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Allocation of Initial Notice Costs Under Federal Rule 23(c)(2)

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In the early common law, litigation was considered a two-party affair.[1] It became multiparty when equity, responding to multiple suits arising from identical questions of law and fact, created the class action to facilitate judicial efficiency[2] and insure justice.[3] The Court of Chancery developed the bill of peace, the precursor of the class action, to allow a representative of a group to bring an action in the name of all the members of the group, whether they were present or not. Since the bill of peace saved the court time, bother, and expense, when faced with repetitive litigation on the issue, it was more convenient for the court than multiple suits.[4] Furthermore, the bill enabled the court to make a judgment based upon a complete appraisal of the conflicting interests, thereby avoiding the injustice of decrees based upon only a partial view of the matter. Thus, from the class suit's inception, it was not merely a procedural aid to plaintiffs, but also served the public interest by facilitating judicial efficiency and assuring justice.

Since public policy considerations underlie class actions, any examination of them must not mechanically assume that they benefit plaintiffs alone. Focusing on one issue that illustrates the diversity of interests present in class actions, this comment will examine the issue of allocation of initial notice costs in class actions under federal rule 23(c)(2).[5] First, the policy considerations underlying class actions will be outlined. Then the general judicial attitude toward the notice requirement of rule 23 will be examined. This comment will then analyze the four basic approaches to allocation of notice costs in view of these policy considerations and judicial attitudes. Finally, an alternative to these approaches will be discussed.

The policy considerations underlying class actions are directed toward four particular groups: the judiciary, the plaintiffs, the defendants, and the public. For the judiciary, the class action reduces the repetitive litigation of related subject matters.[6] Furthermore, since many attorneys, employing differing procedural tactics, are under greater judicial control in one class action than in multiple suits, the class action helps the court main-

1. 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1751, at 503 (1972) [hereinafter cited as WRIGHT & MILLER].

2. *E.g.*, Green v. Wolf Corp., 406 F.2d 291, 297 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969).

3. *E.g.*, West v. Randall, 29 F. Cas. 718, 721 (No. 17,424) (C.C.D.R.I. 1820).

4. Z. CHAFEE, SOME PROBLEMS OF EQUITY 201-02 (1950).

5. This rule provides that "[i]n 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."

6. Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 501, 504 (1969). Mr. Ford adds, however, that if the representative plaintiff fails to represent adequately the class members, an absent member may be able to institute another action regarding the same subject matter. FED. R. CIV. P. 23(a)(4) safeguards against this problem. It requires as a prerequisite to a class action that the representative plaintiff must "fairly and adequately protect the interests of the class."

tain a rational prosecution of the case. For example, one attorney in an individual suit may introduce certain evidence, while another attorney in a similar action may decide not to introduce the same evidence. As a consequence, multiple individual suits can prevent the courts from considering a uniform presentation of the issue. Class actions, on the other hand, require attorneys to present a consistent case. The class action also reduces judicial paper work by eliminating the use of the same documents in multiple suits.[7] Finally, the litigation of multiple claims in one action helps to maintain judicial consistency by ensuring that different judgments do not occur in apparently similar cases.

For the plaintiffs, single proceedings are less expensive and more convenient than multiple actions. In many cases, potential plaintiffs have suffered common injuries but are "isolated, scattered, and utter strangers to each other."[8] The class action brings these plaintiffs together. Moreover, the class action serves a psychological function for the plaintiff by confronting a large corporate or governmental defendant with a large, unified group rather than one economically insignificant individual.

Additionally, the class action generates more public attention than an individual suit since the news media is inclined to give more coverage to an action brought on behalf of a large number of injured parties than to an action for individual relief. This publicity may create favorable public and political reaction even if the final judgment is against the plaintiffs. In a consumer class action, for example, the plaintiffs may lose a suit against an industry practice, but may generate substantial public pressure to influence a change in the industry's practice or political support for protective legislation. Furthermore, the publicity may attract funds needed for the litigation, especially if the action raises an issue of public concern. The news coverage of an environmental or consumer class suit, for instance, might bring organizational or individual financial support from those concerned with the issue.

