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Environmental Litigation and Defendant Class Actions: The Unrealized Viability of Rule 23

A. Peter Parsons*
Kenneth W. Starr**

Avoiding the relitigation of adjudicated controversies is a time-honored principle in Anglo-American jurisprudence.¹ As dockets swell, courts increasingly turn to vehicles for implementing judicial economies.² One ancient mechanism for limiting re-examination of legal disputes is the class action.³

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³ Several venerable principles of the common law reflect this urge to curtail the relitigation of controversies. See RESTATEMENT OF JUDGMENTS, ch. 3 (1942) (discussion of res judicata). The policies served by res judicata include conserving judicial energies and guaranteeing that adjudication will permanently settle disputes. See generally Note, Developments in the Law: Res Judicata, 65 HARv. L. REV. 818 (1952). These policies are indirectly served, of course, by the Full Faith and Credit Clause, which commands that final judgments of one jurisdiction be effectuated in other jurisdictions. U.S. CONST. art. IV, § 1. For a scholarly treatment of the genesis of the Clause, see Corwin, The Full Faith and Credit Clause, 81 U. PA. L. REV. 371 (1933).


5. Class actions are authorized and controlled in federal courts by FED. R. CIV. P. 23. See generally 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1751 et seq. (1969) [hereinafter cited as WRIGHT & MILLER]. The modern class action derives from the traditional practice in chancery of permitting one or more persons to either sue or defend on behalf of all. See Note, Action Under the Codes Against Representative Defendants, 36 HARv. L. REV. 89 (1922). Thus, the genesis of the class action lies in equity. 7 WRIGHT & MILLER § 1751, at 503. One equitable precursor of the modern class action is the bill of peace, which permitted a consolidation of numerous actions if the moving party could demonstrate impracticability of joinder, common questions, and adequate representation. See generally 1 POMEROY, EQUITY JURIS-
Despite its obvious capacity for reducing litigation, the class action device has been invoked predominantly by plaintiffs who seek to represent other, similarly situated, potential litigants. With few exceptions, the class action has not been used to bring together a class of defendants. However, the controlling federal provision, Rule 23

PRUDENCE §§ 252, 253 (1918); Chafee, Bills of Peace With Multiple Parties, 45 HARV. L. REV. 1297 (1932).

4. Cf. Advisory Committee’s Note, Proposed Rules of Civil Procedure, 39 F.R.D. 69, 100 (1966). The committee observed in connection with Rule 23(b)(1)(A): “Separate actions . . . might create a risk of inconsistent or varying determinations . . . . Actions by or against a class provide a ready and fair means of achieving unitary adjudication.” Id. See also West v. Randall, 29 F. Cas. 718, 721 (No. 17,424) (C.C.D.R.I. 1820) (indicating the possibility of avoiding a multiplicity of suits by bringing all persons materially interested in the action into the suit); American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974) (Rule 23 is designed to avoid the “multiplicity of activity” on the part of courts and litigants).

Many states have similar provisions. See 7 WRIGHT & MILLER, supra note 3, § 1751, at 507. For example, New York law expressly provided in 1920: “When the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.” 1920 NEW YORK LAWS ch. 925, as amended, art. 24, § 195 (1921), quoted in Note, 36 HARV. L. REV. 89 (1922).


The rationale supporting defendant class actions was articulated in an early Note, 36 HARV. L. REV. 89, 92 (1922): “Regardless of the form or theory of the action, judgment should be given against all the parties represented, provided, that the plaintiff has been wronged by all of the defendants, that the defendants are so numerous as to make their joinder impracticable, and that the interests of all the defendants are fairly represented.” The Note writer further observed: “A judgment against absent and unknown parties is not without precedent. A judgment for costs has been held valid against unknown defendants served constructively.” Id. at 92-93 n.29, citing Watson v. McClane, 18 Tex. Civ. App. 212, 45 S.W. 176 (1898). See also RoBards v. Lamb, 127 U.S. 58 (1888) (A state statute permitting a final settlement of an estate administrator’s accounts, binding on distributees who did not have notice of the settlement, does not deny them due process. Their rights are preserved because the administrator accounts to the executor, who is the representative of the distributees). While an executor or administrator more obviously represents beneficiaries than a named representative does a class of defendants, the principle that courts may order payments of absent parties’ money if they are properly represented is clearly accepted.

Modern defendant class actions have not been confined to patent actions. For example, civil rights actions for declaratory and injunctive relief against a class of defendants have been successfully maintained. In Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), aff’d per curiam, 390 U.S. 333 (1968), a class of former prisoners brought
of the Federal Rules of Civil Procedure, expressly authorizes defendant
class actions.  

The purpose of this Article is to examine the availability of de-
fendant class actions, particularly focusing on environmental litigation.
After an introductory section, the discussion will first examine the legal
bases for defendant class actions under Rule 23. Next, it will con-
sider the constitutional problems involving jurisdiction and represen-
tation encountered in such actions. After proposing a theory to vindic-
cate defendant class actions against constitutional attack, the Article
will examine the operation and potential advantages of the device in
environmental litigation.

INTRODUCTION

A. Class Actions and Environmental Litigation

The rapid proliferation of environmental litigation evidences the
need for workable procedures to handle such lawsuits expeditiously.  
Frequently, if a prospective plaintiff is aggrieved
by unlawful pollution,
the number of potential defendants will be quite large.  
For example,

an action against the class of wardens and jailers in Alabama. The court, in allowing
the suit, observed that the class of defendants did not have to be "identically situated" so long as common questions of law and fact existed. Id. at 330.

7. "One or more members of a class may sue or be sued as representative parties
on behalf of all only if . . . the claims or defenses of the representative parties are typi-
cal of the claims or defenses of the class . . . ." FED. R. CIV. P. 23(a) (emphasis
added). This possibility is recognized in Anderson & Roper, Limiting Relitigation by
Defendant Class Actions from Defendant's Viewpoint, 4 JOHN MARSHALL J. OF PRACTICE
& PROCEDURE 200 (1971); Comment, Damages in Class Actions: Determination and

8. See, e.g., Cramton & Boyer, Citizen Suits in the Environmental Fields: Peril or Promise?, 2 ECOLOGY L.Q. 407 (1972); Symposium, Recent Developments in Envi-
ronmental Law, 14 B.C. IND. & COM. L. REV. 575 (1973). Federal environmental legis-
alation has even been invoked by a national bank seeking to preclude a potential competi-
tor from obtaining a charter from the Comptroller of the Currency on the grounds of
failure to comply with the National Environmental Policy Act. First Nat'l Bank of
has been a fertile source of litigation. See, e.g., Maryland-Nat'l Capital Park and Plan-
ing Comm'n v. U.S. Postal Serv., 487 F.2d 1029, 5 ERC 1719 (D.C. Cir. 1973);
NRDC v. TVA, 367 F. Supp. 122, 5 ERC 1316 (E.D. Tenn. 1973), supplemented, 367
F. Supp. 128, 5 ERC 1669 (E.D. Tenn. 1973), aff'd, 502 F.2d 852, 7 ERC 1014 (6th

Rptr. 639, 3 ERC 1227 (2d Dist. 1971) (suit against 293 industrial corporations and
municipalities); Heart Disease Research Foundation v. General Motors Corp., 3 ERC
1710 (S.D.N.Y. 1972), aff'd, 463 F.2d 98 (2d Cir. 1972) (suit against the four major
American auto manufacturers for damages suffered by 125 million residents of urban
centers as a result of air pollution); City of Chicago v. General Motors Corp., 332 F.
Supp. 285 (N.D. Ill. 1971) (class action on behalf of "all Illinois citizens who are resi-
dents of Chicago." Id. at 288).
a potential group of defendants might be sixty industrial plants dumping a single chemical into the same river. In these circumstances, a defendant class action would be the best way to settle the dispute from the viewpoint of the court, plaintiffs, and sometimes even defendants.

The advantage to plaintiffs of bringing all potential defendants together in a single suit is obvious. Courts, too, should welcome defendant class actions, both for their efficiency and because they reduce the likelihood of inconsistent or incomplete adjudication of issues. Defendants who defend as a class could reduce their litigation costs and eliminate some tactical advantages the plaintiff otherwise enjoys.

If the plaintiff proceeds *seriatum* against individual polluters and wins the first case, he establishes a powerful precedent in subsequent individual actions by him or other plaintiffs against the remaining polluters. Thus, to the extent that subsequent courts defer to the findings in the first case, defendants may find their rights effectively foreclosed before they get a day in court. Plaintiffs can exacerbate this problem by bringing their most appealing case first, using the precedent it establishes to bolster subsequent, weaker suits.

On the other hand, if the plaintiff loses in his initial action, he can, if undaunted and well-heeled, proceed from defendant to defendant, invoking new theories of law or simply looking for a friendlier forum. Thus, where alleged polluters are similarly situated, yet too numerous to be joined in a single action, the defendant class action device provides an attractive alternative for all parties.

**B. Background of Defendant Class Actions**

Since the adoption of amended Rule 23, most defendant class actions

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10. If federal courts eliminate the doctrine of mutuality of estoppel (as many states have done, following Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892 (1942)), plaintiffs could not continue to relitigate issues they once lost. While this would reduce the utility of defendant class actions for prospective defendants, the *Bernhard* doctrine might make them even more attractive to courts. Under *Bernhard*, a plaintiff must relitigate every issue on which he won in previous suits—but if he once loses, say on the tenth suit, he is collaterally estopped in subsequent actions. Thus, a prospective defendant's chances depend largely on where he stands on the plaintiff's hit list, unless, through joinder or a defendant class action, all such actions can be tried together.

