obstruction of a highway to a public gaming house or indecent exposure (public nuisance). In an environmental context, a typical nuisance action might involve a prayer for damages or injunctive relief on account of air pollution caused by industrial emissions.

The public action also involves a private plaintiff, but, more often than nuisance, an official defendant representing a government.

2. Id. at 572-73. A private action grounded on a theory of public nuisance will lie only if the plaintiff can demonstrate that he has suffered damage different in kind from the rest of the community. Id. at 586-91. See generally, Bryson & Macbeth, Public Nuisance, the Restatement (Second) of Torts and Environmental Law, 2 ECOLOGY L.Q. 241 (1972).
agency. Ordinarily the complainant will seek an injunction or declaratory judgment against allegedly illegal governmental activity. Sometimes the protested action will involve a continuing injury. Often, however, the plaintiff is trying to halt an undertaking which is unique and non-recurring—as in the fruitless effort to prevent the Amchitka Island underground nuclear test, \(^5\) or the suit to enjoin the construction of a highway through New York's scenic Hudson Valley.\(^6\) Such cases frequently present problems of conservation rather than control or prevention of pollution.\(^7\) Whatever the nature of the injury, however, the plaintiff is suing as a "private attorney general," as permitted under a relevant statute, to vindicate public concerns.\(^8\)

Although there is no dearth of recent nuisance actions,\(^9\) the greatest expansion in environmental litigation has taken place in the public interest field.\(^10\) The public suit owes much of its vitality to

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4. Nuisance actions may, of course, be brought against a public defendant, e.g., a sanitation department disposal plant or even a city or state. See, e.g., Illinois v. City of Milwaukee, 405 U.S. 91, 4 ERC 1001 (1972), upholding the existence of a federal common law applicable to interstate environmental nuisance. More frequently, however, such claims are brought against industrial concerns or individuals. Public suits, on the other hand, ordinarily lie against government officials and are usually based on statutory law. Yet actions brought by groups such as the Environmental Defense Fund (EDF), whether against private or official defendants, are "public" in the sense that they seek to vindicate social concerns rather than individual interests. Thus, the dichotomy set up in the text between nuisance and public actions is meant to be a generalization, not an inflexible rule.


7. See, e.g., Parker v. United States, 448 F.2d 793, 3 ERC 1134 (10th Cir. 1971), cert. denied, 405 U.S. 989 (1972) (Forest Service may not permit logging in areas being considered for wilderness designation); Buch v. Morton, 449 F.2d 600, 3 ERC 1258 (9th Cir. 1971) (California may not open public domain lands to entry or location under federal mining laws); New Windsor v. Ronan, 3 ERC 1023 (S.D.N.Y. 1971) (landowners, towns, and environmental associations failed to obtain injunction barring condemnation of 9000 acres for proposed airport site).

8. The private attorney general doctrine holds that Congress may, in protective legislation, designate a private citizen as a quasi-prosecutor to assert public rights. Associated Industries of New York v. Ickes, 134 F.2d 694, 704 (2d Cir.), vacated as moot, 320 U.S. 707 (1943).


10. E.g., Parker v. United States, 448 F.2d 793, 3 ERC 1134 (10th Cir. 1971), cert. denied, 405 U.S. 989 (1972) (suit under Wilderness Act of 1964 to invalidate logging contract); EDF v. EPA, 465 F.2d 528, 4 ERC 1526 (D.C. Cir. 1972) (action
the liberalized standing doctrine prevailing in the federal courts. At the present juncture, virtually any conservationist group\footnote{11} will have standing to sue if it holds "a concern that is within the field or zone which is involved in the litigation," is a "reputable group with the staying power and ability to present the issues with sufficient adversity to create a concrete issue for the Court,"\footnote{12} and can allege an environmental insult affecting one or more of its members.\footnote{13} Furthermore, the number of protective statutes in the environmental area has increased exponentially in the last decade. For example, at the federal level, one has only to point to such legislation as the National Environmental Policy Act of 1969,\footnote{14} the Clean Air Amendments of 1970\footnote{15} and various recent provisions of the Federal-Aid Highway Act.\footnote{16}

For lawyers wandering in the "wilderness" of environmental law,\footnote{17} these are indeed welcome trends. Professional protectors of nature have leaped out of the woods and into the courtroom, vying only with professional stockholders in their passionate intensity. In their

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    \item 12. Rheingold, A Primer on Environmental Litigation, 38 BROOKLYN L. REV. 113, 116-17 (1971).
    \item 13. Sierra Club v. Morton, 405 U.S. 727, 3 ERC 2039 (1972). In this 4-3 decision denying the Sierra Club standing to challenge a proposed wilderness area development [discussed in text accompanying notes 184-87 infra], the Supreme Court attempted to define the outer limits of federal standing requirements.
    \item 16. E.g., 23 U.S.C. § 128 (1970) (providing for public hearings prior to highway route selection to assess the "economic and social effects" of the location and "its impact on the environment"); id. § 138 (requiring special approval for roadways traversing public parks, recreation areas and wildlife and waterfowl refuges).
    \item 17. See generally Sive, Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law, 70 COLUM. L. REV. 612 (1970).
\end{itemize}
zeal to achieve significant results, such litigators have recently turned increasingly to the class action as well as the single-plaintiff lawsuit. In practice, class actions in the environmental area have not enjoyed notable success, yet more are being filed all the time. Recent class suits have ranged from relatively modest efforts as that of Delaware and several civic associations to enjoin the Army Corps of Engineers from filling in a portion of a navigable creek, to such baroque attempts as that of one individual, representing more than seven million city residents, to enjoin the activities of 293 polluting corporations and municipalities and recover damages as well! Blunderbuss actions of the latter type have prompted one concerned lawyer to remark: "There have already begun to develop environmental suits brought with an excess of passion and a deficiency of care and competence." The fact that immoderation inevitably breeds backlash has led two other commentators to warn that "environmental lawyers must take care that their claims do not inoculate the courts against all environmental class actions."

Unfortunately, these dire predictions are swiftly turning into fact. One recent case—a handbook of how not to conduct an environ-


22. Sive, in DICTA (Virginia Law Weekly), Apr. 30, 1971, at 1, col. 1. Sive is particularly fearful of the ill effects of excessive publicity-seeking in suits "brought by officeholders and office seekers whose objectives are simply the bold headline, and who do not have the means or the competence to carry the suit through." Id.

23. Lamm & Davison, supra note 19, at 69.

mental lawsuit—bears out the worst fears of the writers who forecast environmental backlash on the part of harried judges. Brought by the Heart Disease Research Foundation and two individual plaintiffs, on behalf of approximately 125 million residents of metropolitan areas of the United States, this action sought $375 trillion in air pollution damages from the four major American car manufacturers. Remarking that "tact compels me to turn quickly to the legal theories underpinning or said to underpin the three claims," Judge Tyler summarily dismissed the suit on the merits (or lack thereof). But his attitude toward the representative aspects of the suit is evidenced by the following comment:

It would be interesting to ruminate upon all the ironies and absurdities, intended or unintended, of this amended pleading prepared over the signature of a New York law firm. . . . Perhaps plaintiffs and their counsel have failed to realize that the damages sought are some 300 times more than the gross national product of the United States.

Because of the plaintiffs' failure to place realistic limits on the size of the class and the claim, this court may well have been permanently inoculated against all environmental class actions. If so, the judge is scarcely to blame.

The moral of this brief history is that litigators must employ the

25. Id.
26. Id. at 1711.
27. One wonders what this court would have made of the classes allegedly represented in three recently filed environmental suits, one attacking the use of DDT, the other two challenging air pollution. The first proposed a class of [all the people of the United States, not only of this generation, but of those generations yet unborn . . . who are entitled to the full benefit, use and enjoyment of the environment and natural resources of the several states and the United States without damage and degradation from the production, distribution and use [of DDT] . . . . Yannacone v. Montrose Chemical Co., Civ. No. 3761-69 (S.D.N.Y., filed Oct. 14, 1969), quoted in Lamm & Davison, supra note 19, at 63. In the second, the plaintiffs sought to represent . . . citizens and residents of Texas, New Mexico, and Mexico, who have suffered injury, damages, annoyance, and inconvenience from the alleged pollution of the air by the defendants, and those who have shown "a special interest" in protecting the public, their property, and the environment from damage by air pollution. Fischer v. American Smelting & Refining Co., No. 70-CIV-729 (S.D.N.Y., filed Feb. 24, 1970), quoted in Lamm & Davison, supra note 19, at 63. An amended complaint in the latter suit added new plaintiffs suing on behalf of present and future generations "entitled to the protection of their health and welfare and to the protection of their environment from damage . . . ." Id. at 63-64. The third class suit, filed on behalf of all the residents of Detroit and six other communities, requested damages of $250 million from 24 industry and government defendants for air pollution. 3 Env. Rptr.—CtR. Dev. 361 (1972). These complaints also suffer probably fatal defects in their lack of sufficient class definition and their obvious manageability problems.
class action device intelligently and not expect one useful procedural tool to carry more than its fair share of ecological freight. For class suits

are not a cornucopia of remedies for all social ills. . . . [T]he patent excesses of some of the "class actions" recently filed show that the limitations and dangers of Rule 23 of the Federal Rules of Civil Procedure are not widely understood.28

The class action should be viewed as only one weapon in the environmentalist's arsenal. The burden of proof as to the propriety of class allegations is, not surprisingly, laid on the proponent.29 This fact alone should convince the careful lawyer to choose the class action solely if, after conscious deliberation, it appears best suited to the case at hand.

Having highlighted the abuses of the environmental class action, this Comment will now outline its positive uses and realistic limitations. The discussion will focus almost exclusively on the class action in federal court under rule 23 of the Federal Rules of Civil Procedure. Part I deals with the economic theory justifying class actions, in certain instances, as cost-internalization devices. Part II examines from the litigator's point of view the practical problems posed by the requirements enumerated in rule 23 for the proper maintenance of a class action. These two sections illustrate the analytical distinctions that must be made between suits for injunctive relief (either nuisance or public) and suits for money damages. Finally, part III reappraises the utility of the class action in public lawsuits—this time from a reformer's standpoint. As will be seen, public policy considerations may justify resort to the environmental class action in some cases when strategic and tactical factors might tend to discourage its use.