The class suit serves its most important function for the plaintiffs when used as "a vehicle for redressing small injuries to a large number of persons."[9] In modern society, when individuals are damaged by large institutions, the damage to each individual may be small, though the collective damage is great. The damages to an individual consumer from a price fixing scheme, for example, may be only a few dollars, but the damage to all consumers similarly injured may total millions of dollars. Each consumer cannot sue individually since the cost of litigation will invariably outweigh the possible recovery. On the other hand, if consumers unite in a class action, the litigation costs are no longer prohibitive in relation to the cumulative recovery.[10] Moreover, some members of the injured group may be

7. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 435 (1960).

8. Kalven & Rosenfield, *The Contemporary Function of the Class Action*, 8 U. CHI. L. REV. 684, 688 (1941). The authors argue that the "cardinal difficulty with joinder . . . is that it presupposes the prospective plaintiffs' advancing en masse on the courts." The class suit, on the other hand, allows the action itself to amass the scattered plaintiffs. Green v. Wolf Corp., 406 F.2d 291, 297 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969).

9. Ford, *supra* note 6, at 504.

10. 1973 WIS. L. REV. 301, 308. The author states:

> The sum total of harm might be seen as having two variables: the size of the individual injury and the number of individuals injured. As the former decreases

unaware of their legal remedy. A class action informs them of the means of redress.[11]

For the defendants, the class action eliminates the necessity of defending multiple suits. Although the class action reduces the risks to both plaintiffs and defendants of inconsistent determinations in different courts, judicial consistency is especially advantageous for defendants. Without the protection of a class suit, successful defendants might find themselves sued again by another plaintiff for the identical injury on similar grounds.

Commentators are divided in their assessment of the benefits of the class action to the public interest. Some contend that the class action serves the public interest when it is used to police corporations, the government, or other large institutions.[12] They argue that in its "historic mission of taking care of the smaller guy,"[13] the class action helps to enforce antitrust, securities, and fair employment practices legislation.[14] Other commentators, however, argue that many class actions, especially consumer suits with numerous parties, are detrimental to the public interest. They maintain that the class action is used as a form of legalized blackmail confronting the defendant with unmanageable and expensive litigation, which can be avoided only by an out-of-court settlement depriving the defendant of his constitutional right to a trial on the merits. Furthermore, they argue that the consumer must eventually bear the ultimate burden of these settlements because the defendant will raise prices to offset the costs of the settlement.[15]

The arguments against the public interest benefits of class actions are not convincing in view of the requirements of federal rule 23 and the ultimate benefits of the class action to society. Under rule 23, the trial court must determine whether the suit can be maintained as a class action and can dismiss the suit if it is unmanageable. Since the defendant has an opportunity to argue against the rule 23 motion by contending that the suit is unmanageable, he is not deprived of his constitutional rights if the court decides that the class action can be maintained. If the defendant settles, his decision is a choice not to defend an action which the court, in an adversary proceeding, has decided is maintainable; it is not the result of legalized blackmail. Furthermore, even though a defendant may raise its prices to cover the costs of the settlement, the class action ultimately benefits the consumer through a deterrent effect; industries are encouraged to engage in fair and honest economic practices.

Federal rule 23 must be examined against these policy considerations and the general judicial attitudes toward the amended rule. One of the important changes brought about by the 1966 amendments to the federal rules is that a judgment in a class action binds all the members of the class,

and the latter increases, the amount of harm remains constant, but the class action becomes a more important tool for redressing that harm because the plaintiff individually cannot justify the legal expenses in view of his small potential recovery.

11. Kalven & Rosenfield, *supra* note 8, at 686.

12. For a discussion of the merits of the class action in contrast to governmental administrative regulation in this area see text accompanying notes 101-03 *infra*.

13. Benjamin Kaplan, *quoted in* Frankel, *Amended Rule 23 from a Judge's Point of View*, 32 ANTITRUST L.J. 295, 299 (1966).