11. It is apparent that some litigants succumb to a naive enchantment with the possibility of consolidating environmental litigation to maximize impact. Thus, in *Diamond v. General Motors Corp.*, 20 Cal. App. 3d 374, 97 Cal. Rptr. 639 (2d Dist. 1971), the plaintiff brought a class action on behalf of all seven million-plus residents of Los Angeles County against almost three hundred corporations and municipalities. These excesses, however, do not negate the potential utility of defendant class actions when, *e.g.*, a substantial number of enterprises conduct similar operations which clearly harm a plaintiff.

12. Prior to the 1966 amendments, Rule 23 provided in pertinent part:
actions have been patent infringement cases which, since they typically involve many similarly situated potential defendants, are especially amenable to defendant class actions. The defendant class action's utility in this setting is illustrated by Technograph Printed Circuits, Ltd. v. Methode Electronics. Over a six-year period, Technograph had instituted some seventy patent infringement actions against approximately eighty manufacturers of electronic equipment. Subsequently, the company moved to convert four such actions which were pending in one district court into a defendant class action. In granting the motion, the court indicated a defendant class action was appropriate because class membership was quite numerous and the controversy involved "massive multidistrict litigation of national interest."

Research Corp. v. Pfister Associated Growers Inc. extended and clarified the reach of defendant class actions. The suit, originally against Pfister alone for patent infringement, was expanded into a defendant class action involving both patent and antitrust issues. With respect to the antitrust claims, the court recognized that "[e]ach member of the alleged conspiracy may have individualized issues, such as . . . its share in whatever damages are recoverable," but held that the individual questions were overridden by various common questions, such as the actionable injury, if any, suffered by the plaintiff.

If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced against the class is

(1) joint or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

Thus, Research Corp. approved a defendant class action even though critical individualized questions existed.\(^{19}\) Common questions need not be fully dispositive of the litigation in order to use the device.\(^{20}\)

The Seventh Circuit demonstrated the potential scope of defendant class actions in Appleton Electric Co. v. Advance-United Expressways.\(^{21}\) In Appleton Electric, a plaintiff class of several million shippers sought freight refunds from a defendant class of 1,400 motor carriers whose rate schedules had been cancelled by the Interstate Commerce Commission. The defendant class strongly protested that the complexity of the issues and the overwhelming size of the classes defied manageability. The Seventh Circuit rejected these objections, noting its traditional tolerance of multi-party suits\(^ {22}\) and the trial judge's broad discretion to determine the manageability of class actions.\(^ {23}\) Appleton Electric shows the binding breadth available in one trial by bold use of Rule 23.

Though no environmental defendant class action has yet been expressly approved, another recent decision came tantalizingly close to doing so. In Texas v. Pankey,\(^ {24}\) Texas brought an action against New Mexico ranchers using a pesticide which was polluting the Canadian River flowing into Texas. Texas named eight individual ranchers as defendants but also sought relief against all other New Mexico ranchers within the Canadian River's watershed "on a class basis."\(^ {25}\) In reversing the district court's dismissal of Texas' complaint, the Tenth Circuit did not rule on the propriety of the class action.\(^ {26}\) However, the court twice noted the defendant class action aspect, without apparent misgivings.\(^ {27}\) Pankey's refusal to dismiss an action against a class of polluters, coupled with express approval of defendant class actions in Technograph, Research Corp., and Appleton Electric, argues strongly that Rule 23 authorizes environmental defendant class actions.

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20. See note 18 supra.
21. 494 F.2d 126 (7th Cir. 1974).
22. Id. at 134, citing Illinois Bell Tel. v. Slattery, 102 F.2d 58 (7th Cir. 1939).
23. 494 F.2d at 139.
25. 441 F.2d at 237.
26. The dismissal and Texas' appeal turned on (1) whether district courts have jurisdiction over federal question suits instituted by a state and (2) whether Texas presented a federal question as defined by the jurisdictional statute, 28 U.S.C. § 1331(a). Id. at 236, 237. The propriety of a class action was consequently not in issue.
27. Id. at 237, 242.
C. Pre-Amended Rule 23 Defendant Class Actions

Prior to 1966, defendant class actions were infrequently instituted. Typically, they were brought against members of an organization or participants in an economic venture to determine the liability of representative and absent class members. For example, in the 1945 Texas case of Richardson v. Kelly, the receiver of an insolvent inter-insurance exchange sued 28 exchange members as individuals and also sued to establish the liability of all 3200 members for certain assessments. In permitting the action, the court relied on prior insurance cases holding that policeholders' rights or the validity of insurers' assessments had been dispositively settled in a prior policyholder class action.

The courts, moreover, often rejected defendant class actions.

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28. But see, e.g., United States v. American Optical Co., 97 F. Supp. 66 (N.D. Ill. 1951). In that case, the Government brought an antitrust action against a corporate defendant and against certain named individuals as representatives of a class of approximately 2,000 doctors. The court determined that a final decree, if entered, could lawfully bind the entire class because of the determination of adequate representation. Id. at 70. It is instructive to note that the Government sought only injunctive relief against the defendant class, not money damages. Id. at 68. Cf. Miller v. Barnwell Bros., Inc., 137 F.2d 257 (4th Cir. 1943), where an insurance company's receiver was permitted to sue to recover an assessment from insureds although the insureds had not been parties to the proceeding in which liability was imposed on the insurer. See also Irwin v. Missouri Valley Bridge & Iron Co., 19 F.2d 300, 303 (7th Cir.), cert. denied, 275 U.S. 540 (1927).

29. See, e.g., Christopher v. Brusselback, 302 U.S. 500 (1938); Smith v. Swormstedt, 16 How. 288 (1853) (involving a class of plaintiffs bringing suit against a class of defendants). In Swormstedt, Mr. Justice Nelson stated: "the rule is well established, that . . . a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest." Id. at 302. See also Tisa v. Potofsky, 90 F. Supp. 175 (S.D.N.Y. 1950) (members of a labor organization's executive board constitute an appropriate defendant class which can be sued in a representative capacity).

30. 144 Tex. 497, 191 S.W.2d 857 (1945). For a criticism of Richardson on grounds of its determination that representative defendants adequately represented absent members of the defendant class, see Z. Chafee, Some Problems of Equity 239-42 (1950); Note, Due Process Requirements of a State Class Action, 55 Yale L.J. 831 (1946); Comment, Denial of Due Process Through Use of the Class Action, 25 Tex. L. Rev. 64 (1946).

31. 191 S.W.2d at 863. The court notes that in those cases the factor of "common interest" among the "class" members was determinative regardless of whether liability was joint or several. "[A]lthough the liability of each subscriber was several, it was properly recognized that the duty to pay assessments was common to all and resulted in a 'unity between them in the fund from which their rights were to be enjoyed,' and that, therefore, it was a duty which could be enforced in a class suit." Id. The court placed particular reliance on Hartford Life Ins. Co. v. Ibs, 237 U.S. 662 (1915) and Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921).

32. See Contract Buyers League v. F & F Investment, 48 F.R.D. 7 (N.D. Ill. 1969) (disallowing a bilateral class action with respect to defendants, but allowing a plaintiffs' class action on behalf of blacks victimized by "blockbusting").
The Supreme Court, in the 1938 case of *Christopher v. Brusselback*,\(^{33}\) indicated that Equity Rule 38, the precursor of Rule 23, could only be used to determine absent defendants' rights to property within the court's jurisdiction.\(^{34}\) The Court intimated that absent defendants cannot be bound by determinations of personal liability.\(^{35}\)

*Christopher* was an action to enforce the prior judgment in an earlier, successful defendant class action which purported to determine the statutory liability to a bank's creditors of all the bank's shareholders. However, absent defendant-shareholders had not been served with process in the prior action. In *Christopher*, the Court found that since the controlling statute imposed a *personal obligation* on the shareholders, only "a court having jurisdiction to render a judgment against them *in personam*"\(^{36}\) could rule on their liability. Simply by owning shares, the stockholders had not "subjected themselves to a procedure for determining in their absence the essential conditions of liability, or . . . relinquish their right to contest, as in any other litigation, every step essential to its establishment."\(^{37}\) Since *Christopher* suggests that there are constitutional limitations on the broad language of Rule 23, it is necessary to examine the extent of those limitations on environmental defendant class actions.