I

AN ECONOMIC JUSTIFICATION OF THE CLASS ACTION

In economic terms, environmental class actions can serve a useful purpose by equalizing the respective bargaining positions of polluters and "pollutees" in nuisance cases.30 Consider the case of a paper mill that pollutes the surrounding air with noxious particles and fumes. If the harmful by-products of the manufacturing process

“carry no price tag, with the result that their cost . . . to society is not a factor in the private decisions leading to their existence, then they are known as externalities.”31 Such external diseconomies constitute a defect in the market pricing system, a misallocation of the factors of production. To state the matter simply, the economy is diverting too many resources into paper production because the manufacturer is not forced to take all of his costs into account. Since nothing is truly “free,” however, society absorbs the costs and pays the producer's bill. Thus, the problem is to make the polluter internalize all his costs so that the pricing mechanism once again functions properly in the allocation of productive factors. When all the costs have been internalized, any shift in resources will harm others more than it will benefit the polluter. The point of equilibrium is known as an “efficient solution.”32

In the perfect world of the model, optimization will occur regardless of who bears the cost of these external effects (or, in legal terms, no matter who is “liable”).33 The law could be structured to protect the rights of polluters, not pollutees. In such a state of affairs, citizens would have to offer the manufacturers enough money to convince them to forego their right to pollute.34 Conversely, the law might grant society the right to clean air. In that case the hypothetical class of producers would have to “bribe” the neighboring citizens to release their right to a pure environment. So long as everything has its price, and all prices are taken into account, the various interest groups can “bargain” their way to an optimal solution. Thus liability becomes a question solely of income distribution, not of basic efficiency.

In real life, the foregoing analysis founders somewhat because of the existence of “transaction costs,” which fall into two classes:35

32. This ideal solution is also called “Pareto optimality” after the Italian economist Vilfredo Pareto.
   Pareto optimality theory assumes one particular distribution of money income among all members of society and then postulates that only one allocation of commodities will be optimal given that income distribution.
   Id. at 385 n.11.
33. Michelman, supra note 30, at 654-55.
34. If a certain amount of pollution is a necessary by-product of production, then the “right to pollute” becomes equivalent to a right to manufacture—or at least to do so more cheaply than under enforced standards of purity.
35. One should also take note of the fact that, in the real world, rights are rarely 100 percent. A society might establish a norm of “80 percent clean air.” Within that standard, polluters would have a right to release contaminants without interference from the public. This is the basic approach of The Clean Air Amendments of 1970 [42 U.S.C. §§ 1857-571], which require the establishment of ambient air standards in each of the fifty states; however, common law nuisance actions may still be maintained.
The latter cost (or "freeloader" phenomenon) intrudes when the enforceable right inheres not in the group but in its adversary. In the paper mill example, were society to impose liability on victims who interfere with the producer's "right to pollute," rather than vice versa, a large class of pollutees would be forced to approach a single manufacturer and "buy" the right to cleaner air. Realistically, bargaining and consequent efficient allocation of resources would never take place in these circumstances. The rational victim simply would sit back and wait for someone else to make an offer, since, if this were done, he would then receive the benefit without cost. (In a sense this "freeloader" would be externalizing his expenses.) Therefore, placing "rights" in the manufacturer and "liabilities" on the pollutee would result in a maintenance of the status quo, an economically suboptimal solution.

This collective-good phenomenon can be eliminated by reversing the postulated state of rights and duties, and forcing the single polluter to bargain with members of the group. This is difficult to do, however, in the real world. Manufacturers, even where potentially liable under state or federal law, do not make prior offers to neighborhood victims. They simply proceed to pollute, thus forcing the "offerees" to enforce their rights as plaintiffs. But since the costs of a lawsuit—in terms of time, energy and out-of-pocket expenses—ordinarily outweigh the value of the individual's recovery, most potential plaintiffs will never go to court. To the extent that victims fail to sue, cost-externalization continues; the goal of efficient allocation recedes. At this juncture, the utility of the class action becomes clear. For, to some degree, the interpretation of class-action rules has substantive as well as procedural consequences. Substantive determinations result whenever

38. *Cost Internalization*, supra note 30, at 403-04. This phenomenon might not occur, however, in the following hypothetical situation: The polluter will not give up his right for less than $100 but no one victim is willing to pay more than $10. If there are ten potential plaintiffs, of whom nine are willing to contribute, the tenth man could not benefit freely by sitting on his hands.
39. In line with this analysis, the polluter is sometimes called the "best briber." Michelman, *supra* note 30, at 669, 672. Placing liability on the manufacturer not only obviates the collective-good problem but also places the conference costs on the party best able to bear them. See text accompanying notes 35-36 *supra*.
the denial of a class action forecloses the possibility of any relief for those with small claims. To the extent that class actions succeed in establishing enforceable group rights, internalization is aided because agreement on class demands is more easily secured than agreement on a class payment offer.  

In other words, class members will agree more readily on what they want to gain than on what they are willing to forego.

Naturally, court-awarded damages, or even out-of-court settlements, do not duplicate pure "bargaining" in a model world. Settlements more closely approximate the ideal since the parties themselves place values on the right to manufacture freely and the right to a clean environment. Yet after the defendant has engaged in a particular harmful course of conduct, the negotiators are basing their offers not so much on subjective price decisions as on their predictions of what a judge or jury will award. To this degree, even face-to-face transactions are constrained by non-market factors.

On initial consideration, a judgment for damages may seem totally unrelated to "market" phenomena since the judge or jury, rather than the actual parties, decides the amount. But in a broad sense, the opponents do roughly "agree." Assume that the plaintiff obtains the relief that he sought—he at least is satisfied. In the context of the paper mill hypothetical, there is no immediate way of ascertaining whether the defendant would have accepted this expense as a cost of conducting his business. Once damages have been awarded, the manufacturer has no choice but to pay. In the long run, however, the defendant may validate the court's decision by continuing to manufacture as before, thus internalizing his pollution costs by paying recurrent judgments. If he continues this course of conduct the defendant is conceding that the benefits of continued production outweigh the costs of "bribing" potential plaintiffs. If the manufacturer diverts some of his resources into pollution control equipment or goes out of business entirely—thus permitting his workers and capital to be used in some other endeavor—he is saying that the allocational balance inclines in the opposite direction. But since the whole purpose of bargaining is to determine "whether the gain from preventing the harm is greater than the loss which would be suffered elsewhere as a result

40. Cost Internalization, supra note 30, at 404.

41. See, e.g., East Haven v. Eastern Airlines, 331 F. Supp. 16, 2 ERC 1856 (D. Conn. 1971) (noise, fumes and vibrations from aircraft overflights); Ratzlaff v. Franz Foods, 250 Ark. 1003, 468 S.W.2d 239, 3 ERC 1124 (1971) (water pollution from neighboring plant); Schatz v. Abbott Laboratories, 51 Ill. 2d 143, 281 N.W.2d 323, 3 ERC 1989 (1972) (odors from neighboring factory); Reader Flying Service v. Crampton, 470 P.2d 281, 1 ERC 1423 (Wyo. 1970) (pesticide damage from crop spraying).
of stopping the action which produces the harm,"\textsuperscript{42} the lawsuit (as a substitute for direct dealing) compels a rough form of cost internalization and, where needed, a reallocation of productive factors. To the extent that the class action forces defendants to deal with plaintiffs' demands it aids the internalization process and renders it less haphazard.

It should be noted that all of the foregoing discussion applies exclusively to actions for damages. When a court enjoins the operation of a business,\textsuperscript{43} its decree "implies at least a tentative substitution of judicial for market judgment on the question of whether [certain] costs are worth bearing for the sake of associated production."\textsuperscript{44} This conclusion does not follow in cases where: (1) an equitable action leads to a negotiated settlement;\textsuperscript{45} (2) the court imposes a limited injunction proscribing only a particular manner of operation;\textsuperscript{46} or (3) the injunction is negotiable, \textit{i.e.}, conditioned on the parties' arriving at a settlement\textsuperscript{47} or the defendant's paying a set amount of damages.\textsuperscript{48} However, in the case of "pure" or total injunctions, where settlement is neither sought nor attained, the parties do not bargain initially or validate forced "agreements" through the subsequent course of their conduct. "[T]he comparative evaluation of an activity and its . . . costs, and the related decision about how far the activity

\textsuperscript{44} Michelman, \textit{supra} note 30, at 672-73. \textit{See also} Bryson \& Macbeth, \textit{Public Nuisance, the Restatement (Second) of Torts and Environmental Law}, 2 ECOLOGY L.Q. 241, 270-72 (1972).
\textsuperscript{45} Indeed the spectre of an injunction is more likely to cause a defendant to settle than the threat of damages. If the parties do bargain to an agreement, they have reached some approximation of the desired market solution.
\textsuperscript{46} \textit{See, e.g.}, Rayborn \textit{v.} Smiley, 253 So. 2d 664, 3 ERC 1396 (La. App. 1971). If after the issuance of such a limited injunction the defendant adapts his business to the court's terms, the foregoing damages analysis applies, since obedience to the mandate (\textit{e.g.,} installation of pollution control equipment) has become a cost of doing business. Equally, if the defendant chooses to go out of business, he is indicating that the benefit of staying open no longer outweighs its cost.
\textsuperscript{47} \textit{See, e.g.}, Fortin \textit{v.} Vitale, 15 Mich. App. 657, 167 N.W.2d 355 (1969). In that case the nuisance suit was remanded with directions to the parties to attempt to reach an equitable solution. When efforts to minimize odors from a compost used to grow mushrooms failed, a permanent injunction was reinstated. Fortin \textit{v.} Vitale, 28 Mich. App. 565, 184 N.W.2d 609, 2 ERC 1330 (1970).
\textsuperscript{48} \textit{See, e.g.}, Boomer \textit{v.} Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312, 1 ERC 1175 (1970) (payment of permanent damages to adjacent landowner ordered in lieu of injunction barring continued operation of cement plant). \textit{See also} Michelman, \textit{supra} note 30, at 669.
should be restricted or modified, are collectively made,” not left to the market.40

Substitution of judicial fiat for decentralized bargaining (or its substitute, the damages award) certainly undermines economic efficiency, at least to the degree that centralized decision making does not indicate “unusual certitude about how the economic balance tilts—so as to make the market test itself seem unnecessarily costly.”50 Rather, resort to nonmarket determinations is often to be explained by “societal insistence on injecting non-monetizable, non-transactionalizable factors—‘moral’ factors, in short—into the equation.”51 To be sure, these factors—“moral,” sentimental, aesthetic, or other—are sometimes more important than economic criteria. Although many reasons may justify weighing non-economic factors in resource allocation decisions, the question is whether a legislature is not better suited than a court to strike a proper balance among such competing considerations.