14. *See* Kalven & Rosenfield, *supra* note 8, at 684.

15. Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9, 10 (1971).

whether they appear in the action or not, unless a member of the class "opts out" of the litigation at its onset.[16] Because of this binding effect, rule 23 now provides the court with a flexible approach to class actions.[17] The rule favors the exercise of the trial court's discretion, rather than the mechanical use of formulas. For example, the Notes of the Rules Advisory Committee on the notice requirement state that the trial court need not always follow the formalities of service of process, but can require that the notice be "accommodated to the particular purpose" of each case.[18] Since this flexibility allows the court to modify the scope of a class action,[19] some courts have suggested that when there is doubt whether a class action can be maintained, the presumption should be in favor of the action.[20]

Because of the binding effect of a class action, the court must determine as soon after the commencement of the suit as possible whether the action can be maintained as a class suit[21] and, in a rule 23(b)(3) action,[22] must direct notice to those members of the class who can be identified with reasonable effort. Rule 23(c)(2) does not indicate who is to pay for the notice, but simply requires that "the court direct to the members of the class the best notice practicable under the circumstances." Likewise, the Advisory Committee Notes on the 1966 Amendments are silent on the issue of notice costs, although Benjamin Kaplan, a reporter to the Committee, stated that the plaintiff should ordinarily bear the initial expense of providing notice.[23] Kaplan does not explain his reasons for this view, nor does he discuss its underlying policy considerations. Since Kaplan deals with the issue in a footnote and merely asserts an unsupported assumption that the plaintiff must pay, his statement should carry little weight as authority.

16. Green v. Wolf Corp., 406 F.2d 291, 298 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); FED. R. CIV. P. 23(c)(2). This rule provides: "The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

17. Green v. Wolf Corp., 406 F.2d 291, 298 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); FED. R. CIV. P. 23(d)(1) provides that a trial court prescribe "measures to prevent undue repetition or complication in the presentation of evidence or argument." FED. R. CIV. P. 23(d)(4) allows the court to amend the pleadings to eliminate allegations concerning absent parties.

18. *Amendments to Rules of Civil Procedure*, 39 F.R.D. 69 (1966).

19. *E.g.*, FED. R. CIV. P. 23(c)(4). This section provides that "(A) an action may be brought as a class action with respect to particular issues, or (B) a class may be divided into subclasses, and each subclass treated as a class."

20. Green v. Wolf Corp., 406 F.2d 291, 298 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); Esplin v. Hirshi, 402 F.2d 94, 101 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969). The *Esplin* court stated: "[A]ny error, if there is to be one, should be committed in favor of allowing the class action. . . . [I]t is within the power of the court to limit either the issues or the parties."

21. FED. R. CIV. P. 23(c)(1).

22. *Id.* 23(b)(3) provides that a class action is maintainable if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

23. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 398 n.157 (1967). The article is prefaced with the remarks: "The views expressed in this article . . . are entirely personal and have no other status."

In addition to the issue of the allocation of initial notice costs, courts are faced with two other issues regarding apportionment of notice expense. First, courts must determine which party must bear the ultimate burden of notice costs. Most courts and commentators have dealt with this issue by delaying its resolution until after judgment.[24] Second, courts must decide which party must pay the notice expense if the action is dismissed under rule 23(e).[25] In the recent case of *Berse v. Berman*,[26] the court followed the Second Circuit's decision in *Eisen v. Carlisle & Jacquelin*[27] that, in some cases, the plaintiffs must bear the burden of initial notice costs, and held that the representative plaintiff must also pay the expense of notifying the class of dismissal.[28] Therefore, if *Berse* is followed, the plaintiff runs the risk of bearing the burden of notice expense, even if the action is dismissed and never litigated.

Courts and commentators have taken four basic approaches to the issue of who must pay the initial notice expense. Some have stated that the costs should be borne by the court or the public. Others have merely stated the conclusion that one party or the other should pay. Additionally, a number of authorities have stated that since the class action is basically for the benefit of the plaintiff, he should always pay for its costs. Finally, some authorities have argued that a balancing test should be used to allocate the costs of notice. Each of these positions must be considered separately to accurately assess the issues presented by notice cost apportionment.