I

**CONSTITUTIONAL DIMENSIONS OF DEFENDANT CLASS ACTIONS**

A. Jurisdiction and Due Process

The basic constitutional dilemma of defendant class actions arises out of the due process rights of absent members of the defendant class. Fundamental to due process is the notion that the authoritative determination of a personal liability, obligation or right of a defendant requires the court's *in personam* jurisdiction over that party.\(^{38}\)

The other thorn of the dilemma grows from the class action con-

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33. 302 U.S. 500 (1938).
34. *Id.* at 505.
35. *Id.* at 504-05. See note 18 supra.
36. *Id.* at 502.
37. *Id.* at 504. The Court relied on *Smith v. Swormstedt*, 16 How. 288 (1853) in framing this limitation. However, it should be noted that the language in *Swormstedt* seems amply broad to authorize *in personam* suits against a class of defendants. 16 How. at 302.
38. *Pennoyer v. Neff*, 95 U.S. 714 (1878). *Pennoyer*, of course, stems from the territorialist conception of judicial power, which views judicial authority as circumscribed by geographical limitations. Completely aside from notions of fairness to a putative defendant, e.g. providing notice and opportunity to defend, the *Pennoyer* rationale views judicial power as limited by geographical boundaries. Hence, constructively providing Neff with notice of the Oregon suit against him by publication in California was ruled insufficient to confer power on Oregon state courts to adjudicate the controversy.
cept that in personam jurisdiction over all class members is not mandatory.\(^{39}\) Imposing such a requirement would completely undercut the broad purposes of the class action device—requiring personal jurisdiction over all class members would in effect destroy the class action concept since by definition there could be no “absent” members. All class members would have to be named and be before the court as a prerequisite to the prosecution of an action.\(^{40}\) This tension between due process requirements and the nature of the class action has been resolved for plaintiff class actions by requiring that the designated class representatives \textit{adequately represent} the interests of the entire class.\(^{41}\) If the named parties are effective representatives of the broader class, absent members are viewed as vicariously present and thus afforded their day in court.\(^{42}\)

Courts understandably resist arguments that adequate representation alone meets all due process objections of absent defendants. Indeed, attempting to expand this justification of the binding effect of class actions on absent, unnotified defendants creates a strong tension with traditional notions of personal jurisdiction requirements.\(^{43}\) Even contemporary cases hold that the defendant must have such a relationship with the state of the forum as to render it not unfair or inequitable that the party be subjected to that state’s jurisdiction.\(^{44}\)

39. Personal jurisdiction in class actions need only exist as to the designated class representatives. The threshold issue for entry of judgment binding all class members is whether the named representatives adequately represent the interests of the absentees, not whether all members are before the court. See, e.g., Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636 (D. Kan. 1968). See generally Note, Class Actions— Adequacy of Representation, 44 Notre Dame Law. 151 (1968).

40. As to a defendant class action, this was the precise argument invoked by the dissent in Richardson v. Kelley, 144 Tex. 497, 191 S.W.2d 857 (1945). The dissent contended that the determination of a personal liability demanded in personam jurisdiction over the absent members of the class. 191 S.W.2d at 871.

41. Fed. R. Civ. P. 23(a): “One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (4) the representative parties will fairly and adequately protect the interests of the class.” For actions brought under Rule 23(b)(3), at least, absent members must also be provided notice of the action. See note 52 infra. See also note 39 supra.


43. See, e.g., Pennoyer v. Neff, 95 U.S. 714 (1878), discussed at note 38 supra and accompanying text. If a suit “involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.” Id. at 733.

44. International Shoe Co. v. Washington, 326 U.S. 310 (1945). These flexible notions of fairness underlie the successful proliferation of state long-arm statutes. For a recent case upholding use of the Wisconsin long-arm statute to obtain jurisdiction over a Texas corporation whose sole contact with Wisconsin was its solicitation, negotiation, and execution in Texas of a contract with a Wisconsin corporation, see Nordberg Div. of Rex Chainbelt, Inc. v. Hudson Eng’r Corp., 361 F. Supp. 903 (E.D. Wis. 1973).
Fundamentally, a jurisdiction's processes, as one form of governmental power, can reach only those persons who otherwise interact with that governmental unit. This traditional principle of limited judicial power is capsulized in the doctrine of "minimum contacts" announced in *International Shoe Co. v. Washington.* The principle is further supported by the Supreme Court's more recent pronouncement in *Hanson v. Denckla* that a state cannot lawfully exercise jurisdiction over a putative defendant unless the latter has purposefully availed himself of the benefits and protections of the forum state.47

Clearly, then, judicial power is not without bounds. If a court purports to determine the rights and obligations of a person named by the plaintiff as party opponent, the tribunal must first determine whether it enjoys power to adjudicate. Without a lawful basis for such power, including at least the required nexus between forum and defendant, any purported adjudication is void ab initio.48

Inevitably, some defendant class actions will involve absent members whose obligations or liabilities will be determined without the requirements of *International Shoe* and *Hanson v. Denckla* having been met. The first question, then, is whether the *Hanson* standards for in personam jurisdiction apply to defendant class actions.49 One district court has indicated that, if traditional due process standards are met for the named defendants who the court finds will adequately represent absent class members, the litigation binds absent members.50 In *Northern Natural Gas Co. v. Grounds,* a defendant class action case, the court said the "essential requisite of due process as to absent members of the class is not notice, but the adequacy of representation of their interests by named parties."

45. 326 U.S. 310 (1945).
47. Id. at 253.
48. This nexus can become quite ephemeral, however, as a result of the fiction of quasi-in-rem jurisdiction created by the "location" of a debtor within the jurisdiction. *Harris v. Balk,* 198 U.S. 215 (1905). A modern application of this doctrine, *Seider v. Roth,* 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S. 99 (1966), held that contractual rights of an insured under an insurance policy constitute a "debt" subject to attachment. A recent Fifth Circuit decision holds that under *Harris v. Balk* it is proper to use Mississippi's long-arm statute for a non-resident plaintiff to obtain quasi-in-rem jurisdiction over a foreign corporation on a cause of action arising out-of-state by the plaintiff's attaching debts owed to the defendant corporation by companies doing business in Mississippi. *Steele v. G.D. Searle & Co.*, 483 F.2d 339 (5th Cir. 1973), cert. denied, 415 U.S. 958 (1974).
49. See notes 33-35 and 40 supra and accompanying text.
51. Id. See note 39 supra.
52. Id. at 636. The *Grounds* view of the need for notice has since been corrected by *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974) [*Eisen IV*]. *Eisen IV* holds that plaintiff class representatives must provide notice to absent members of their class if
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The Grounds approach may be acceptable for plaintiff class actions. Unlike defendants, plaintiff class representatives invoke judicial processes, and it can be reasonably hypothesized that by satisfying the several requirements of Rule 23, class representatives constitute functional agents of the entire class. Moreover, many if not all absent members of a plaintiff class would never enjoy a day in court but for the class action, given the modest value of individual claims and/or the high cost of litigating them. Absent plaintiffs, then, while technically lacking a day in court, are compensated by free, effective representation and the possibility of a windfall recovery in a suit they might never have brought.

The suit is filed under Rule 23(b)(3) (permitting absent members to opt out of the action). The Court did not decide whether notice is required for suits brought under other subsections of Rule 23. 417 U.S. at 177 n.14. However, Eisen IV does not affect the rule that adequately represented but absent members of a class may be bound by the litigation.

Indeed, it is as much a criticism as a justification of Rule 23 that litigation which would otherwise not exist due to the modest claim held by a single potential litigant proliferates because of the availability of the class action. Militating against this criticism is, of course, the rule proscribing aggregation of claims to satisfy the jurisdictional amount requirement. See Zahn v. International Paper Co., 414 U.S. 291 (1973). The Zahn rule apparently also requires that the claim against each defendant meet the jurisdictional amount. However, this is not as severe a restriction on environmental class actions as it might appear.

In the first place, Congress has exempted some suits to enforce federal pollution laws from jurisdictional amount requirements. See, e.g., 42 U.S.C. § 1857h-2(a) (1970) [Clean Air Act]; 33 U.S.C. § 1365(a) (Supp. 1975) [Federal Water Pollution Control Act].

Second, the Sixth Circuit recently approved a very attractive way to place the jurisdictional amount in controversy in tort actions. The court held, in Michie v. Great Lakes Steel, 495 F.2d 213, 215, 6 ERC 1444, 1445 (1974), that multiple defendants, whose independent actions of allegedly discharging pollutants . . . thereby created a nuisance, [are] jointly and severally liable . . . for . . . injuries . . . sustained as a result of such actions, where said pollutants mix in the air so that their separate effects in creating the individual injuries are impossible to analyze. [emphasis added]

The theory is that made famous by Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948). If the harm cannot be apportioned, as may generally be true in pollution cases, at least before trial, “the entire liability may be imposed upon one (or several) tortfeasors subject, of course, to subsequent right of contribution among the joint offenders.” Michie, supra, 495 F.2d at 217, 6 ERC at 1447.

The effect is to encourage defendant class actions. If there is a substantial injury, plaintiff need not determine which of many polluters caused it, but may instead name all of them as a defendant class, leaving them to parcel the damages among themselves.

54. To some extent, it is unfair to characterize class action damages, other than punitive damages, as a “windfall.” While it is true that absent plaintiffs might not gain damages by their own efforts, that may be only because transaction costs or ignorance would deprive them of their due. Absent plaintiffs, after all, only recover as actual damages sums which the court determines they were entitled to all along, but wrongfully denied by defendants—hardly a windfall. Of course, socially and psychologically we treat paying money differently from not receiving it. To this extent, absent defendants do stand to lose more than absent plaintiffs.
In defendant class actions, however, the *Grounds* approach may be unfair. Designated representatives of a defendant class are not natural agents of unnamed class members. Their interest is in defeating the plaintiff's claims as to their own liability.\(^5\) Imposition of liability on absent class members cannot hurt the representatives, and may even give them an economic advantage over their competitors among the absentees.\(^6\) This contrasts with plaintiff class actions, where the class representatives’ interest in maximizing total recovery from defendants will benefit all class members.\(^7\)

Second, unlike absent plaintiff class members, no defendant class member will be effectively "deprived" of his day in court by dismissal or limitation of the defendant class action. Indeed, the putative defendant class member in all likelihood wants to avoid any such day in court.\(^8\) Any presumed advantage inuring to the absent defendant from elimination or reduction of attorneys’ fees is outweighed by being thrust into the litigation at all, or, if a suit was inevitable, by loss of control of the litigation resulting from not having been designated a class representative.\(^9\)

These distinctions between absent plaintiffs and defendants suggest due process requires more than adequate representation to justify in personam jurisdiction over absentee defendants. This suggestion is supported by *Christopher*\(^10\) and by *Hanson*’s rule that individual de-

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55. Courts could impose a responsibility on representatives to subordinate their interests to those of the class. Thus, California has placed a "fiduciary obligation" on plaintiff class representatives who may not "compromise the group action in return for an individual gain." La Sala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 871, 489 P.2d 1113, 1116, 97 Cal. Rptr. 849, 852 (1971). *See also* Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497, 499 (N.D. Ill. 1969), giving "only token weight" to the lack of desire of defendant representatives to litigate, presumably because they have a duty to do so.