But whether or not an injunction constitutes an effective medium for moral judgments, it certainly fails in economic terms as a method of “pricing,” and hence, allocating resources. Therefore, the theoretical economic justifications for the class action in environmental litigation apply principally to nuisance-type damages actions and not to public or private injunctive lawsuits.52

49. Michelman, supra note 30, at 652. However, in a recent nuisance action brought by the developer of a new retirement community against a nearby cattle feed-lot operation, the Arizona Supreme Court granted the permanent injunction requested, but also ordered the prevailing party to pay the costs incurred by the defendant in either closing down or moving. Spur Industries, Inc. v. Del Webb Development Corp., 108 Ariz. 178, 494 P.2d 700, 4 ERC 1052 (1972). In balancing the equities, the court pointed out that the developer—who had been fully aware of the existence of the feed-lot—had taken advantage of lower rural land values and the availability of large tracts for the placement of the new town. In such a situation, the court felt it was not excessive to require that he indemnify the owners of the pre-existing, lawful business. Id. at 185, 494 P.2d at 708, 4 ERC at 1058. Carefully limiting its holding to like circumstances, the court remanded the case for assessment of the damages reasonably and directly caused by the granting of the permanent injunction. Id. If such an extension of traditional equity doctrines becomes accepted practice, then injunctive actions will more closely resemble in effect the “rough bargaining” discussed above with respect to damages actions.

50. Michelman, supra note 30, at 653.

51. Id. at 650.

52. Although, in view of the three exceptions noted above [text accompanying notes 45-48 supra], an argument can be made that even public or private injunctive actions can in many instances satisfy the economic criteria discussed. If the injunction is negotiable, or the very filing of the complaint leads to a negotiated settlement, some degree of actual bargaining occurs. If the court issues a limited injunction, one would be able to observe, as in a damages action, whether the defendant validates the judgment in the course of his future conduct.
THE USE OF THE CLASS ACTION: A PRACTITIONER'S APPROACH

A. Rule 23 of the Federal Rules of Civil Procedure

The class suit began as a loophole in English equity procedure. An evasion of the rule of compulsory joinder of all interested persons, the class action was used where joinder proved impracticable because of the number of potential parties, or impossible because of the court's jurisdictional limits.\(^{53}\) In the United States, rule 38 of the Equity Rules of 1912 simply permitted one or more "to sue or defend for the whole" when "the question [was] one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court . . . ."\(^{54}\) Original civil rule 23, promulgated in 1937, extended the class device to the unitary action, "whether formerly denominated legal or equitable."\(^{55}\)

Billed as a "substantial restatement of Equity Rule 38. . . . as that rule has been construed,"\(^{56}\) the civil rule nevertheless injected a new note of complexity into the class procedure. Cast in terms of jural relationships involving a complicated balance of rights and liabilities, original rule 23 distinguished three types of class actions: true, hybrid, and spurious. The "true" class action lay to enforce for or against the class a right "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."\(^{57}\) The "hybrid" action presupposed a "several" right, where "the object . . . is the adjudication of claims which do or may affect specific property involved in the action."\(^{58}\) Finally, in the so-called "spurious" action, the right is "several, and there is a common question of law or fact affecting the several rights and a common relief is sought."\(^{59}\)

Unfortunately, "in practice, the terms 'joint,' 'common,' etc., which were used as the basis of the rule 23 classification, proved obscure and uncertain."\(^{60}\) Therefore, when federal rule 23 was revised

\(^{53}\) 3B J. Moore, supra note 29, ¶ 23.02(1).
\(^{54}\) Id. ¶ 23.01[2], at 23-17, quoting Advisory Comm. on Rules for Civil Procedure, Report (1937).
\(^{55}\) Id.
\(^{56}\) Id.
\(^{58}\) Id.
\(^{59}\) Id.
in 1966 as part of a general change of the rules governing parties and joinder of claims, the framers sought to substitute pragmatic functional tests for the former rule's abstractions. Revised rule 23 retains the flavor of the old Equity Rule by providing in subdivision (a) that “[o]ne or more members of a class may sue or be sued as representative parties on behalf of all . . . if (1) the class is so numerous that joinder of all members is impracticable . . . .” As further prerequisites to the class action, rule 23(a) calls for a situation in which there are common questions of law or fact, the claims or defenses of the representative parties are typical of those of the class, and the named plaintiffs will fairly and adequately protect the interests of the class.

In addition to meeting all of these standards, the potential class

62. Revised rule is currently Fed. R. Civ. P. 23 [hereinafter cited as Rule 23]. Subdivisions (a) and (b) of rule 23 read as follows:
(a) Prequisites 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.
(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.

63. Rule 23(a). See note 62 supra.
64. Id.
action must qualify under one of the headings of rule 23(b), which encompass controversies where: (1) separate lawsuits might lead to differing results imposing inconsistent duties on the party opposing the class; (2) individual adjudications could substantially impair the interests of non-party class members; (3) the opposing party stands on grounds generally applicable to the entire class, making uniform injunctive or declaratory relief appropriate; or (4) common questions of law and fact predominate over individual issues, making the class action superior to other methods of adjudication.\textsuperscript{65} The criteria enumerated in the revised rule postulate three essential conditions. First, a "class" must exist. Second, conditions must be such as to make the class device useful and alternatives impracticable. Third, the interests of absent parties must be adequately represented.

The remaining provisions of the rule, subdivisions (c) to (e), set forth the mechanics of managing a class action. "As soon as practicable" after the commencement of a class suit, the court must issue an order determining whether or not it may be so maintained.\textsuperscript{66} Then, as a further requirement, in any (b)(3) class action,\textsuperscript{67} the court shall direct to the members of the class the \textit{best notice practicable under the circumstances}, including individual notice to all members who can be identified through reasonable effort.\textsuperscript{68} This notice shall inform each member of his right to be excluded from the class (and hence the binding effect of the judgment) if he so requests by a certain date\textsuperscript{69} and, alternatively, of his right to enter an appearance through counsel.\textsuperscript{70} By contrast, the judgment in an ac-

\textsuperscript{65} Rule 23(b). See note 62 \textit{supra}.

\textsuperscript{66} Rule 23(c)(1). The order may be conditional. However, if the order is final and its effect is to terminate the litigation, it may be immediately appealed. Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966); Green v. Wolf Corp., 406 F.2d 291 (6th Cir. 1968); Reader v. Magma-Superior, 108 Ariz. 186, 494 P.2d 708, 4 ERC 1033 (1972) (as is the case in many states, the Arizona class action rule is modeled after Federal Rule 23).

\textsuperscript{67} Subdivision (b)(3) applies to situations in which "class-action treatment is not as clearly called for as in [(b)(1) or (b)(2)], but . . . may nevertheless be convenient and desirable . . . ." Advisory Comm. Note, \textit{supra} note 60, at 102. Typical examples would be suits to recover damages arising out of securities frauds or antitrust violations affecting a large number of people. For a fuller discussion of (b)(3) actions, see text accompanying notes 102-10 \textit{infra}.


\textsuperscript{69} Judge Marvin Frankel likens this "opt-out" proviso to the "highly successful procedures of the Book-of-the-Month Club." Frankel, \textit{Some Preliminary Observations Concerning Civil Rule 23}, 43 F.R.D. 39, 44 (1968).

\textsuperscript{70} Rule 23(c)(2).
tion maintained under subdivision (b)(1) or (b)(2) shall "include
and describe all those whom the court finds to be members of the
class."71 In other words, no class member may opt out of a non-(b)(3)
class; res judicata concludes his rights regardless of his wishes or even his
awareness of the lawsuit's existence.

Various sections of the revised rule inject a flexibility into the class
procedure which the prior form notably lacked. Subdivision (c)(4)
permits an action to be maintained as a "class action with respect to
particular issues."72 In addition, "a class may be divided into sub-
classes and each subclass treated as a class" to avoid potential con-
flicts of interest.73 The court may also, in its discretion, issue protec-
tive or managerial orders requiring additional notice at any stage of the
proceedings, inviting intervention by absent members, imposing con-
ditions on the representative parties or "dealing with similar proce-
dural matters."74 Finally, rule 23 requires that a class action "not be
dismissed or compromised without the approval of the court, and
[that] notice of the proposed dismissal or compromise . . . be given to
all members of the class in such manner as the court directs."75

Revised rule 23 bears no exact correspondence to the rule which
it replaced. Judge Frankel has stated the relationship between the old
and new rules as follows:

In reshuffled and sharply defined forms, the first two of the new
subdivisions, (b)(1) and (b)(2), embrace the old "true" and "hy-
brid" and a still open-ended range of other forms. New subdivi-
sion (b)(3) bears many resemblances to the old "spurious" cate-
gory, but it effects vital changes . . . .76

In any event, the current rule is much better suited than its predeces-
sor to carrying out the three-fold purpose of the class action: taking
"care of the smaller guy" whose claim is less than the costs of enforcing
it;77 promoting procedural goals of economy of time, effort, expense,
and uniformity of result;78 and deterring anti-social conduct by those
who—absent the class device—might never be called to account.79

71. Rule 23(c)(3).
72. Rule 23(c)(4).
73. Id.
74. Rule 23(d).
75. Rule 23(e).
76. Frankel, supra note 69, at 43.
77. Statement of Prof. Benjamin Kaplan, Reporter of the revised rule, quoted in
Frankel, Amended Rule 23 From a Judge's Point of View, 32 ANTITRUST L.J. 295, 298
(1966); cf. Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U.
CHI. L. REV. 684 (1941), who refer to the person "who finds himself inadvertently
holding a small stake in a large controversy." Id. at 684.
78. Advisory Comm. Note, supra note 60, at 102-03; Kaplan, supra note 60, at
390.
79. Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 BUFF-
These three public policy aims of the modern class suit may be summed up as justice, efficiency, and prophylaxis. In view of the ambitious remedial intent of its drafters, courts have by and large interpreted the rule in a sympathetic and liberal fashion.  