Most commentators have rejected the proposition that the court should bear the expense. Nevertheless, in *School District of Philadelphia v. Harper & Row, Inc.*,[29] the court construed the language of rule 23(c)(2), that the court "direct" the notice, to mean that the court itself had the burden of sending out the notice. Most courts and commentators have rejected this construction,[30] arguing that the rule requires only that the court supervise the sending of the notice. They contend that the court can "direct" the parties to assist in preparing and forwarding notice.

Nevertheless, some authorities argue that if the plaintiff is unable to bear the burden of the notice expense, the court should bear the cost to enable the action to continue.[31] The court in *Berland v. Mack*[32] stated that

24. Cole v. Schenley Indus., 60 F.R.D. 81, 87 (S.D.N.Y. 1973); Ostapowicz v. Johnson Bronze Co., 54 F.R.D. 465, 467 (W.D. Pa. 1972) (costs will probably be taxed in toto to the losing party); Sultan v. Bessemer-Birmingham Motel Associates, 322 F. Supp. 86, 91 (S.D.N.Y. 1970) (if class prevails, defendants must pay); Berman v. Narragansett Racing Ass'n, 48 F.R.D. 333, 338 (D.R.I. 1969); Herbst v. Able, 47 F.R.D. 11, 22 (S.D.N.Y. 1969); Ward & Elliott, *The Contents and Mechanics of Rule 23 Notice*, 10 B.C. IND. & COM. L. REV. 557, 565 n.51 (1969).

25. This section provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

26. 17 FED. RULES SERV. 2D 876 (S.D.N.Y. Aug. 8, 1973).

27. 479 F.2d 1005 (2d Cir.), *cert. granted*, 94 S. Ct. 235 (1973).

28. Nevertheless, the *Berse* court held that since there had been no offer of settlement in the case, it was removed from the requirements of rule 23(e). 17 FED. RULES SERV. 2D 876, 877-78.

29. 267 F. Supp. 1001, 1004-05 (E.D. Pa. 1967).

30. *E.g.*, Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 568 n.23 (2d Cir. 1968); Minnesota v. United States Steel, 44 F.R.D. 559, 577 (D. Minn. 1968); Kaplan, *supra* note 23, at 398 n.157.

31. Comment, *Recovery of Damages in Class Actions*, 32 U. CHI. L. REV. 768, 781 n.69 (1965).

when the public interest encourages class actions, as is the case in the private enforcement of federal securities laws, the notice expenses should be paid from public appropriations. Thus, if there is a public interest supporting the maintenance of the suit, notice costs, at least in part, should not be borne by either of the parties.

This approach, however, has been either rejected or considered as only a last resort by most authorities.[33] Judge Knox, in *Ostapowicz v. Johnson Bronze Co.*,[34] stated that the Judiciary Administrative Office had informed him that funds were not available to finance class actions. Other authorities have criticized the appropriation of court funds because it utilizes public funds for the benefit of private parties, rather than for public purposes.[35] Others have argued that in some cases the plaintiff could not proceed unless the court paid the notice costs; when the court pays this expense, which otherwise could prevent the plaintiff from maintaining the suit, it gives up any pretense of judicial impartiality[36] and acquires a stake in the outcome of the action.

Since the policy considerations underlying class actions deal with matters of both judicial efficiency and public interest, these criticisms are not convincing. When the action concerns the interests of the public, the litigation does not merely benefit the parties alone, but also aids the resolution of a problem of societal concern. Furthermore, the courts have always had a stake in lawsuits in their desire for judicial efficiency, and their impartiality is not jeopardized if their concern is for the maintenance of an action in the public interest.