56. However, a court's initial determination of adequacy of representation will presumably thwart any such speculative gain on the part of named representatives. The court also has a continuing duty to protect absent parties. Zwerkle v. Cleveland-Cliffs Iron Co., 52 F.R.D. 151, 159 (S.D.N.Y. 1971); Siegel v. Chicken Delight, Inc., 271 F. Supp. 722, 727 (N.D. Cal. 1967).

57. This built-in altruistic factor results from the underlying considerations inducing named representatives to bring a class action, since the representatives are seeking to maximize the total recovery against the defendants. Where lead plaintiffs might be tempted to avoid litigation risks and costs by a quick settlement, Rule 23(e)'s requirement of court approval should insure the settlement is fair to the class.

58. Unless plaintiffs choose to maintain the action under Rule 23(b)(3), which permits absent parties to opt out, defendants will be forced to have their "day in court" if the class action is approved.

59. Potential control of litigation strategy is automatically reduced by the presence of the named representatives and their counsel in the action. Hence, the ability of a 23(b)(3) absentee defendant to "enter an appearance through his counsel," Rule 23(c) (2)(C), is obviously not tantamount to control of defense strategy.

60. *See* notes 33-37 *supra* and accompanying text.
fendants, at least, cannot be forced to submit to a state court's power unless they "purposefully avail themselves" of the state's protections.61

B. Due Process and Notice

One traditional due process prerequisite for jurisdiction over parties is notice to them of the action.62 Courts have generally required notice to absent class members however, only to permit them to opt out of 23(b)(3) actions.63 In other class actions, absent members are treated as passive beneficiaries of the designated representatives' industry.64 In all likelihood, the argument goes, no suit would have been brought by absent class members, because the individual claims have comparatively modest value. Besides, even if they wish to do so, absent parties cannot extricate themselves from a 23(b)(1) or 23(b)(2) suit. Since notice is, after all, only a means to the end of providing an opportunity to litigate,65 requiring this costly and burdensome procedure where the opportunity would be foregone or meaningless would exalt form over substance.66 Moreover, imposing a notice requirement could dangerously inhibit use of the class action device because the costs of giving notice could effectively preclude many suits.67

61. Hanson v. Denckla, 357 U.S. 235 (1958). "The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State . . . ." Id. at 253.

62. The right to notice cannot lawfully be eliminated, since lack of notice is incompatible with due process. See, e.g., Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); MacKenna v. Ellis, 263 F.2d 35, 43 (5th Cir. 1959).

63. They are required to do so in such actions. Fed. R. Civ. P. 23(c)(2), as construed in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) [Eisen IV]. See also Advisory Committee's Note, Proposed Rules of Civil Procedure, 39 F.R.D. 69, 106-07 (1966). Rule 23(c)(2) provides: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

64. "In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum." Advisory Committee's Note, Proposed Rules of Civil Procedure, 39 F.R.D. 69, 106 (1966). However, some courts view notice as required in all class actions. See Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968) [Eisen II]. But see 7A Wright & Miller, supra note 3, § 1786, at 142-43.

65. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). The basic purpose of notice is "to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Id. at 314 (emphasis added). Notice is thus simply a tool by which to notify persons of an opportunity to make an appearance in judicial proceedings. In circumstances where such an appearance is not reasonably to be anticipated, notice serves no function.


67. The inhibitory effect of requiring representative plaintiffs to provide notice to
The foregoing considerations argue against requiring notice to absent members in plaintiff class actions (except 23(b)(3) actions). However, dispensing with notice to absent defendants is quite a different matter. Elementary fairness suggests that the defendant must, where practicable, be apprised of the suit against him and be afforded a reasonable opportunity to be heard before a court imposes a personal judgment against him. As the Supreme Court held in *Mullane v. Central Hanover Trust*, 68 means must be employed which are reasonably calculated to notify the defendant of the action against him.69 Only then can the court lawfully entertain the suit.

Can plaintiffs avoid the constitutional requirement of reasonable notice by bringing an action against a class? The question is important, for the notice provisions of Rule 23(c)(2) and 23(d)(2) do not require notice to an absent defendant in a class action brought under Rule 23(b)(1) or (b)(2).70 Any argument that notice to unnamed defendant class members is not constitutionally required must assume, in view of *Mullane*, that giving notice to designated class representatives is tantamount to providing notice to the absentees. This assumption is tenable only if designated representatives are functional agents of the class,71 so notice to the representatives may be imputed to absent members. Even if the fiction of functional agents, plausible in the plaintiff class action setting, were accepted in the defendant class situation, a critical purpose of notice would obviously not be satisfied by limiting actual notice to class surrogates. The unnoticed member would never actually be apprised of his right to appeal and defend in the action—the essential purpose of notice requirements.72

69. 339 U.S. at 314. "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Id. at 315.
70. The "mandatory notice pursuant to subsection (c)(2) [applicable to (b)(3) class actions], together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject." Advisory Committee's Note, *Proposed Rules of Civil Procedure*, 39 F.R.D. 69, 107 (1966) (emphasis added). It should be borne in mind, however, that some courts view notice as mandatory in all class actions. See generally 7A WRIGHT & MILLER, supra note 3, § 1786.
71. See text accompanying note 64 supra.
72. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). *See also* Milliken v. Meyer, 311 U.S. 457, 463 (1940) (adequacy of notice "is dependent on whether or not the form of substituted service provided for such cases and employed
as agents or fiduciaries for the class, the designated representatives were legally bound to notify the remaining class members, absent defendants could be liable for a money judgment without ever knowing of the pending proceedings. Clearly, such a result must be avoided.

Defendant class actions are, therefore, less open-ended than plaintiff class suits. Whatever the resolution as to jurisdiction over non-present defendant members, due process requires at minimum that all defendants to be bound by a judgment be afforded the notice required by Mullane. Hence, unlike plaintiffs, no defendant class member can constitutionally suffer a binding adjudication of his rights and obligations without first receiving notice of the litigation.

Providing notice to all absent defendants should not, however, destroy the utility of defendant class actions. Compared to many plaintiff classes, most defendant classes will probably be relatively small, and most members easily notified by mail. Consequently, the requirement will not entail such enormous expense and effort as to effectively preclude the actions.

C. Minimum Contacts and a Theory of Fairness in Defendant Class Actions

Assuming plaintiffs give notice of the action to absent defendants, can the court adjudicate the rights and obligations of those defendants whose contacts with the forum do not meet the stringent standards of Hanson v. Denckla? To justify such a departure, the class action

is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard.) Neither of these cases, of course, requires the member to have actual notice of the action, provided an effort to notify him, sufficient to satisfy due process requirements, has been made.

73. Such a burden probably could not be placed on representatives of a defendant class. "Where . . . the relationship between the parties is truly adversarial, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175 (1974) [Eisen IV]. Although the plaintiff in Eisen was also the representative of his class, so that Eisen could possibly be characterized as holding that the representative must pay for costs of notice, courts are unlikely to accept such a characterization in the face of the quoted language.

74. Of course, the class must not be so small that individual lawsuits are a more efficient way to resolve the dispute. Fed. R. Civ. P. 23(a)(1).


In practice, the Hanson shield may be very hard to invoke on collateral attack. Quite tenuous contacts with a state have been held sufficient to give a court in personam jurisdiction. See, e.g., McGee v. International Life Ins. Co., 355 U.S. 220 (1957). On collateral attacks generally, see Note, Collateral Attack on the Binding Effect of Class Action Judgments, 87 HARV. L. REV. 589 (1974).

However, the question is not so much whether the court's determination that it has jurisdiction will withstand collateral attack (see Durfee v. Duke, 375 U.S. 106 (1963)), as whether a timid court may be persuaded that there is sufficient risk of such attacks that it should exercise its discretion to confine the class action to in-state defendants.
must give defendants a substitute for the due process protection which Hanson's rule otherwise provides. Fundamental fairness underlying doctrines of due process involves, at base, the opportunity for an adequate and full airing of one's position by one vigorously defending that position in circumstances where it is not inequitable to require the maintenance of a defense. This much, at least, can be achieved by the traditional requirement of adequate representation.\textsuperscript{76}

Any surrogate defense means, of course, that the absentee will lose most if not all control of litigation strategy.\textsuperscript{77} However, nonrepresentative in-state defendants are equally denied control. Since this disadvantage does not deprive the court of jurisdiction over them, it should not do so for nonrepresentative out-of-state defendants.