B. Burdens of the Class Device

In practice, the class action device poses many hurdles for the lawyer to surmount. At the very least, the proponent must: (1) adequately define the class; (2) fulfill all four requirements of subdivision (a); and (3) fit one of the classifications of subdivision (b). Most of the modern law in this field has been made in cases of securities fraud, and antitrust and civil rights violations. Furthermore, in these areas the class suit has been accorded especially hospitable treatment. Given the stringency of the rule's standards, the court's attitude is no mean factor in appraising the usefulness of the form in a particular factual context. Therefore, any consideration of specific criteria for maintenance of a class action should recognize that interpretation—and hence discretion—count for almost as much as statutory language.

The first step under rule 23 is ascertaining the class. The court may not permit the action to proceed as a representative suit unless the members of the class can at least be defined, if not clearly enumerated, at the outset. The next step involves assessing the various factors listed in subdivision (a). As to the numerical requirement, classes of seven, eight, nine, sixteen and eighteen members have been held insuf-
icient, although a group of eighteen has also been ruled adequate, as has one of 25. All that rule 23(a)(1) demands is impracticability of joinder; this does not connote "impossibility," but only the difficulty or inconvenience of joining all members of the class."

Plaintiffs have met the second requirement of rule 23(a)—the existence of common questions of law or fact—by alleging a general conspiracy to violate the securities, antitrust or civil rights laws that affects a definite class of people. In an environmental case, the common thread might be the issue of whether the defendant's behavior constitutes a nuisance, or whether an administrative agency has followed proper procedures. The third and fourth requirements of rule 23(a)—the typicality of the named parties' claims or defenses and their ability "fairly and adequately [to] protect the interests of the class"—go to adequacy of representation. While subdivision (a)(3) has little independent meaning, having been largely equated with the existence of common questions or fair representation, (a)(4) has assumed an added importance under revised rule 23. Now that the judgment in rule 23 actions always includes all "whom the court finds to be members of the class" (other than those who have requested exclusion under subdivision (b)(3)), the judge has a special duty to assure himself of the adequacy of representation in every case.

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84. See 3B J. Moore, supra note 29, ¶ 23.05, at 23-272 to -273, and cases cited therein.


88. See, e.g., Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909 (9th Cir. 1964); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968), rev'd on other grounds, 438 F.2d 825 (2d Cir. 1971) (securities fraud cases); Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968) (antitrust); Norwalk CORE v. Norwalk Re-development Agency, 395 F.2d 920 (2d Cir. 1968) (discrimination).


90. Rule 23(a)(4).

91. 3B J. Moore, supra note 29, ¶ 23.06-2.

92. Rule 23(c)(3). Under the old rule, only the "hybrid" class suit bound absent members of the class; in the "true" and "spurious" varieties, only the rights of the named plaintiff were concluded. 3B J. Moore, supra note 29, ¶ 23.07[1]. One anomaly of the former procedure was the so-called "one-way" intervention by which courts sometimes permitted members of the class to intervene in order to secure the benefits of a favorable judgment after the merits had been determined. Id. ¶ 23.02-1; Kaplan, supra note 60, at 386-87.

93. See Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968).
The federal courts agree that quality, not quantity, of representation counts.\textsuperscript{94} \textit{Eisen v. Carlisle & Jacquelin}\textsuperscript{95} held that one odd-lot investor might represent some 3,750,000 odd-lot investors if he were otherwise qualified. The court in \textit{Dolgow v. Anderson},\textsuperscript{96} a securities case, not only discounted the significance of numerical disparity between those before the court and those represented, but also stated:

To assert that the minute interests of the parties before the court is a factor which militates against allowing a class action is to ignore the spirit of Rule 23. Since as we have seen, if the plaintiff's claim is very large a class action is rendered unnecessary, the main purpose of the class action is to provide a means of vindicating small claims. It would be anomalous to hold that only major financial interests can make use of it.\textsuperscript{97}

If the number of record plaintiffs and the size of their potential recovery count for little, what factors does the court weigh in deciding whether "the representative parties will fairly and adequately protect the interests of the class"?\textsuperscript{98} The generally accepted test of adequate representation is that "the party's attorney be qualified, experienced and generally able to conduct the proposed litigation."\textsuperscript{99} In the absence of proof to the contrary, a lawyer is presumed to be qualified.\textsuperscript{100}

The requirements of rule 23(b) are somewhat less clearcut.\textsuperscript{101} Subdivisions (b)(1)(A) and (B) have rather specialized applications that need not concern us here.\textsuperscript{102} Subdivision (b)(2) applies to most actions for injunctions or declaratory judgments,\textsuperscript{103} while (b)(3) covers the typical claim for monetary relief.\textsuperscript{104} Both have been invoked ex-
tensively in environmental class suits. The factors that trigger the applicability of subdivision (b)(3)—the predominance of common questions of law or fact and the superiority of the class device to other available methods—present more practical problems than the standards thus far encountered. As the Rules Advisory Committee stated:

In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.

On the matter of predominance, the Committee suggests that a fraud case might be suitable for class action treatment unless "there was material variation in the representations made or in the kinds and degrees of reliance by the persons to whom they were addressed." A "mass accident" case, according to the drafters, would ordinarily not lend itself to representative treatment because of the possibility of significant individual questions not only of damages but also of liability and defenses to liability. As to claims of concerted antitrust violations, the courts have gone both ways on the issue of predominance. Minnesota v. United States Steel Corp. has, however, suggested a general rule that "in the normal antitrust case, where a conspiracy to fix prices is at issue but damages differ widely among several plaintiffs, the predominant questions are common to the class." Similar situations are likely to arise in the environmental field with respect to

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105. See cases discussed in part II, C infra.
106. Rule 23(b)(3).
107. Advisory Comm. Note, supra note 60, at 102-03.
109. Advisory Comm. Note, supra note 60, at 103. The Committee's analysis of mass accident cases might not hold true for such potential modern disasters as the crash of a Boeing 747 due to faulty equipment or negligent piloting, where the probability of personalized defenses like contributory negligence or assumption of risk is minimal. See Comment, Mass Accident Class Actions, 60 CALIF. L. REV. 1615 (1972). The need for individual determination of damages will not of itself destroy a class action. Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42 (S.D.N.Y. 1966).
111. 44 F.R.D. 559 (D. Minn. 1968).
112. Id. at 571.
such conditions as air pollution from stationary sources which causes varying degrees of injury to those in the immediate vicinity.\footnote{118}

Regarding the issue of whether the representative format is superior to other devices, the rule sets out four non-exhaustive considerations pertinent to the court’s finding:\footnote{114}

(A) the interest of members of the class 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; [and] (D) the difficulties likely to be encountered in the management of the class action.\footnote{116}

In addition, the court should certainly consider the range of alternative procedural devices available in federal court. These would include rule 20 permissive joinder, rule 24 intervention, rule 42(a) consolidation of actions\footnote{116} and quasi-consolidation under 28 U.S.C. § 1407.\footnote{117}

The foregoing discussion outlines the minimum prerequisites for the maintenance of a class action. In many instances, however, the class plaintiff will encounter added obstacles. Apart from rule 23, he may, like the individual complainant, face jurisdictional problems if his only basis for suing in federal court is general diversity or federal question competence. Both the applicable statutes require an amount in controversy of more than $10,000,\footnote{118} and in \textit{Snyder v. Harris}\footnote{119} the Supreme Court recently declined to hold that “matter in controversy” [as used in 28 U.S.C. §§ 1331 & 1332

\begin{footnotesize}
\footnote{114. As to the non-exhaustiveness of the list, see Advisory Comm. Note, supra note 60, at 104. Although these factors purport to apply to the issues both of predominance and superiority, their relevance to the former is questionable.}
\footnote{115. Rule 23(b)(3). For applications of these criteria, see Hohmann v. Packard Instrument Co., 399 F.2d 711 (7th Cir. 1968); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391 (S.D. Iowa 1968), \textit{aff'd}, 408 F.2d 1171 (8th Cir. 1969); Fischer v. Kletz, 41 F.R.D. 377 (S.D.N.Y. 1966).}
\footnote{116. 28 U.S.C. § 1404 (1970) permits a district court to transfer a civil action “to any other district or division where it might have been brought” for “the convenience of parties and witnesses, in the interest of justice.” This provision may be used, \textit{inter alia}, to effect consolidation.}
\footnote{117. 28 U.S.C. § 1407 (1970) provides that when civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation . . . upon its determination that transfers for such proceedings will promote the just and efficient conduct of such actions.}
\footnote{118. 28 U.S.C. §§ 1331(a) & 1332(a) (1970).}
\footnote{119. 394 U.S. 332 (1969).}
\end{footnotesize}
(1970)]] encompasses the aggregation of all claims that can be brought together in a single suit, regardless of whether any single plaintiff has a claim that exceeds the jurisdictional amount.\textsuperscript{120}

Since the class action exists primarily in order to vindicate small claims, \textit{Snyder} drastically circumscribes its use.

To be sure, several factors mitigate the seeming harshness of this decision. In the first place, many federal statutes provide an independent, non-monetary jurisdictional base.\textsuperscript{121} Practically all public lawsuits are covered by federal laws with specific review provisions,\textsuperscript{122} or ones that incorporate relevant parts of the Administrative Procedure Act.\textsuperscript{123} Then, too, various non-damage cases have allowed the plaintiff to measure the amount from the defendant's point of view rather than his own.\textsuperscript{124} Since one individual may receive miniscule financial benefits from an injunction while his opponent may be forced to shut down a profitable business or install expensive pollution-control devices, this method of calculation clearly may increase the amount in question and enhance the plaintiff's position. Finally, a court unconstrained by the need to determine monetary damages may simply evade the aggregation problem by valuing each class member's rights.