Nevertheless, as Judge Knox suggested in *Ostapowicz*, courts cannot make a general practice of using their funds to pay the costs of notice since their funds are extremely limited. On the other hand, if Congress appropriated funds for class actions of public concern, the courts, under the flexible approach of rule 23, could determine those cases in which the funds would be used. At the end of the litigation, the court could determine which party should repay its expenditures. Support for this kind of appropriation is found in the approach of the Supreme Court in *Boddie v. Connecticut*.[37] In that case, the Court held that requiring welfare recipients to pay court fees in a divorce proceeding violated the due process clause of the fourteenth amendment. The Court ruled that access to the legal system is necessary to the regularized resolution of conflicts and the maintenance of an organized society. When the state has a monopoly over techniques for conflict resolution, it cannot deny access to these techniques solely on the inability of the parties to pay litigation fees. Since the court has narrowed the *Boddie* holding to cases involving fundamental rights,[38] and many class

32. 48 F.R.D. 121, 132 (S.D.N.Y. 1969).

33. 3B J. MOORE, FEDERAL PRACTICE ¶ 23.55, at 23-1155 (2d ed. 1969); BOARD OF EDITORS OF THE FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION 51 (1973).

34. 54 F.R.D. 465, 467 (W.D. Pa. 1972).

35. Ward & Elliott, *supra* note 24, at 566; Note, *Federal Rules of Civil Procedure: Rule 23, the Class Action Device and Its Utilization*, 22 FLA. U.L. REV. 631, 640 n.72 (1970).

36. Ward & Elliott, *supra* note 24, at 566; 7A WRIGHT & MILLER § 1788, at 171.

37. 401 U.S. 371, 374-75 (1971).

38. Ortwein v. Schwab, 410 U.S. 656 (1973) (challenge to court fees in a case involving the right to welfare payments was held not to involve a constitutional right); United States v. Kras, 409 U.S. 434 (1973) (challenge to fees in a bankruptcy pro-

actions do not involve these rights, *Boddie* does not constitutionally require the legislative appropriation of notice funds. Nevertheless, *Boddie*'s reasoning, that an organized resolution of conflicts is necessary to the society, is persuasive authority for this kind of appropriation, especially for cases in which the class action is the only means available for resolving the dispute.

In another group of cases, the courts have ruled that either the plaintiff,[39] the defendant,[40] or both parties[41] must bear the burden of expense without explaining the reasons for their decisions. These conclusionary result cases do not discuss the policy considerations underlying the allocation of notice costs and have become mechanical precedents for the proposition that one or the other party must pay notice costs.

The major decision applying the conclusionary result approach was *Eisen III*,[42] one stage in the extraordinary progression of *Eisen v. Carlisle & Jacquelin*, an antitrust class action against two odd-lot stock brokers, alleging that the brokers had combined and conspired to monopolize odd-lot trading and had fixed an excessive odd-lot differential in violation of the Sherman Act.[43] The plaintiff also alleged that the defendant New York Stock Exchange had failed to discharge its duties under the Securities Exchange Act of 1934.[44] The injured class was eventually determined to contain 2,250,000 identifiable persons in every state of the United States and in most foreign countries.[45] In *Eisen I*,[46] the district court ruled that a class action could not be maintained, but held that the representative plaintiff could bring an action on his individual claims. In *Eisen II*,[47] the Second Circuit ruled that the plaintiff could appeal *Eisen I*'s decision that a class suit could not be maintained. In *Eisen III*, the Second Circuit remanded the case for an evidentiary hearing on this issue. In *Eisen IV*,[48] the district court reversed its earlier position, ruling that the suit could be maintained as a class action. The Second Circuit reversed this decision in *Eisen VI*.[49]

The courts considered the allocation of notice costs throughout the *Eisen* progression. The courts in *Eisen III* and *Eisen VI*, without any considera-

ceeding not sustained since it did not involve a constitutional right, and alternative means of resolving the conflict existed).

39. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973); Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968); Alameda Oil Co. v. Ideal Basic Indus., 326 F. Supp. 98 (D. Colo. 1971); Sultan v. Bessemer-Birmingham Motel Associates, 322 F. Supp. 86 (S.D.N.Y. 1970); Berman v. Narragansett Racing Ass'n, 48 F.R.D. 333 (D.R.I. 1969); Weiss v. Tenney Corp., 47 F.R.D. 283 (S.D.N.Y. 1969); Herbst v. Able, 47 F.R.D. 11 (S.D.N.Y. 1969).