One persuasive reason for denying critical importance to an absent defendant's loss of control is that the outcome of a prior individual action will often have a strong stare decisis impact in a subsequent suit against a similarly situated defendant.\textsuperscript{78} To be sure, the second defendant controls his own suit, but the practical value of such control is slight in view of the influential precedent established in the earlier litigation. As the court in Technograph indicated in its analysis of Rule 23(b)(1)(B), "[s]elected adjudications [of important questions] . . . may be accorded great weight in industrial relations by comity between courts . . ."\textsuperscript{79} Therefore, allowing a defendant class action, when accompanied by notice to absent defendants and an opportunity for them to appear, may afford more practical protection than forbidding a class action while attributing strong precedential value to the determination of an individual action.

In sum, in cases involving multiple defendants, fairness should be treated as the central due process question, not merely as an incident of verbal formulae describing judicial power over persons.\textsuperscript{80} Even if tra-

\textsuperscript{76} FED. R. CIV. P. 23(a)(4). See Marston v. L.E. Gant, Ltd., 56 F.R.D. 60, 62 (E.D. Va. 1972), wherein the court observed that adequacy of representation "should be scrutinized with particular care where suit is brought against a purported class of defendants . . . ." See also Z. CHAFEE, SOME PROBLEMS OF EQUITY 238 (1950).

\textsuperscript{77} See note 59 supra and accompanying text.

\textsuperscript{78} See text accompanying note 11 supra.


The California Supreme Court has recognized the need for very flexible due process standards to allow desirable multi-party litigation in Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957). Similarly, Rule 4(f) explicitly extends jurisdiction of district courts beyond Hanson v. Denckla's limits to permit joinder of necessary but otherwise inaccessible parties.
ditional doctrines would not confer power, unfairness is not present if the absent defendant has received notice of the suit, is adequately repre-
sented, and is provided an opportunity to defend. Thus, a new stan-
ard of fairness is warranted. The standard will adapt traditional no-
tions of judicial power to the defendant class action setting. To carry
out Congress’ mandate for unified litigation over matters of widespread,
direct interest, a flexible approach to jurisdiction is needed, lest litiga-
tion proceed piecemeal, with the undesirable consequences of delay,
diseconomy, and possible inconsistency.

Adequate representation therefore becomes the touchstone of
due process in the defendant class setting, as is the case with plaintiff
class actions. This is not to say the two types of actions are identical
from the standpoint of due process. Perhaps because courts perceive
plaintiff class actions as windfalls for absent plaintiffs, no one suggests
jurisdiction over them should be limited by Hanson v. Denckla. It
is much harder to argue that absent defendants receive a windfall by
being subjected to litigation. However, this does not mean the Hansontest should be extended to defendant class actions. Unlike the de-
fendants in Hanson, the absent defendant class member need sustain
no inconvenience to defend himself in the litigation—the defense is
undertaken instead by parties judicially determined to be adequate
representatives of his interests. If, moreover, he is put on notice of
the action and may personally appear, it is not unfair to bind him by
the litigation.

81. A recent federal district court decision on an analogous issue suggests the via-
bility of this approach. In holding that federal securities statutes allowing nationwide
service of process are not to be constrained by the strict limitations of International
Shoe, the court observed: “We believe that it is better to include the traditional proce-
dural due process notions as a part of a judicial fairness test . . . .” Oxford First Corp.
unfair to require a California corporation lacking International Shoe minimum contacts
with Pennsylvania to defend against a lawsuit filed in Pennsylvania’s Eastern District.


83. Indeed, Professor Wright warns of the added importance of adequate represen-
tation in view of the temptation to plaintiffs “to name as representatives of the defendant
class persons whose defense will be less than zealous.” Wright, Class Actions, 47
to pursue their class’ interests could help insure adequate representation. See note 55
supra.

84. See Note, Consumer Class Actions with a Multistate Class: A Problem of

85. Hanson denied jurisdiction of Florida state courts over a single foreign de-
defendant in an individual action.

86. This should help dispel any forum non conveniens arguments advanced on be-
half of absent defendants.

87. Some courts have gone so far as to assert that they can bind absent parties
whether or not they have jurisdiction over them. See, e.g., Calagaz v. Calhoon, 309
F.2d 248, 254 (5th Cir. 1962) and Advertising Specialties Nat’l Ass’n v. F.T.C., 238
Once constitutional problems raised by suits against a class of defendants are resolved, the practicalities of using the device can be profitably examined. Recent federal legislation provides many possibilities for instituting an action against a class of defendants. For example, a plaintiff could bring a citizens’ suit for compliance with Environmental Protection Agency standards with a pendent claim for compensatory damages against a class of defendants emitting pollutants. If the plaintiff wins, he may reap not only compliance by the wrongdoers but damages and costs of litigation as well.

F.2d 108, 120 (1st Cir. 1956). Both of these cases were decided before the 1966 revision of the Federal Rules; neither sought money damages from absent defendants. However, the principle was reaffirmed in Management Television Systems, Inc., v. Nat’l Football League, 52 F.R.D. 162 (E.D. Pa. 1971), an antitrust class action under Rule 23.2. Although the court quashed service of process against two members of the class, it approved the class action:

Defendants contend that the class action cannot be sustained because no enforceable judgment could be entered against clubs not properly served with process. However, class actions are binding on all members of a class under Rule 23(c)(3). Where a class is adequately represented, and where there is no conflict of interest between members of a class, a judgment binding on all the members does not offend due process. Id. at 164.


Even where Congress has not acted, there is nonetheless a federal common law cause of action for nuisance for despoliation of interstate or navigable waters. See, e.g., Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971).


90. The Clean Air Amendments of 1970 expressly provide for the maintenance of citizens’ suits for injunctions to enforce the statute. See note 120 infra and accompanying text. The Rivers and Harbors Act, 33 U.S.C. § 411 (1970) provides indirectly for citizens’ recovery of damages. The statute states that one-half of any fine imposed for criminal violations shall be remitted to the person giving information leading to conviction under the statute. As for pendent claims, suits for common-law nuisance have received renewed attention. See, e.g., Bryson & Macbeth, Public Nuisance, the Restatement (Second) of Torts, and Environmental Law, 2 ECOLOGY L.Q. 241 (1972). At least thus far, federal environmental legislation has not preempted the federal common law of nuisance. See Illinois v. City of Milwaukee, 406 U.S. 91, 107 (1972).

91. There are, however, clear limits on bringing a pendent claim pursuant to state
A. Advantages of the Defendant Class Device

There are several advantages to employing the defendant class action in environmental litigation. The principal benefit of suing a class of defendants lies in the greater likelihood of securing prompt, widespread compliance with anti-pollution standards. This contrasts with the results of the piecemeal approach inherent in bringing suit against a single or small group of defendants. At best, suing individual defendants postpones a comprehensive disposition of environmental grievances of a similar nature within a geographical area. The more likely result of an exclusive use of conventional lawsuits is that many polluters will never be brought to task, absent administrative action by an agency charged with enforcement duties. For example, the initial costs of bringing marginal polluters into compliance may deter citizens’ suits against them, even with the prospect of recovering litigation costs if the action is successful. The conventional suit will therefore tend to single out the most egregious defendants, while avoiding smaller fry against whom even meritorious suits are poor financial risks. Although attacking only the more outrageous offenders may

law. First, the state law may be preempted by federal legislation. For example, the Seventh Circuit held in City of Chicago v. General Motors Corp., 467 F.2d 1262 (7th Cir. 1972), that the Clean Air Amendments of 1970 preempted state-imposed standards with respect to new vehicles beginning with the 1968 models. Id. at 1265. The court held further that no cause of action would lie under Illinois products liability law since the test of “unreasonably dangerous” products had to be applied to each product individually. Id. at 1267. But see Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973) (the Federal Water Pollution Control Act does not preempt state regulation).

Second, one federal court dismissed a pendent claim in an environmental action by Illinois and the United States against a steel producer discharging wastes into Lake Michigan. Without full elaboration, the court simply noted that the count was cumulative of other, federally-based claims if the latter claims were meritorious, and if the federal claims were unsuccessfully prosecuted, “this court should not litigate Illinois’ common law action against the defendant under Section 1331 or Section 1345.” United States ex rel. Scott v. United States Steel Corp., 356 F. Supp. 556, 560 (N.D. Ill. 1973).

92. This is an intensification of one of the oft-heralded advantages of a plaintiffs’ class action—deterring injurious conduct by those who might not otherwise ever be held accountable. See Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 BUFFALO L. REV. 433 (1966).

93. While under the Clean Air Act, a private citizen is authorized to sue the EPA Administrator when he fails to carry out any required act, Clean Air Amendments of 1970 § 304(a)(2), 42 U.S.C. § 1857h-2(a)(2) (1970), enforcement is a discretionary duty.

94. Since the power to award attorneys’ fees and other litigation costs is discretionary under most federal statutes, and fees are in any event awarded only after litigation, the efficacy of this particular provision in encouraging citizen suits has been seriously questioned. See Cramton & Boyer, supra note 8, at 418.

95. The courts have explicitly recognized the relevance of costs in maintaining suits in determining whether an action may be brought as a class action. See Contract Buyers League v. F & F Investment, 48 F.R.D. 7 (N.D. Ill. 1969). See also Weeks v. Bareco Oil Co., 125 F.2d 84, 90 (7th Cir. 1941).
reduce pollution, it precludes comprehensive abatement of deleterious conditions and uniform treatment of defenders.