\textsuperscript{120} \textit{Id.} at 338. The Court in effect ruled that although joint or common claims—those falling under the old true or hybrid class action of the original rule and now classified primarily as (b)(1) actions—could be aggregated for the purpose of reaching a required jurisdictional amount, claims that are separate and distinct—the old spurious type now embraced primarily by the (b)(2) and (b)(3) categories—could not. \textit{Maraist & Sharp, After Snyder v. Harris: Whither Goes the Spurious Class Action?}, 41 Miss. L.J. 379, 383 (1970). See generally Bangs, \textit{Revised Rule 23: Aggregation of Claims for Achievement of Jurisdictional Amount}, 10 B.C. IND. & COM. L. REV. 601 (1969) (pre-Snyder); \textit{Note, Aggregation of Claims in Class Actions}, 66 Colum. L. Rev. 1554 (1968) (pre-Snyder); \textit{Note, Taxpayer Suits and the Aggregation of Claims: The Vitiation of Flast by Snyder}, 79 Yale L.J. 1577 (1970).

\textsuperscript{121} \textit{See, e.g.}, 42 U.S.C. § 1857h-2(a)(1) (Clean Air Amendments); 28 U.S.C. §§ 1333 (admiralty), 1334 (bankruptcy), 1335 (statutory interpleader, 1336 (ICC), 1337 (interstate commerce and antitrust matters), 1338 (patents and copyrights), 1339 (postal matters), 1340 (internal revenue), and 1343 (civil rights) (all 1970).

\textsuperscript{122} \textit{See, e.g.}, Federal Power Act § 313(b), 16 U.S.C. § 825l(b). This section was the basis for jurisdiction in \textit{Scenic Hudson Preservation Conf. v. FPC}, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966). See cases cited in note 10 supra.


at more than $10,000. *Biechele v. Norfolk & Western Railway Co.*\(^{125}\) held that "the right of each member of the class to live in an environment free from excessive coal dust" exceeds $10,000.\(^{126}\) Such an approach is only feasible, of course, when the rights involved are essentially intangible and the plaintiffs, by opting for injunctive relief, have foregone the need to prove money damages.

Despite the foregoing limitations on the *Snyder* holding, the non-aggregation doctrine can still wreak havoc with the ordinary nuisance recovery action brought in federal court. If nothing else, *Snyder* resurrects the old confusing jural categories which revised rule 23 had seemed to consign to oblivion.\(^{127}\) Some courts have gone even further and have obliged not just the record plaintiffs but *all* members of the class to allege the required amount.\(^{128}\) Thus the potential diversity or federal question plaintiff who invokes rule 23 in the hope of bootstrapping himself into federal court on the strength of others' claims may be sorely disappointed.

Within the scope of the rule itself, the 23(b)(3) plaintiff encounters the further hurdle of the subdivision (c)(2) notice requirement.\(^{129}\) The prevailing view assigns to the plaintiff the large tasks of preparing and paying for the notification of absent but identifiable class members.\(^{130}\) The opinion in *Dolgow v. Anderson*,\(^{131}\) a securities fraud case, suggested that in certain instances the defendant might be obliged to bear these burdens.\(^{132}\) To justify this minority view, Judge Weinstein relied on the fiduciary duties of the corporate defendant, the

126. Id. at 355. The court also ruled that the defendant's right to operate its coal loading facility was worth more than $10,000. Id.
127. See text accompanying notes 57-61 supra.
130. See discussion and cases cited in Ward & Elliott, supra note 68, at 562-67.
132. Id. at 498.
advantage to it of binding many potential plaintiffs by one judgment, and the greater ability of the corporation to afford the necessary outlay. However, a court would be unlikely to impose such a task on any defendant who lacked a continuing relationship with at least some portion of the plaintiff class. As Dolgow pointed out, the defendant in that case would only have to add one enclosure in its next mailing to stockholders in order to meet the notice requirement. In most environmental suits, compliance would entail much greater hardship.

A final issue under this heading is what form of communication constitutes the "best notice practicable under the circumstances"? Obviously, the answer to this question bears heavily on the matter of expense, and a stringent notice requirement may well terminate a class suit at the threshold. Booth v. General Dynamics Corp. upheld notice by publication in the context of a taxpayer suit. In finding such notice "sufficient to satisfy due process requirements," the court relied heavily on its desire to preserve "the viability of the taxpayer action device." But not all courts have been so lenient. Although intimating that notice by publication might be permissible in some circumstances, Judge Medina stated in Eisen v. Carlisle & Jacquelin:

Nevertheless, if the court finds that a considerable number of members of the class can be identified with reasonable effort, and financial considerations prevent the plaintiff from furnishing individual notice to these members, there may prove to be no alternative other than the dismissal of the class suit.

To the degree that the representative of tens of thousands of absent persons must undertake to notify each one individually, the value of the class action recedes to the vanishing point.

The class plaintiff subjects himself not only to the many requirements of the rule but also to the broad discretion of the court. Subdivision (d) accords the judge presiding over a class suit great leeway in issuing protective and managerial orders. Such options as additional notices to absent members or the imposition of conditions on the representative parties may further hinder the plaintiff in his conduct of the suit. The court may require discovery or some form of preliminary hearing to determine whether the class action is properly maintainable.

133. Id.
134. Id. at 500.
135. Rule 23(c)(2).
137. Id. at 472. Note that notice must fulfill constitutional due process as well as statutory requisites. See Note, supra note 68.
138. 391 F.2d 555, 570 (2d Cir. 1968).
139. Frankel, supra note 69, at 41.
as such. Even if the judge permits the case to proceed, a real danger exists that the order sanctioning the class device may be amended at a later stage or the class allegations stricken entirely.\textsuperscript{141}

Although one might point to mitigating factors, such as the possibility of a partial class action or subdivided classes,\textsuperscript{142} the representative suit places undeniable and heavy burdens on the plaintiff who undertakes it. Clearly, therefore, it should never be chosen until alternate forms of action have been carefully weighed and discarded.\textsuperscript{143}

\textbf{C. Impact of the Burdens of Rule 23 on the Environmental Lawsuit}

Although environmental class actions have proliferated in recent years, few have yet reached final disposition. Among those that have, dismissal on the merits or on other grounds unrelated to rule 23 is common.\textsuperscript{144} Several successful public suits seeking injunctions—primarily in disputes over highway location—have resulted in reported decisions which do not deal with the class aspects of the litigation.\textsuperscript{145} There-

\begin{itemize}
\item 141. See note 66 supra. Cf. Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42 (S.D.N.Y. 1966). In addition, rule 23(e) provides that a class action cannot be dismissed or compromised without the approval of the court and appropriate notice to class members.
\item 142. Rule 23(c)(4) states:
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 . . .
\item 143. Further substitutes for the representative suit which a responsible plaintiff should consider might include: administrative proceedings; a test case in which all interested persons agree to abide by the decision in one action and stays are applied to other litigation if it has already commenced; or, in the public interest arena, a "private attorney general" lawsuit.
\item 144. See, e.g., McQueary v. Laird, 449 F.2d 608, 3 ERC 1184 (10th Cir. 1971) (challenge to continued maintenance of chemical warfare arsenal in Colorado barred by sovereign immunity); EDF v. Corps of Engineers, 348 F. Supp. 916, 4 ERC 1408 (N.D. Miss. 1972) (allegation of lack of compliance with NEPA rejected); Cohen v. Price Comm'n, 337 F. Supp. 1236, 3 ERC 1548 (S.D.N.Y. 1972) (Price Commission not required to submit NEPA impact statement before permitting bus and subway fare increases because of the special nature and duties of the agency); Honchok v. Hardin, 326 F. Supp. 988, 2 ERC 1573 (D. Md.), aff'd mem., — F.2d —, 3 ERC 1436 (4th Cir. 1971) (claim that federal statute is unconstitutional in permitting mining in a national forest dismissed as insubstantial).

\textsuperscript{4}
fore, discussion of the usefulness of the class device in environmental suits remains largely speculative.\footnote{146}

From the meager group of pertinent cases, one can draw some tentative conclusions. First of all, class definition has proved to be a persistent problem. In a suit to enjoin the purchase of a Gulf Coast barrier island by the Texas Parks and Wildlife Commission, the court disallowed a purported class defined as “all Texas citizens who are for the orderly development of Texas Parks and recreational facilities in accordance with the State Comprehensive Outdoor Recreation Plan (SCORP)”\footnote{147} on the ground that the plaintiffs had failed to identify the group sufficiently. \textit{Diamond v. General Motors Corp.}\footnote{148} and \textit{Chicago v. General Motors Corp.},\footnote{149} similar state and federal cases, respectively, both resulted in dismissal of class suits for injunctive relief from automobile exhaust pollution.\footnote{150} The intended class in \textit{Chicago} consisted of all citizens of that city; in \textit{Diamond}, of all Los Angeles residents. In failing to find the requisite cohesion, the court in \textit{Chicago} referred to the proposed membership as “that gigantic and extraordinarily diverse class.”\footnote{151}

On the other hand, \textit{Izaak Walton League of America v. Macchia}\footnote{152} upheld a class suit in which the plaintiffs purported to represent all persons having beneficial rights and interests in certain marine resources, “be they ‘born or yet unborn.’”\footnote{153} This action, however, sought only to prevent dredging and filling operations near a particular island. A relatively uncontroversial conservation suit, it would not have affected so many people in so many different aspects of their lives

\begin{footnotes}
\item[146] See generally Lamm & Davison, \textit{supra} note 19.
\item[149] 332 F. Supp. 285, 2 ERC 1710 (N.D. Ill. 1971) \textit{aff'd}, — F.2d —, 4 ERC 1632 (7th Cir. 1972). Since the Court of Appeals found sufficient grounds for affirming the dismissal on the merits, it did not decide the correctness of the District Court’s ruling on the class action issue. \textit{Id.} at —, 4 ERC at 1635 n.11.
\item[150] The plaintiff in \textit{Diamond} also sought “billions of dollars in compensatory and punitive damages.” 20 Cal. App. 3d at 376, 97 Cal. Rptr. at 641, 3 ERC at 1228.
\item[151] 332 F. Supp. at 287, 2 ERC at 1712. The same problem is evident in the \textit{Heart Disease Research Foundation, Fischer and Montrose} cases discussed at notes 24-27 and accompanying text \textit{supra}.
\item[152] 329 F. Supp. 504, 2 ERC 1661 (D.N.J. 1971).
\item[153] \textit{Id.} at 510, 2 ERC at 1668.
\end{footnotes}
as the *Chicago* and *Diamond* complaints challenging the omnipresent automobile.