40. Lewis v. Bogin, 337 F. Supp. 331 (S.D.N.Y. 1972); Battle v. Municipal Housing Authority, 53 F.R.D. 423 (S.D.N.Y. 1971); Bragalini v. Biblowitz, 13 FED. RULES SERV. 2D 635 (S.D.N.Y. 1969).

41. Minnesota v. United States Steel, 44 F.R.D. 559, 577 (D. Minn. 1968) (dictum) (one or both parties may have to give notice).

42. Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968).

43. Sherman Antitrust Act §§ 1-2, 15 U.S.C. §§ 1-2 (1970). Odd-lot transactions involve less than 100 shares. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 257 (1971).

44. Securities Exchange Act of 1934 §§ 6(b), (d), 19(a), 15 U.S.C. §§ 78f(b), (d), 78s(a) (1970).

45. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1008-09 (2d Cir. 1973).

46. 41 F.R.D. 147 (S.D.N.Y. 1966).

47. 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

48. 52 F.R.D. 253 (S.D.N.Y. 1971).

49. 479 F.2d 1005 (2d Cir.), *cert. granted*, 94 S. Ct. 235 (1973). Subsequent to *Eisen VI*, an en banc hearing was denied.

tion of the rule's underlying policy, held that the plaintiff should bear the expense. In *Eisen IV*, however, the district court held that the costs could be apportioned and did so at a preliminary hearing on that issue, *Eisen V*.[50]

The superficial treatment of notice costs is exemplified by *Eisen III*. The court simply stated, "[t]he task of furnishing notice to class members in such a case as this must rest upon the representative party when he is the plaintiff."[51] The only authorities given by the court for this proposition were two articles, one by Benjamin Kaplan and another by Marvin E. Frankel. Kaplan's article contained no reason for his footnote assertion that the plaintiff should pay.[52] Frankel, on the other hand, never even suggested that the plaintiff should pay, but only indicated that the parties' lawyers, not the court, should determine how to notify the class members.[53] Thus, an unsupported footnote and an erroneously construed article were the basis for the *Eisen III* decision.

In *Eisen VI*, the Second Circuit relied totally on *Eisen III*. The court first disputed the statement in *Berland v. Mack*[54] that the ruling in *Eisen III* on notice costs was merely dictum.[55] In *Eisen VI*, the court reiterated its ruling in *Eisen III* that in this particular case, the plaintiff must pay the notice costs. The court also suggested two instances in which the plaintiff might not be required to pay all the notice expense: in a stockholder's derivative action when the corporate defendant regularly sends communications to all its stockholders, and the corporation may owe the stockholders a fiduciary duty; or in an action against a public utility if the utility sends out monthly bills to its customers.[56] The court refused, however, to specifically enumerate the circumstances under which the plaintiff would definitely not be required to pay all the notice expense. As a result, *Eisen VI* left the Second Circuit adhering to almost the same position that existed after *Eisen III*. The court ignored all policy considerations, and Kaplan's footnote remained the sole authority for the decision.

Since *Eisen III* and *Eisen VI* did not deal with policy considerations, they have become mechanical formulas for determining who should pay the cost of notice. Both cases were limited in their holdings to the particular facts presented. Nevertheless, subsequent decisions in *Herbst v. Able*[57] and *Weiss v. Tenney Corp.*,[58] have used *Eisen III* as a precedent for the general rule that all plaintiffs must bear the expense of notice. Although *Eisen VI* hinted that certain policy considerations should be examined, the court in

50. 54 F.R.D. 565 (S.D.N.Y. 1972).

51. 391 F.2d at 568.

52. Kaplan, *supra* note 23, at 398 n.157. *See* text accompanying note 23 *supra*.

53. Frankel, *supra* note 13, at 300. Mr. Frankel states, "We agree that any judge who has been on the job more than eight months should be able to figure out that [notice] is to be done by the lawyers and their secretaries."