The sweeping effect of defendant class actions is more than merely formal. A decree imposing liability and ordering remedial action effectively guarantees faithful and prompt compliance by the defendants under threat of the court’s use of its contempt power. All members of the defendant class would be subject to the rendering court’s authority, since the contempt power retains its efficacy beyond the designated representatives of the defendant class. If notice, representation, and an opportunity to be heard confer jurisdiction over absent members in the original action, the court should retain jurisdiction to enforce its decree. Similarly, the contempt power should extend to defendant class members who violate the decree outside the court’s territorial jurisdiction.

Besides achieving uniform compliance, environmental class actions may, for economic reasons, be more carefully argued than individual suits. A poorly prepared or ill-conceived individual suit may effectively insulate a polluter from full compliance with governing regulations, at least as enforced by private civil litigation. Unsuccessful conventional suits may also inhibit subsequent lawsuits against those situated similarly to the original defendant by discouraging further expenditures of time and resources on what appears to be a losing proposition. No assurance of increased preparation and industry is necessarily provided if the action is brought against a class of defendants, unless the claimant brings the action on behalf of a class of plaintiffs. In the latter case of a bilateral class action, the requirement of “adequate representation” of class interests provides the safeguard of judicial scrutiny of the plaintiffs’ likely effectiveness in championing the members’ cause.

96. See generally 11 Wright & Miller, supra note 3, § 2960.
98. The uncertainty of receiving compensation for litigation costs can potentially affect the quality of preparation and presentation. Plaintiffs with marginal financial resources may therefore constitute less formidable opponents than, for example, an agency charged with enforcement duties. See notes 125-34 infra and accompanying text. This problem is exacerbated if a plaintiff of limited means must file, plead, discover, try and appeal many individual cases, rather than a single class action.
99. In Heart Disease Research Foundation v. General Motors Corp., 3 ERC 1710 (S.D.N.Y. 1972), aff’d, 463 F.2d 98 (2d Cir. 1972), a class action was brought on behalf of all residents of American metropolitan areas for $375 trillion in damages. The district court in dismissing the suit described it as filled with “ironies and absurdities.” 3 ERC at 1711. See note 9 supra.
100. Rule 23(a)(4) prescribes as a prerequisite to a class action that “the representative parties will fairly and adequately protect the interests of the class.”
101. The test of adequate representation was described by the Second Circuit in Ei-
his individual capacity, designation of a class of defendants will prob-
ably encourage greater preparation and industry, due to the greater
potential financial and environmental impact of the class action. De-
fendant class actions will therefore tend to improve the quality of
environmental litigation.

The third principal advantage of environmental defendant class
actions is that they reduce litigation costs. The genius of the class ac-
tion concept lies in providing an opportunity to obviate, with a single
trial, prolific and repetitive lawsuits. For instance, the defendant
class suit in Technograph was preceded by seventy-four separate in-
fringement actions. While overloaded courts benefit most from avoid-
ing unnecessary litigation, members of the defendant class are also
saved "the expensive ordeal of continually having to demonstrate their
innocence at trial."

In plaintiff class actions, increased judicial efficiency is partly off-
set by the likelihood of generating litigation where none would other-
wise exist. Considerable controversy has raged over the "legalized
blackmail" overtones of action brought by a plaintiff class. Critics
suggest the scramble to litigate the "big case" with potentially enormous
attorneys' fees will have a degrading influence on the bar. Other
troublesome questions arise when the final settlement in a successful
plaintiffs' class action yields large attorneys' fees with only a nominal
class recovery.

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102. See notes 3-4 supra and accompanying text.
Fortunately, these disadvantages endemic to plaintiffs' class suits are not shared by the defendant class action. No circumstances are immediately evident where defense counsel would be subject to temptations to engage in solicitation, as is the case with plaintiffs' class actions. And any large recoveries in defendant class actions will derive from the injuries defendants inflicted on the plaintiff, not merely on the number of people plaintiff purports to represent.

B. The Operation of Rule 23 in Environmental Class Actions

Amended Rule 23 consists of several subdivisions. Subsection (a) enumerates the first four preliminary hurdles, each of which must be satisfied for any class action to be maintained. Under its terms the class must be so numerous that joinder is impracticable; questions of law or fact common to the class must exist; the claims or defenses of the representative parties must be typical of those of the class as a whole; and the representative parties must be capable of fairly and adequately protecting the class' interests. Failure to satisfy any requirement terminates the class aspect of the action. This all-or-nothing restriction is evidenced in American Pipe & Construction Co. of Utah,107 in which the Supreme Court affirmed a district court's dismissal of the class action because plaintiffs failed to demonstrate impracticability of joinder, notwithstanding their showing of the other three elements.

Subdivision (a)'s preliminary matters aside, the actual shaping of the class action is accomplished under Rule 23(b). Subdivision (b)(1)(A) pertains to actions where repetitious lawsuits could establish inconsistent or incompatible standards of action for the party opposing the class,108 a provision which principally applies to an individual rather than a class of defendants. The Research Corp. and Technograph cases, however, indicate that (b)(1)(A) can be satisfied in a defendant class action relating to patent infringement.109 So too, in an environmental action, varying adjudications could impose incompatible standards of conduct with respect to the plaintiff. For example, he might be able to enforce his rights against certain offenders while being precluded from enforcing these rights against others.110 Similarly, if the defendants counterclaim against the plaintiff, he would be subject to the danger addressed by subdivisions (b)(1)(A).111 The Advisory

111. Id.
Committee's Note, approving use of the subdivision in "litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance . . .," further suggests its applicability to defendant classes.

Subdivision (b)(1)(B) is also applicable to defendant class actions. It provides for a class action if separate suits would create a risk of adjudications "which would as a practical matter be dispositive of the interests" of nonparties or if fragmented litigation would "substantially impair or impede their ability to protect their interests." Although not res judicata as to nonparties, the precedential value of an individual environmental lawsuit could "as a practical matter be dispositive of" or "substantially impair" the litigation prospects of other potential defendants situated similarly to the loser in the individual suit. The deference given to a sister court will tend to be even greater, of course, when the subject matter of the litigation is highly complex, as is often the case with environmental lawsuits.

The second principal subdivision of Rule 23(b), subsection (b)(2), is equally promising. An action may be maintained under its aegis if "the party opposing the class has acted . . . 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 . . . ." The courts have found that by merely filing suit a plaintiff acts on grounds generally applicable to the defendant class. If injunctive relief would be appropriate for either the plaintiff or defendant class, this subsection is an appropriate vehicle. Injunctive relief is of course a familiar remedy in the environmental setting, where plaintiffs seek to have wrongful conduct terminated and, if they prevail, defendants may seek injunctive relief to ward off future litigation.

Finally, subdivision (b)(3), under which defendants may opt out of the action, can be used if the court finds that common questions of law or fact predominate over questions affecting only individual members and if the court determines that a class action is superior to other available methods of adjudication. Section (b)(3) will often be applicable to environmental actions, since the overriding question of liability for harming the ecosystem will be common to all defendants. Defenses may also be common to the class.


113. "The difficulty of subject matter . . . gives selected adjudications of validity or invalidity more than the usual weight when a court is considering the adoption of another court's opinion or reasoning by means of comity." Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497, 500 (N.D. Ill. 1969).

That common questions predominate does not in itself legitimate use of the (b)(3) device. The court must make the additional, slippery evaluation whether the device is "superior" to other adjudicative avenues, such as consolidation. The Rule provides four guideposts for deciding this issue. The court shall consider (1) the interests of class members in individually controlling the defense; (2) the extent and nature of related litigation already commenced against the class; (3) whether the litigation should be concentrated in the particular forum; and (4) the likely management difficulties to be encountered.

The due process tensions inherent in defendant class actions are most easily resolved in (b)(3) suits. The enhanced substantive effect of a (b)(3) suit's binding effect on absent class members is greatly tempered by the provisions for opting out and for notice. Under this subsection, only those defendants who passed up the opportunity to avoid the litigation would be directly bound by the results. The class member would decide after receipt of individual notice, as Eisen IV requires. With defendants guaranteed this option, courts wary of the relatively novel defendant class action device might be more favorably disposed to allow it to proceed.

Due process, of course, does not demand adding this sweetener to make the medicine more palatable. With individual notice, a right to appear, and adequate representation, courts can constitutionally settle claims of liability with respect to absent defendants. Tactically, plaintiffs may find (b)(3) less desirable because, by opting out, defendants can reduce the potential comprehensive compliance with environmental standards which the defendant class action is designed to achieve. But at least (b)(3) can provide a last-ditch rallying point to keep the class action alive, particularly in instances where courts would feel more at ease if defendant class members were given a choice in the matter.

C. Substantive Uses of a Procedural Device: Recent Environmental Legislation

In view of the possible uses and advantages of a Rule 23 defendant class action, the available judicially and legislatively authorized causes of action for environmental degradation should be briefly noted. Many judicially created remedies for environmental grievances still

116. In fact, all jurisdictional problems may be obviated by the opt-out provision of subsection (b)(3). One must assert the absence of jurisdiction or the defense will be "waived." If a defendant has an absolute right to opt out of a suit, but does not assert it, he might be held to have thus waived his jurisdictional objections as well.
117. See Part I supra.
sound in venerable theories of tort law. Absent specific legislation, a plaintiff can resort to technical theories of nuisance, trespass, or strict liability.\textsuperscript{110} These causes of action are, of course, available against multiple defendants as well as individual ones.