Aside from the basic matter of class definition, overly ambitious class actions present the related problems of typicality of claims and adequacy of representation. (Perhaps the only issue which they do not raise is that of sufficient numerosity!) In both *Diamond* and *Chicago* the courts stressed the existence of disparate interests within the proposed class. According to the *Chicago* decision, "the interests of the representative party must be coextensive with the interests of the other members of the class, and . . . there must be a lack of adverse interests . . . ."\(^{154}\) The court correctly pointed out that the named plaintiff could not, in a suit seeking to enjoin automobile sales, fairly represent those members of the population who were automobile dealers, proprietors of gas stations, or persons who would otherwise have been adversely affected if the requested relief were granted. While a defined class, with or without subclasses, might eliminate the most flagrant conflicts of interest, broadly based environmental class actions will invariably pose disquieting questions of who really desires what type of remedy. For instance, do most residents of Chicago truly want to solve the air pollution problem by halting the production of cars? Do many Americans wish to trade the perils of D.D.T for a possible plague of locusts? The heart of the problem is that citizens suffering from generalized types of environmental degradation seldom comprise a well-defined "interest group" in the same sense as defrauded security purchasers or victims of price-fixing schemes.

Other problems specifically raised by the few litigated cases are those flowing from the *Snyder v. Harris*\(^ {155}\) non-aggregation doctrine and from subdivision (b)(3)'s requirements of predominance of common questions and superiority of the class device. The language of the Supreme Court's holding in *Snyder* has already caused conflicting results in environmental class actions based on federal question or diversity jurisdiction. In *Zahn v. International Paper Co.*,\(^ {156}\) a district court held that each class member in a federal diversity suit for damages to lakefront property, allegedly caused by the defendant's pollution of Lake Champlain, must meet the $10,000 jurisdictional amount.\(^ {157}\) Since it was "not credible that every such owner has suffered pollution damage in excess of $10,000,"\(^ {158}\) the court refused

\(^{154}\) 332 F. Supp. at 287, 2 ERC at 1711.

\(^{155}\) 394 U.S. 332 (1969); discussed at text accompanying notes 103-05, *supra*.

\(^{156}\) 53 F.R.D. 430, 3 ERC 1191 (D. Vt. 1971), aff'd, — F.2d —, 4 ERC 1619 (2d Cir. 1972) (2-1 decision).

\(^{157}\) *Id.* at 432, 3 ERC at 1192. As occurred in *Snyder*, the court classified the suit as a "spurious" class action since the claims of the class members were separate and distinct.

\(^{158}\) *Id.* at 431, 3 ERC at 1192.
to let the suit continue as a class action.\footnote{159} The Ninth Circuit, however, reached a different result in \textit{Inglewood v. Los Angeles}.\footnote{160} Not wishing to dismiss the federal question suit completely, the court remanded it for a determination as to which members clearly could not provide evidence of $10,000 in property damages allegedly suffered from operation of the Los Angeles International Airport. The case was to be dismissed as to those individuals only.\footnote{161} This was a compromise step that the court in \textit{Zahn} explicitly refused to take. It felt that requiring the plaintiffs, before trial, to plead facts sufficient to satisfy the jurisdictional amount would destroy any advantage the class format had over normal joinder.\footnote{162} To be sure, the result in \textit{Inglewood} does not entirely favor the maintenance of environmental class actions. The extra burden of having to undergo pretrial examinations on the extent of damages to all class members lessens the utility of the representative action for all parties involved. Whatever the ultimate resolution of this issue, the \textit{Snyder} decision clearly will bar many federal class actions for an indeterminate time to come.

In addition to holding representation inadequate, the court in \textit{Diamond} dismissed the class action because it could not find a predominance of common questions of law or fact: "[t]he right of each member to recover (as well as the amount of his recovery), will depend upon substantial issues which must be litigated as between individual plaintiffs and defendants."\footnote{163} The absence of predominance

\footnote{159} The court referred to arguments by commentators and apparent circuit court authority against literal application of the \textit{Snyder} doctrine, but it reasoned that the Supreme Court's language constrained its ruling. The court concluded by stating:

\textit{We reach our decision today with great reluctance. . . . [t]he requirement that each class member meet the jurisdictional amount clearly undermines the usefulness of Rule 23(b)(3) class suits, because the problem of defining an appropriate class over which the court has jurisdiction will often prove insuperable.}

\textit{Id.} at 433, 3 ERC at 1193. The Second Circuit agreed with this view of the effect of such a ruling. It stated, however, that the policies of 28 U.S.C. § 1332 (the jurisdictional amount limitation made applicable by the Supreme Court) in checking the rising caseload in federal courts had to take precedence over the policies favoring class suits. — \textit{F.2d} at —, 4 ERC at 1621.

\footnote{160} 451 F.2d 952, 3 ERC 1386 (9th Cir. 1971).

\footnote{161} \textit{Id.} at 953, 3 ERC at 1388. The court believed it objectionable to dismiss the entire action automatically when the complaint alleges the jurisdictional amount for some indeterminate number of class members:

\textit{Rather, the court should decide for the individual plaintiffs which can recover and which cannot. Once these matters are resolved, the court can begin seeking a more substantial showing from the plaintiffs as to the type of proof they will be able to present. Whenever appropriate, the court can dismiss the complaints as to those parties who are clearly shown to be unable to meet the requirements of jurisdictional amount.}

\textit{Id.} at 954, 3 ERC at 1389.

\footnote{162} 53 F.R.D. at 433, 3 ERC at 1193.

\footnote{163} 20 Cal. App. 3d at 377, 97 Cal. Rptr. at 642, 3 ERC at 1228.
of common issues arose from several factors. For one thing, the plaintiffs were alleging a continuing public nuisance and would thus be required to show special damage to each member of the class.

Whether an individual has been specially injured in his person will depend largely upon proof relating to him—going to such matters as his general health, his occupation, place of residence and activities. Whether a parcel of real property has been damaged will depend upon its unique characteristics, such as its location, physical features and use.\[164\]

In this regard, defendants might interpose as to individual members such defenses as assumption of risk in moving into the area or contributory negligence in not taking reasonable precautions. This particular problem could plague environmentalists in many types of actions seeking the award of damages.\[165\]

The plaintiffs in Diamond also could not convince the court of the superiority or even viability of the class device in that particular context. The judge felt that the number of parties, the diversity of their interests, and the multiplicity of issues would make the proposed suit unmanageable.\[166\] This attitude contrasts dramatically with that of the court presiding over a mammoth consolidated group of class suits against the automobile industry. In determining that the action could proceed as a class suit in In Re Motor Vehicle Air Pollution Control Equipment,\[167\] the court stated that the manageability of the classes alleged herein may certainly tax the imagination and ingenuity of the litigants, counsel and the court. But until management is recognized as impossible or near impossible, the court will depend upon the ingenuity and aid of counsel to solve the complex problems that litigation will bring.\[168\]

“If successful,” the court concluded, “the economies of time, effort and expense will more than compensate the effort.”\[169\]

\[164\] Id. at 379, 97 Cal. Rptr. at 643, 3 ERC at 1229.

\[165\] See, e.g., East Haven v. Eastern Airlines, 331 F. Supp. 16, 2 ERC 1856 (D. Conn. 1971). Plaintiffs alleged that operation of the Tweed-New Haven airport constituted a continuing trespass, a public and private nuisance, and an unconstitutional taking of their property. The court initially determined that the suit could not be maintained as a class action, since there were “too many variables in the extent to which residents of the neighborhood were affected by airport and airline activities.” Id. at 18, 2 ERC at 1857. Seven plaintiffs eventually prevailed in their individual capacities. See id. at 36, 2 ERC at 1868.

\[166\] 20 Cal. App. 3d at 378, 97 Cal. Rptr. at 642, 3 ERC at 1228.

\[167\] 52 F.R.D. 398 (C.D. Cal. 1970). Plaintiffs grounded their suit on an alleged conspiracy by automobile manufacturers to prevent the development and manufacture of air pollution control equipment for motor vehicles, in violation of the antitrust laws. Id. at 401.

\[168\] Id. at 404.

\[169\] Id.
One may question the truly Panglossian optimism of this approach, given classes the size of state populations.\textsuperscript{170} Aside from day-to-day logistics of management, the initial requirement of notice will present a formidable problem. Since plaintiffs are suing for damages, the action falls within the 23(b)(3) rubric\textsuperscript{171} and thus requires that the court direct the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."\textsuperscript{172} One possible advantage of a huge class is the argument it affords the plaintiff for impracticability of individual notice. Yet the defendant might plausibly argue that most members of classes comprised of city, state, or national populations could be identified through census records or even telephone listings with only moderate effort. And the rule speaks only to the problem of identification—not to the hardship of paying for massive mailings.\textsuperscript{173}

The foregoing discussion shows that the actual cases, as well as reasonable extrapolations therefrom, more than bear out the comment that "the limitations and dangers of Rule 23 of the Federal Rules of Civil Procedure are not widely understood."\textsuperscript{174} Since environmental damages actions—particularly broad-based air and water pollution suits—will often involve complex questions of individual susceptibility, causation, assumption of risk, and the like, class allegations will be hard to sustain. Unsympathetic courts, faced with immense management problems, will further undermine the utility of the class device even in those situations for which it was principally intended: where considerations of justice, judicial administration, and deterrence combine to justify its use. Therefore, litigators attempting to redress the injuries of multiple small claimants must keep their classes within sensible bounds.\textsuperscript{175} Several representative suits, each with a carefully de-
fined class, might succeed where one comprehensive action would fail. In addition, environmental class litigators should shy away from extravagant claims and invoke only their strongest causes of actions. Perhaps added experience in managing smaller, more thoughtfully conceived class actions will convince hesitant judges that such suits may be appropriate in the environmental area as well as in antitrust, securities fraud, civil rights, and consumer litigation.