54. 48 F.R.D. 121, 131 (S.D.N.Y. 1969).

55. 479 F.2d at 1009 n.5.

56. *Id.* One commentator has suggested that the major consideration with which the court was concerned was whether the defendant normally sends mailings to potential members of the class. In those cases the cost of notice to the defendants is low. ANTITRUST & TRADE REG. REP. No. 624, at B-1 (1973).

57. 47 F.R.D. 11, 22 (S.D.N.Y. 1969). Judge Motley referred to *Eisen III* when she said that the plaintiff should initially bear the burden. She did not discuss how the facts in *Herbst* were similar or dissimilar to *Eisen*, but asserted that the plaintiff must pay initially.

58. 47 F.R.D. 283, 294 (S.D.N.Y. 1969). Judge Herlands stated that the "plaintiff must bear the burdens of furnishing notice to the class," referring to *Eisen III*.

Cole v. Schenley Industries[59] used *Eisen VI* as a mechanical assertion that in all cases the plaintiff must pay for notice.

In addition to *Eisen III* and *Eisen VI*, other conclusionary result cases have held that plaintiffs should pay the notice costs.[60] Conversely, other courts have reached the equally conclusionary determination that, under the circumstances of the case, the defendant should pay.[61] The shortcoming of all these cases is that their reasoning is contrary both to the policy considerations underlying class actions and the flexible approach inherent in rule 23. Courts should make decisions under rule 23 without the use of a mechanical rule and should explain the reasons behind their decisions. In *Eisen III* and *Eisen VI* the Second Circuit failed to look beyond the footnote in Kaplan's article to the policy considerations underlying class actions. If the court in *Eisen VI* had stated the policy considerations underlying its decision, it would have provided future guidance for the allocation of notice costs.

Under a third and even more mechanical approach, the burden of notice costs is always placed upon the plaintiff, on the assumption that rule 23, and especially the notice requirement, was created solely for the plaintiff's benefit. One commentator has even suggested that if the defendant must pay any of the costs of notice, he is denied due process,[62] apparently on the reasoning that since the plaintiff has commenced the suit, notice costs are an unfair burden on the defendant. This argument would be a meritorious response to a court which arbitrarily ruled that a defendant must always pay notice costs. On the other hand, if a court used a test which balanced the interests of the parties and the public in its determination that the defendant should pay the costs of notice, the court would not deny the defendant due process. By rejecting an arbitrary approach to this issue and adopting a balancing test, the court would actually fulfill the fairness standards of due process for both plaintiffs and defendants.

Most authorities who accept the approach that the plaintiff must always pay for notice costs argue that he is the chief beneficiary of a class action.[63] The plaintiff pays less for a class action than for multiple individual suits.[64]

59. 60 F.R.D. 81, 86 (S.D.N.Y. 1973). Without comparing the facts of the case with *Eisen VI*, the court ruled that the plaintiff must bear the burden of notice costs. *See also* Pearlman v. Gennaro, 17 FED. RULES SERV. 2D 666, 671 (S.D.N.Y. May 31, 1973), and Ostroff v. Hemisphere Hotels Corp., 17 FED. RULES SERV. 2D 677, 679 (S.D.N.Y. June 1, 1973). Both cases use *Eisen VI* as a precedent for the conclusionary proposition that plaintiffs must pay the notice costs. *But see* Unicorn Field, Inc. v. Cannon Group, Inc., 60 F.R.D. 217, 227 (S.D.N.Y. 1973). The court in *Unicorn* suggested that *Eisen VI* is a general rule, subject to the exceptions listed in Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969).

60. Alameda Oil Co. v. Ideal Basic Indus., 326 F. Supp. 98, 105 (D. Colo. 1971); Sultan v. Bessemer-Birmingham Motel Associates, 322 F. Supp. 86, 91 (S.D.N.Y. 1970); Berman v. Naragansett Racing Ass'n, 48 F.R.D. 333, 338 (D.R.I. 1969).