Recent environmental legislation at both federal and state levels has provided useful additions to tort remedies for environmental degradation. Citizen suit provisions in the 1970 Amendments to the Clean Air Act,\textsuperscript{120} the 1972 Federal Water Pollution Control Act Amendments,\textsuperscript{121} and the Noise Control Act of 1972\textsuperscript{122} provide for suits against any person, governmental instrumentality or the EPA Administrator to compel performance or adherence to the standards promulgated under the statutes. Additionally, the measures abrogate all jurisdictional requirements of amount in controversy and diversity of citizenship.\textsuperscript{128} The statutes, moreover, are expressly made supplemental to any existing remedies to which a plaintiff may be entitled. A plaintiff can therefore maintain claims under other statutes or seek common law remedies if the citizen suit provisions do not fit his needs.\textsuperscript{124}

III

DEFINING THE PARTIES IN ENVIRONMENTAL CLASS ACTIONS

A. Anointing the Proper Champion: The Exemplary Plaintiff

Vindication of individual environmental rights is commonly an expensive and lengthy ordeal. The ascertainable damages incurred by the average citizen in breathing noxious fumes, for example, are generally marginal.\textsuperscript{125} Due to de minimis damages and high litigation costs, environmental plaintiffs often include one or more special interest groups, which, if granted standing provide the resources needed to prosecute an action effectively. In the absence of such interest groups, plaintiff class litigation may principally benefit the plaintiffs'...
attorney. While defendant class actions are less vulnerable to such abuse,\textsuperscript{126} the device does increase the potential plaintiff class recovery, and thus may be more attractive to unethical attorneys.

Such considerations may in many instances militate in favor of utilizing a less suspicious plaintiff, especially governmental units. It is well established that a state may sue \textit{parens patriae} to protect the health, safety or welfare of its citizens.\textsuperscript{127} As representative of its inhabitants, the state may sue both domestic and foreign polluters.\textsuperscript{128} Since a state represents all its citizens, it makes a far more appealing representative than even an amalgamation of special interest groups, whose victory might be at the expense of unrepresented interests. Tactically, too, a state enjoys several advantages over a plaintiff class. For foreign polluters, the state may invoke the original jurisdiction of the Supreme Court.\textsuperscript{129} Moreover, it can more easily meet the jurisdictional amount requirement than can a plaintiff class, which must place the amount in controversy for each member of the class.\textsuperscript{130}

The first environmental defendant class action under Rule 23, \textit{Texas v. Pankey},\textsuperscript{131} demonstrated the propriety of such suits. As previously noted,\textsuperscript{132} that case involved New Mexico ranchers using pesticides which swept into the Canadian River which flowed into Texas. The contamination threat prompted Texas to seek injunctive relief against eight ranchers individually and as representatives of the defendant class of ranchers within the watershed.\textsuperscript{133} The Tenth Circuit held that Texas enjoyed the right to protect its natural resources from impairment by external sources.\textsuperscript{134} \textit{Pankey} thus epitomizes state use of the defendant class action in environmental litigation—a well-heeled, unimpeachably motivated plaintiff seeking to rectify in a comprehensive manner the harmful conduct of an entire class of defendants.

\footnotesize{126. See notes 105-06 supra and accompanying text.
128. In the absence of specific enabling legislation, the courts have approved a “federal common law” right of a state to proceed against foreign polluters. See Garton, \textit{supra} note 127.
131. 441 F.2d 236 (10th Cir. 1971).
132. See notes 24-27 \textit{supra} and accompanying text.
133. There is no indication that the defendants took exception to their prosecution as a defendant class.
134. 441 F.2d at 242.
B. Tailoring the Contours of the Defendant Class

Assuming the presence of a proper plaintiff with standing to prosecute the action, he must properly describe the defendant class. A class action can only be maintained upon the court’s express approval, and is binding only on those “whom the court finds to be members of the class.” While the trial court may determine sua sponte that a class exists, the burden of establishing the class rests, understandably, on the party alleging its existence. Preliminarily, therefore, it is incumbent on the litigant alleging a defendant class to shape the contours of class membership so the class is readily ascertainable.

Happily, defendant classes should generally prove easier to define than have plaintiff classes. Industrial polluters, for example, are for the most part stationary in nature and finite in number. The membership of this type of congregation can be readily identified, whereas potential plaintiff classes may include myriads of members not easily, or at least not inexpensively, identifiable.

If a contemplated defendant class is too large or unmanageable, plaintiffs may pare it to a more convenient size. No requirement demands that the class include everyone who has injured the aggrieved parties. For example, a class of defendants could be limited to industrial enterprises dumping a particularly noxious chemical effluent into a river, omitting all other polluters of that river. Indeed, the requirement of subsection (b) (3) that common questions of fact predominate suggests the advisability of self-restraint by the plaintiff in defining the defendant class.

While limiting the class to a “manageable” size, the plaintiff must not so reduce it that joinder of all defendants becomes practicable. In prior cases, joinder of litigants has been deemed practicable with as many as three hundred members; it has been held

137. See 7A Wright & Miller, supra note 3, § 1759.
138. See note 9 supra and accompanying text.
140. Even in actions brought under Rule 23(b)(1) or (2), the Rule 23(a) prerequisites (that common questions of law or fact exist, that the representatives’ defenses are typical of those of the class, and that the representatives can protect their class interests) will encourage plaintiffs to limit defendant class size.
impracticable with as few as thirteen. Approved defendant classes in patent infringement litigation have varied in size from thirteen to four hundred members. Clearly, the criterion of feasibility of joinder is not simply a matter of numbers, but involves a judicial evaluation of the proper form of organization for the multiple-member party.

Joinder is clearly impracticable unless allowed by Rules 19 and 20. Thus, the impracticability requirement is satisfied any time joinder would destroy the court's subject matter jurisdiction and any time it would render venue improper. In such circumstances, or others where joinder would be impracticable, plaintiff's principal problems will be keeping the defendant class to a manageable size and preserving the commonality of factual and legal questions.

1. Use of Subclasses

In defining the defendant class membership, the plaintiff should consider subclasses of defendants. These subgroups of the larger class could be defined by their economic or legal nature or by the nature of their injurious activity. This feature is illustrated in Philadelphia Electric Co. v. Anaconda American Brass Co., an antitrust suit by a class of plaintiffs against several defendants individually. In that case, the plaintiff class consisted of the following subclasses: (1) all governmental entities within the Eastern District of Pennsylvania; (2) all enterprises within the state of Pennsylvania; (3) all parties doing business in the state of Pennsylvania; (4) all parties doing business outside the state of Pennsylvania; (5) all parties doing business in the Eastern District of Pennsylvania; and (6) all parties doing business outside the Eastern District of Pennsylvania.


146. Fed. R. Civ. P. 19(a). This would be true, for example, in a diversity suit where the defendant to be joined is a citizen of the plaintiff's state. 28 U.S.C. § 1332 (a) (1970).

147. Rule 19(a) actually prohibits joinder only if it would render venue improper and the joined party objects. However, if it is likely defendants will object, and many who could do so must be joined, the court should find joinder impracticable.

148. The court might lack jurisdiction of a claim brought pursuant to federal common law, for example, where the state's long-arm statute was restricted in scope. See generally Garton, supra note 127. However, if lack of personal jurisdiction is the barrier to joinder, it is not clear that a class action will hurdle it. See Part IC supra.

149. An overly ambitious suit against all enterprises or individuals dumping a particular chemical effluent into the nation's navigable or interstate waters would probably not be viewed sympathetically by the courts, even if all technical prerequisites for maintaining the action were satisfied. Cf. note 99 supra.

150. Subdivision (c)(4) of Rule 23 expressly provides that "a class may be divided into subclasses and each subclass treated as a class . . . ."

(2) all state governmental units having statewide jurisdiction; (3) all cities in the United States with a population exceeding 50,000; (4) forty-three non-profit rural electric cooperatives; and (5) the class of all home builders within the Eastern District of Pennsylvania.\footnote{152}

\textit{Anaconda} provides a paradigm of the flexibility achievable under Rule 23. Other cases, primarily antitrust litigation,\footnote{153} have involved a state government or instrumentality representing the interests of all governmental entities within a state.\footnote{154} These precedents could support far-reaching environmental defendant class actions. No discernible reason exists for rejecting a suit, for example, against a defendant class of the State of Pennsylvania and all municipal governments dumping untreated effluents into the Delaware River. Consistent with the \textit{Anaconda} approach, the plaintiff could also include as defendants subclasses of industrial and individual polluters whose discharge bypasses municipal systems and a subclass of farmers whose pesticides degrade water quality.\footnote{155} Inclusion of subclasses, as \textit{Anaconda} shows in the plaintiff class setting, would be limited only by the requirements that the class be judicially manageable in size and that there exist common questions of law or fact with respect to the class.