From this brief analysis, the injunctive action might seem more amenable than the damage suit to class treatment since it ordinarily fulfills rule 23(a) criteria, fits neatly within the (b)(2) category, and need not meet the requirements of predominance, superiority, and best practicable notice. Yet the injunctive action still is subject to all the previously discussed problems of court supervision and sanction of compromise or dismissal. Also on the negative side of the scale, the class plaintiff in a (b)(2) action risks final and total defeat of his claim. Because of the absence of an "opt-out" procedure, all members of the class are bound by the judgment. If, however, a non-representative plaintiff sues and loses, another aggrieved party may try again. In the typical suit to enjoin official action or halt private pollution, the single plaintiff can obtain relief of exactly the same scope as could a plaintiff class of thousands. The Government either may or may not proceed with an underground nuclear test; individual mailings, the court determined that notice could easily be given through the campus newspaper and radio station. Given the potential harm of increased noise pollution and dangerous traffic affecting all class members, the court enjoined the construction pending completion by the defendants of an environmental impact statement under NEPA. Id. at 1369; 3 ERC at 1339. A similar result was obtained in Hanly v. Mitchell, 460 F.2d 640, 4 ERC 1152 (2d Cir. 1972), where the class consisted of "residents, merchants, businessmen, institutions, religious organizations and other members of the public living within the area" to be affected by construction of a new federal jail in New York City by the General Services Administration. Id. at 642, 4 ERC at 1153. The plaintiffs' class standing was apparently not attacked, as it was not discussed further in the opinion.

176. See text accompanying notes 63-64, 67-71 supra.
177. See text accompanying notes 139-41 supra.
178. See text accompanying notes 92-93 supra.

179. Even in the absence of res judicata, however, the stare decisis effect of the first action may be quite strong. Cf. Atlantis Development Corp., Ltd. v. United States, 379 F.2d 818 (5th Cir. 1967). Speaking of the right to intervention in the face of stare decisis, the court said:

[T]he Court before whom the potential parties in the second suit must come must itself take the intellectually straight-forward, realistic view that the first decision will in all likelihood be the second and the third and the last one. Even the possibility that the decision might be overturned by en banc ruling or reversal on certiorari does not overcome its practical effect, not just as an obstacle, but as a forerunner of the actual outcome.

Id. at 829.

a cement company either must or need not close down.\textsuperscript{181} There is little possibility of less than total relief and hence, unlike the damages action, no need for many complainants.\textsuperscript{182} Although the perils of res judicata in a class suit may not appear very formidable in a strong case with a competent lawyer, one must remember that "judgments in poorly prosecuted actions which are brought with little attendant publicity" and no intervenors will also bind the class.\textsuperscript{183}

Of course, some legitimate reasons do exist for framing an injunctive suit as a class action. Often the plaintiff will reap a considerable "psychological advantage in coming before the court [and the defendant] not alone, as the representative of one, but on behalf of many."\textsuperscript{184} In a very practical sense, having a class of plaintiffs might well determine the outcome in an injunctive action where the court must weigh the equities of the opposing parties in deciding whether to grant the requested relief.\textsuperscript{185} Furthermore, the recent Supreme Court decision in \textit{Sierra Club v. Morton}\textsuperscript{186} casts a shadow of indeterminate length over future public environmental lawsuits. The Court dismissed the complaint for lack of standing because the Sierra Club "had failed to allege that it or its members would be affected in any of their activities or pastimes"\textsuperscript{187} by the contested development of the Mineral King Valley in California by Walt Disney Enterprises, Inc. In \textit{Sierra Club} itself, the plaintiff clearly can satisfy the Court's criteria for standing merely by amending its complaint to allege harm to its members who use the valley.\textsuperscript{188} Yet to the degree that the decision revives the con-


\textsuperscript{182} Less than total injunctive relief in a non-class action would be commonplace in civil rights cases where an employee is suing to compel the defendant to hire or promote him. In order to obtain an injunction forbidding discrimination in general, the plaintiff must bring the action on a representative basis. \textit{See} Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968) (class action under Title VII of the 1964 Civil Rights Act).

\textsuperscript{183} Lamm & Davison, \textit{supra} note 19, at 91.

\textsuperscript{184} Weinstein, \textit{supra} note 79, at 435. As the Supreme Court recently stated in an antitrust suit, "[R]ule 23 . . . provides for class actions which may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture." \textit{Hawaii v. Standard Oil Co. of California}, 405 U.S. 251, 266 (1972).

\textsuperscript{185} \textit{See}, e.g., Hanly v. Mitchell, 460 F.2d 640, 4 ERC 1152 (2d Cir. 1972); Nolop v. Volpe, 333 F. Supp. 1364, 3 ERC 1338 (D.S.D. 1971) (both discussed in note 175 \textit{supra}). \textit{See also} cases cited in note 145 \textit{supra}.


\textsuperscript{187} 405 U.S. at 735, 3 ERC at 2042.

\textsuperscript{188} On remand, the Sierra Club has successfully amended its complaint to meet the objections posed by the Supreme Court by adding nine individual plaintiffs comprising a homeowners association in the area and by alleging that both the Club and individual members sponsor outings there. \textit{Sierra Club v. Morton}, 348 F. Supp. 319, 4 ERC 1561 (N.D. Cal. 1972).
ventional "personal injury" tests for complainants in public actions, it may foreshadow a more general tightening of the test for standing in federal court. Should this prove to be the result, the class action will present an increasingly rational and attractive alternative to the public lawsuit brought by an organizational plaintiff.

In the current state of the law, however, the environmental class action for injunctive relief still seems a poor strategic choice. Indiscriminate selection of this form invites time-consuming objections by defendants eager to stall. More significantly, it also encourages adverse determinations by hostile judges, who are sometimes only too glad to cloak substantive dismissal in the garb of procedural defect.

III

A REFORMER'S APPROACH

Defendants themselves occasionally lend credence to the foregoing analysis of the burdens of class litigation by moving to designate public actions as representative suits. Ironically, it is a plaintiff's lawyer who has advocated wider application of the standards of rule 23. In the public lawsuit, David Sive would equate the test for standing with that used to measure the "adequacy" of representation in class actions.

Assuming that the rule of Citizens Committee v. Volpe governs

189. Prior to Sierra Club, the trend in some circuits was to grant standing to any reputable conservation group which exhibited a concern within the "zone of interests" of the statute in question and maintained an organizational interest in the problem of environmental protection. The requirement of "injury-in-fact" was often deemed not to require that the organization allege specific harm to its members, but only an environmental injury to society. See, e.g., EDF v. Hardin, 428 F.2d 1093, 1 ERC 1347 (D.C. Cir. 1970); Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97, 1 ERC 1237 (2d Cir. 1970); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 1 ERC 1084 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966); EDF v. Corps of Engineers, 325 F. Supp. 728, 2 ERC 1260 (E.D. Ark. 1971). But see Alameda Conservation Ass'n v. California, 437 F.2d 1087, 2 ERC 1175 (9th Cir.), cert. denied, 402 U.S. 908, 2 ERC 1910 (1971). See also note 11 supra.

190. It should be noted, however, that the class action is not the only alternative to a representative action. In some situations a single injured plaintiff might also sue as a private attorney general. In injunctive or declaratory lawsuits, as opposed to damages actions, the class format does not even offer the prospect of a fund from which the nominal plaintiff can recover his costs and attorney's fees. The complainant might, however, prefer the class device because of its possible psychological effect in impressing the court with the importance of the alleged injury. See text accompanying note 184 and cases cited in note 145 supra.

191. See text accompanying notes 24-27 supra.

192. See, e.g., Sierra Club v. Hardin, 325 F. Supp. 99, 2 ERC 1385 (D. Alas. 1971). The action was filed to enjoin, inter alia, the sale of timber and the development of a pulp mill in the Tongass National Forest. A lumber company (defendant-intervenor) successfully moved to have the suit designated a class action with the Sierra Club and the Sitka Conservation Society as representative plaintiffs.

193. Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97, 105, 1 ERC
and that only two elements are necessary for a group to have standing in an environmental suit—that there be a public interest in the subject matter of the suit, and that the plaintiff asserting that public interest be a "responsible representative of the public"—the key question . . . is that of who will be the "responsible representative" . . . . [In the opinion of the writer, the term] means no more and no less than the requirements of Rule 23 . . . for the bringing of class actions.

Sive's thesis would scarcely please the plaintiff in *EDF v. Waldorf Hoerner Corp.*, where the court found that the plaintiffs, in a class action to enjoin the operation of a paper mill, failed to meet rule 23 criteria. The court suggested, however, that the action might have been brought as a public lawsuit.

Yet from a public policy standpoint there is both logic and justice in applying at least some of the standards of rule 23 to the private attorney general action. In the first place, the term "class action" is often used very loosely. In many cases, it is difficult to tell whether the plaintiff is bringing an ordinary public suit or a representative action. Insofar as courts fail to distinguish between the two types of action, a mere label occasionally may spell the difference between victory and defeat. Such confusion breeds highly irrational results.

The remedy, however, is not necessarily to differentiate the types of action more clearly, thus allowing the plaintiff to opt for the less stringent requirements of the "public" rather than the "class" format. From the point of view of justice to class and defendant alike, the

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1237, 1241 (2d Cir. 1970). The court inferred from the conservation purposes of the statute under which the suit arose that Congress intended to give standing to groups interested in protection of those values.

194. *Sierra Club* imposes as a third criterion that the organizational plaintiff allege injury to itself or its members. See text accompanying notes 186-89 supra. This change does not, however, affect Sive's analysis.