Besides expanding the reach of environmental suits, proper use of defendant subclasses can help courts ascertain the source of environmental harm. Assume that a suit is brought alleging water quality degradation as a result of several polluters discharging wastes into a river. Some potential defendants discharge hot water; others, chemical wastes. Assume further that a synergistic interaction between chemical and thermal pollutants intensifies the effect of both effluents.\footnote{156} If

\begin{itemize}
\item \textit{Id.} at 456-64.
\item See cases summarized in \textsc{Staff of Senate Comm. on Commerce, 92d Cong., 2d Sess., Staff Review of Class Action Legislation} 46-74 (Comm. Print 1972).
\item An article which examines the complex environmental problems that beset the Delaware River reveals that an identifiable group of 44 polluters contributes a substantial portion of the river's contamination. These polluters are possible candidates to be named as representatives of a defendant class with appropriate subclasses—municipalities, various categories of industrial polluters, and so forth. Coincidentally, this suit might be brought before a court with a high degree of expertise in the creative use of functional subclasses: the District Court for the Eastern District of Pennsylvania, which rendered the decision in Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968). See notes 151-52 \textit{supra} and accompanying text. \textit{See also Ackerman, Ackerman & Henderson, The Uncertain Search for Environmental Policy: The Costs and Benefits of Controlling Pollution Along the Delaware River}, 121 U. Pa. L. Rev. 1225 (1973).
\item This is likely to be the case. \textit{See de Sylva, Theoretical Considerations of the Effects of Heated Effluents on Marine Fishes}, in \textsc{Biological Aspects of Thermal Pollu-
\item This is likely to be the case. \textit{See de Sylva, Theoretical Considerations of the Effects of Heated Effluents on Marine Fishes}, in \textsc{Biological Aspects of Thermal Pol-
\end{itemize}
an action were brought against the class of chemical polluters alone, the defendant class could assert that liability, if any, rested with the thermal polluters. A similar defense, of course, would be available to a class of thermal polluters. If plaintiffs must sue these groups separately, the party bearing the risk of nonpersuasion will probably lose both suits. The only way to fairly allocate liability is to combine the two subclasses for adjudication of common legal and factual questions, even though certain questions of fact would vary between the subgroups.\textsuperscript{157} Subclasses can therefore provide a useful litigative device in the defendant class setting, subject to the dual caveat that the expanded membership remain manageable in size and that common questions of fact or law predominate.

2. \textit{Reduction of Defendant Class Membership: The Unlikely Plaintiff}

In addition to reaching defendants otherwise outside the litigation, creative use of the defendant class action may convert potential defendants to the role of \textit{plaintiffs}. This surprising but not unlikely result is illustrated by recent litigation involving the Atlantic City boardwalk.

In the summers of 1970 and 1971, Atlantic City residents sued a defendant class composed of fifty-three merchants who were using loudspeakers to hawk their wares along the boardwalk.\textsuperscript{158} During both years forty merchants discontinued use of the bothersome devices and sought to join the plaintiffs in attempting to eradicate or at least reduce the noise. As one merchant explained, "I'll take mine down, but I want to make sure everyone else takes his down, too."\textsuperscript{159}

Possible motivations for prospective defendants to abandon their cause entirely upon the filing of a defendant class action include avoiding adverse publicity the defendant class might receive, creating goodwill by emphasizing the firm's environmental concern, and a simple

\textsuperscript{157} Conflicting interests among class members would, of course, be subject to the continuing scrutiny of the trial court. Supervision of parties by the trial court, the requirement of adequate notice, and (in 23(b)(3) suits) the right to "opt out" help protect the individual class member from possible conflicting ambitions of other members. However, since absent class members are bound only if their "representatives[...] substantial interests are [...] the same as those whom they are deemed to represent," Hansberry v. Lee, 311 U.S. 32, 45 (1940), plaintiffs should at least name representative defendants from each subclass. Of course, Hansberry's constitutional requirement that the representative's interests be compatible with those of other class members was not eliminated by the 1966 Rules revision. \textit{See, e.g.,}, Shulman v. Rittenberg, 47 F.R.D. 202, 207 (D.D.C. 1969).


\textsuperscript{159} Id.
willingness to discontinue injurious practices if competitors follow suit. Indeed, a prospective member of a defendant class may find association with the plaintiffs rather enticing if the enterprise enjoys a competitive advantage over its rivals, if the costs of compliance are marginal, or if the plaintiffs’ case seems impregnable and compliance would not be economically disastrous.

In some circumstances, an enterprise may even take the initiative in filing environmental defendant class actions. For example, a defeated individual defendant or a prior subject of an EPA enforcement proceeding might sue his competitors to subject them to the emission standards he must meet. His incentive to do so would be eliminating the competitive advantage they enjoy so long as he, but not they, must pay the costs of compliance.

3. Standing and the Defendant Class Action

Such an industrial plaintiff should have no trouble demonstrating standing to sue his competitors, for he has experienced a direct economic disadvantage at the hands of the defendant class. Conversely, the defendant class has, by comparison, profited economically from continuing violations of environmental standards. Since the injuries other prospective plaintiffs suffer are often more aesthetic than economic, their standing to sue is a closer question.

The Supreme Court, in *Sierra Club v. Morton*, held that some

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163. Economic injury has always enjoyed a preferred status over aesthetic damages. This is due, of course, to the pragmatic nature of the courts. Economic injury is more readily susceptible to measurement than the more elusive aesthetic damage. *K. Davis, ADMINISTRATIVE LAW TREATISE* § 22.19 (Supp. 1970). *See Leighty, Aesthetics as a Legal Basis for Environmental Control*, 17 WAYNE L. REV. 1347, 1361 (1971).

164. 405 U.S. 727 (1972) (Standing was denied to the Sierra Club under § 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1972), where the Sierra Club was determined not to be “adversely affected or aggrieved” within the meaning of the Act. The Court found the “special interest” of the Sierra Club insufficient to give it standing to represent its membership interest in environmental conservation) (Douglas, J., and Blackmun, J., dissenting). An expansive reading of footnote 15 (405 U.S. at 741) in *Sierra Club v. Morton* would seem to allow a suitor to assert the interest of the general public as “private attorney general” once he has attained threshold standing for judicial review. Threshold standing may be defined as having “injury in fact,” arguably within
environmental interests are insufficient to support standing to sue. In that case, the Sierra Club was denied standing to seek an injunction against the construction of a ski resort.\(^{165}\) The organization’s sole basis for complaint was a “special interest” in preventing environmental degradation.\(^{166}\) This the Court found insufficient as a matter of law to confer standing. A more direct, adverse impact on the prospective plaintiff was necessary.

Ordinarily, there is no problem establishing standing to be sued. The plaintiff’s desired relief gives the defendant an ample stake in the outcome of the litigation. However, class actions pose a special problem, in that the named class members must represent the interests of others. While proper representation and standing are not analytically identical issues,\(^{167}\) both are resolved by considering whether the litigant is sufficiently touched by the issue in question to permit him to present it to the court.

Consider the question whether plaintiffs should attempt to designate a polluting industry’s trade organization as the named class representative. The organization may not incur any financial liability if it loses, so superficially it seems, like the Sierra Club in *Sierra Club v. Morton*, an improper party. However, the trade organization is an entirely appropriate class representative. Established precedent clearly allows the designation of a trade association as a member of the defendant class

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165. Mr. Justice Douglas, in dissent, favored relaxation of standing requirements to allow suit on behalf of environmental objects. 405 U.S. at 741-52. In the context of environmental class actions, liberalized standing would obviate plaintiff’s having to allege representation of a class of individuals who may be minutely damaged by a proposed project. Instead, Douglas would suggest direct representation of the threatened objects. Proponents of jural status for environmental subject matter suggest the use of a legal fiction, similar to the corporation, able to assert its own defenses against despoliation. Presumably, environmentalist groups may then defend an object in terms of its intrinsic ecological merit rather than its relationship to transitory human aesthetic and economic values. See Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450 (1972). The first advocate for independent treatment, although unsuccessful, sprung from a tree trunk in a children’s book: “I am the *Lorax*. I speak for the trees. I speak for the trees.” DR. SEUSS, *The Lorax* 21 (1971).

166. 405 U.S. at 739.

and as the designated class representative. For example, in Advertising Specialty National Association v. FTC, the court held that a manufacturers' trade association was representative of the entire class of defendants. Despite certain "elements of individuality" existing among the various members of the organization, the court found that the several members of the association considered themselves part of an "integrated industry" and enjoyed "common and consistent interests . . . ."  

The reason for this distinction between trade associations and citizens' organizations such as the Sierra Club is not difficult to discern. Unlike citizens' groups, a trade association is economically affected, at least indirectly, by grievances successfully maintained against the bulk of its membership. In fact, a principal aim of such associations is to enhance the financial well-being of its membership. Thus, the court's approach in Advertising Specialty is consistent with the Sierra Club v. Morton decision.

Nevertheless, it behooves the plaintiff to designate individual members as representatives of the class in addition to any trade association. The court in accepting the trade association in Advertising Specialty expressly observed that the FTC had done so. This precautionary tactic forestalls any judicial fear that the trade association might fail to litigate with the tenacity of the intimately involved and directly affected member-defendant. Moreover, if the interests of the members as a whole might diverge from the interests of an individual member, the Advertising Specialty technique of naming both the trade association and selected individual class members as designated representatives should guarantee that all defendants are properly represented, and so can be bound by the action.

IV

CONCLUSION

Defendant class actions will scarcely serve as the chief procedural avenue for effecting compliance with environmental standards established by the various legislative and administrative bodies. The high costs and great expertise demanded to secure compliance will undoubtedly keep the onus of pollution control on specialized agencies
charged with enforcement duties. The frequency of the defendant class action's use therefore may well be limited. And, realistically, even more expansive employment of the device will not alone produce an era of more effective controls over environmental degradation.

But the defendant class action is a constitutionally sound and highly practical vehicle for environmental litigation when the constraints imposed by Rule 23 are satisfied. As creative attorneys recognize its applicability and appropriateness, it should take its deserved place as an important legal tool for protecting the environment.