195. Sive, *Standing and Jurisdictional Problems in Environmental Suits*, TWENTY-SECOND ANNUAL INSTITUTE ON OIL AND GAS TAXATION 1, 17 (1971). In another context Sive stated further that although from the environmentalist's and his attorney's standpoint such applicability [of rule 23] may impose a number of restrictions and problems [it] is the principal answer to those who, colorably or sincerely, express fear over the inundation of the federal courts with floods of frivolous or unprincipled environmental suits.

196. 1 ERC 1640 (D. Mont. 1970).

197. *Id.* at 1641. In the court's view, the suit could not be maintained as a class action because under the terms of rule 23(a) EDF was not a member of the class it purported to represent. *Id.*; see text accompanying notes 208-21 infra. The suit was subsequently dismissed on the merits. 1 ERC at 1643.

“self-appointed representative of the public interest” should be made to meet the same high standards as the plaintiff in the ordinary class action. Logically, a practical test of standing, grounded in the ability of the plaintiff’s lawyer to “put up a real fight,” makes particularly good sense in the public interest area. For why should the traditional non-pragmatic requisite of a private grievance give a party the necessary stake to play the public defender? In addition, such abstractions as the “injury in fact” and “zone of interests” tests for determining standing laid down in *Association of Data Processing Service Organizations, Inc. v. Camp* and reaffirmed in *Sierra Club v. Morton* lend little aid to the court seeking to apply them and de-emphasize the crucial question of who is sufficiently qualified to litigate vital issues on behalf of society at large. Moreover, defendants surely merit the protection from harassment afforded by “once-and-for-all” class judgments. If sympathetic courts apply rule 23 notice cri-

200. See Z. Chafee, *Some Problems of Equity* 231 (1950). In order to be truly a practical test, however, the courts ought to place on the plaintiff the burden of proving his attorney’s competence. See text accompanying notes 98-100 *supra*.
202. 397 U.S. 150 (1970). *Data Processing* held that a plaintiff is entitled to standing in federal court if he alleges “that the challenged action has caused him injury in fact, economic or otherwise” [*Id.* at 152], and that the interest he seeks to protect “is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” *Id.* at 153. As Justice Brennan points out in his concurring and dissenting opinion in *Data Processing*’s companion case, *Barlow v. Collins*, 397 U.S. 159, 168 (1970), only the first branch of this two-pronged test is constitutionally required.
203. 405 U.S. 727, 3 ERC 2039 (1972). See text accompanying notes 186-89 *supra*.
204. Both Justices Blackmun and Douglas addressed this point in their dissents in *Sierra Club*. Justice Blackmun stated:

[...]

405 U.S. at 757-8; 3 ERC at 2050 (Blackmun, J., dissenting).
teria sensibly—or not at all—proponents of claims of reasonable scope should be able to live with this stricter approach. Sive finds support for his proposition in the language of *Citizens Committee for the Hudson Valley v. Volpe*. Whether the case really means what Sive suggests and, if so, whether other courts will follow its approach, are questions that only time will answer.

One problem with Sive's thesis is the implicit requirement that the record plaintiff be a "member" of the represented class. While courts uniformly accord organizations standing to sue for injunctions to protect their members' interests, the majority view denies the group plaintiff "class representative" status where the class includes non-members of the organization. Yet welcome signs exist of a liberalizing trend. In *Norwalk CORE v. Norwalk Redevelopment Agency*, an action challenging the displacement of low-income minority group members by an urban renewal project, the court stated:

The association plaintiffs were denied standing below because they are "not themselves members of the classes whose rights they claim to be asserting." . . . We think that the reasons for requiring an

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206. See Lamm & Davison, *supra* note 19, at 94-96. Pointing out that the notice requirement can be the greatest hurdle facing environmental litigators, the authors argue that the public policy reasons supporting public class actions should encourage courts to explore methods of mitigating the burden of rule 23(c) on plaintiffs:

Notice should not be allowed to become a defensive weapon but should be, ultimately, a solution correlating fairness, practicability, possibility, and the type of relief sought.

*Id.* at 94.

207. 425 F.2d 97, 1 ERC 1237 (2d Cir. 1970). See text accompanying note 193, *supra*.


209. As the court stated in *Sierra Club v. Hardin*:

The policy reasons for permitting the conservation groups to represent the interests of their members in a class action are compelling. Any other rule would have the practical effect of preempting many meritorious actions, as one individual, or a small number of individuals, would have to sustain the entire financial burden of the lawsuit. . . . Few members of the general public will have the resources or courage to face such odds for the sake of vindicating a right to which all are entitled as a matter of law.


211. 395 F.2d 920 (2d Cir. 1968).
individual plaintiff in a class action to be a member of the class do not necessarily preclude an association from representing a class where its raison d'être is to represent the interest of that class.\textsuperscript{212}

The court proceeded, however, to condition such status on a "compelling need" to grant the organization standing in order to vindicate the "constitutional rights of persons not immediately before the court."\textsuperscript{213}

Smith v. Board of Education of Morrilton School District\textsuperscript{214} accorded standing to a teachers' association seeking, \textit{inter alia}, an injunction requiring employment of high school teachers without regard to race. The opinion states:

\begin{quote}
[T]o argue that [the Associated Teachers of America] . . . is not a member of the class for which relief is sought, is, we think, but another way of arguing the question whether ATA is a real party in interest [under Rule 17] . . . . Having held that ATA is a proper party in this latter respect, we think it follows that it is not to be dismissed from the case because of Rule 23(a).\textsuperscript{215}
\end{quote}

The Smith court did not, like Norwalk, speak in terms of "compelling need." Yet it did refer to a number of factors militating in favor of liberal standing that do not obtain in the average environmental case, principally the danger of reprisal against individual plaintiffs who assert constitutional rights in a context of racial enmity.\textsuperscript{216}

One case that cannot so easily be distinguished is Hawaii v. Standard Oil Company of California.\textsuperscript{217} The Supreme Court held that a state could not, in its role of parens patriae, recover treble damages for alleged antitrust violations.\textsuperscript{218} In the lower courts, however, Hawaii had sued not only as parens patriae but also, on behalf of its citizens, as a rule 23 representative. Since the state chose not to appeal the dismissal of this second count, the Supreme Court could not review the propriety of the ruling. Nevertheless, the Court commented:

The district court dismissed Hawaii's class action only because it was unwieldy; it did not hold that a State could never bring a class action on behalf of some or all of its citizens. Respondents virtually conceded that class actions might be appropriate under certain circumstances . . . .\textsuperscript{219}

\begin{itemize}
\item \textsuperscript{212} \textit{Id.} at 937.
\item \textsuperscript{213} \textit{Id.}
\item \textsuperscript{214} 365 F.2d 770 (8th Cir. 1966).
\item \textsuperscript{215} \textit{Id.} at 777.
\item \textsuperscript{216} \textit{Id.}
\item \textsuperscript{217} 405 U.S. 251 (1972).
\item \textsuperscript{218} \textit{Id.} at 265.
\end{itemize}
If a state can be a "member" of the class of its citizens—or alternatively, need not be a member in order to represent them—why should not an organization be afforded similar status in injunctive suits?

Although at first blush the state would seem to present a more compelling case for representative standing—every citizen is a "member" of the state, after all, even though the state is not, analytically, one of its citizens—an association or non-profit corporation such as the Environmental Defense Fund (EDF) actually deserves the status more. As an organization devoted solely to environmental affairs, it need not consider the conflicting economic or political interests that may limit a state's efforts. In addition, a public-interest organization is often founded for the very purpose of engaging in litigation on behalf of the causes that it espouses. For this reason it will ordinarily develop an expertise which a state's legal department lacks. Indeed, one environmental case did grant representative standing to the Izaak Walton League to sue on behalf of a class composed of all persons having a beneficial interest in certain subaqueous lands and tidal marshes. Unfortunately, the terse discussion of the point fails to illuminate the court's rationale. Conceivably, the court found the practical wisdom of this approach so obvious as not to require further elucidation. If so, one can only hope that other judges follow suit.

An organization could of course avoid all these problems by finding a nominal plaintiff to represent the class. After NAACP v. Button, such conduct poses practically no risk of charges of client solicitation. But since the organization is realistically the "real party in interest" by virtue of its public functions, such fictions serve no useful end and ought to be discarded. If EDF provides the lawyer, the funds and the strategy for litigation, it should not be forced to "provide" the plaintiff. Since organizations already sue as private attorneys general, no cogent reason exists to deny them representative standing under rule 23.

CONCLUSION

In recent years, environmental lawyers have looked increasingly to the class action as a means of redressing public and private wrongs. Its

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221. More recently in EDF v. Corps of Engineers, 348 F. Supp. 916, 4 ERC 1408 (N.D. Miss. 1972), the court permitted EDF to prosecute a suit challenging construction of the Tombigbee Waterway on behalf of its members, the members of a local conservation group and an individual resident of the affected area. As in the Izaac Walton League decision, however, the court did not elaborate on its reasons for doing so.
abuse by overly ardent environmentalists, however, may turn some courts against the device. In addition, strategy considerations seem to dictate a more cautious attitude toward the class format; its intrinsic prerequisites are hard to fulfill, and its economic justifications apply in a severely limited context. Therefore, from both practical and theoretical standpoints, litigators would be wise to confine this procedure to the case of the private action for damages where a clearly definable class exists.

Nevertheless, from a public policy viewpoint, environmental lawyers would do better to bring all public lawsuits as class actions and bear the consequent burdens willingly. Rule 23's practical test of standing, based on the capacity of the plaintiff's lawyer to press the case with vigor and skill, affords much greater benefits to the public than traditional standing tests, expressed in vague non-functional terms. The class action also legitimately aids the defendant since a single inclusive judgment shields him from the harassments of multiple litigation. As David Sive has stated:

[E]nvironmentalists in the courts are no longer muckrakers. They have secured entry into the federal court's establishment. They must aid those courts in the orderly evolution of the body of substantive environmental law . . . .

Correspondingly, the courts must continue to aid environmental groups by explicitly granting them standing to serve as representative plaintiffs. Such recognition would cement the position of responsible organizations. It would also greatly encourage environmental lawsuits that protect the plaintiff's and defendant's interests while serving those of the public as well.

Vivian O. Adler*

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223. Sive, Standing and Jurisdictional Problems in Environmental Suits, supra note 195, at 20.

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