61. *See* cases cited at note 40 *supra*.

62. Note, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement*, 29 MD. L. REV. 139, 155 (1969). A similar suggestion is found in Cusick v. N.V. Nederlandsche Combinatie Voor Chem. Indus., 317 F. Supp. 1022, 1025 n.6 (E.D. Pa. 1970). The court stated that in that particular case with numerous, unidentified plaintiffs, the imposition of the cost of notice on the defendant would raise serious questions of due process.

63. Richland v. Cheatham, 272 F. Supp. 148, 156 (S.D.N.Y. 1967). The court stated that the "[p]laintiff would have all the benefits of Rule 23 without assuming any of the burdens." *See also* Note, *supra* note 35, at 640.

64. Note, *Binding Effect of Class Actions*, 67 HARV. L. REV. 1059, 1064 (1954).

Furthermore, since the notice brings more class members into the action, the representative plaintiff benefits from a reduction in his litigation costs. Other authorities contend that since the plaintiff is disturbing the status quo, he must pay for the notice costs.[65] Also, one commentator has argued that since the plaintiff has brought the class action as self-appointed representative of the class, he already knows he may be forced to pay notice costs.[66]

A major argument for this approach arises in regard to large public interest class actions. In some of these actions, the individual claim is so small that the litigation costs prohibit an individual suit; the costs of notice, however, are equally prohibitive of a class action. If these notice costs are not defrayed, the plaintiff can bring neither a class action nor an individual suit. If the notice costs are defrayed by either the court or the defendant, the plaintiff will be able to bring a class action, and therefore the number of class actions should increase. Thus, if any party other than the plaintiff pays for the notice, one of the major policy considerations underlying class actions, the reduction in the number of suits, will be undermined.

This approach is too limited in its evaluation of the policy considerations underlying class actions. Plaintiffs do pay less for litigation in class actions than in multiple individual suits. On the other hand, the defendant also benefits from the res judicata effect of a class action judgment. The argument that the representative must pay because he knows he must pay is a tautology. Furthermore, merely because the plaintiff disturbs the status quo when he commences the action does not therefore require him to pay notice expenses. He may be asserting a public interest claim to enforce the federal securities laws or to curtail fraudulent corporate practices: disturbing a status quo condemned by law. Likewise, notice not only helps the plaintiff obtain financial aid from other class members, but also serves the public interest by informing other injured members of their rights.[67] Finally, litigation will not necessarily increase if plaintiffs are not always required to pay for notice. In the case of a large injured class, a number of parties might bring individual actions in small claims courts, resulting in multiple suits on the same issue. If the damage is more than a few dollars, the possibility of a large number of individual claims is great. Furthermore, even if the damage is small, some plaintiffs may join their claims, resulting in multiple litigation of joint claims on the same issues across the country. The class action reduces the multiple, piecemeal resolution of these cases.

Since all the policy considerations underlying class actions do not concern the benefit to the plaintiff, one single rule for allocating notice costs is too mechanical.[68] In modern society, with the growth of massive public

65. Ward & Elliott, *supra* note 24, at 566.

66. Note, *supra* note 64, at 1065.

67. The representative plaintiff can also incur a disadvantage from notice. Other members of the class may attempt to intervene and wrest control of the litigation from him. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 435 (1960).

68. 3B J. MOORE, *supra* note 33, ¶ 23.55, at 23-1154; Wright, *Class Actions*, 47 F.R.D. 169, 180 (1969): "It is not yet settled—and indeed it may be there should not be one single rule—whether notice is to come from the court, from the representative of the class, or perhaps even from the party opposing the class." *But see* Wright, *Recent Changes in the Federal Rules of Procedure*, 42 F.R.D. 437, 565 (1966): "I think it might well be a condition of the sending of the notice that the plaintiff's attorney pay into the clerk the funds necessary for mailing and preparing [notice]."

interest class suits, the costs of notice would immediately terminate the suit if a mechanical rule that the plaintiff must always pay were adopted.[69] "[N]o rigid rule as to allocation of expense of notice is advisable and . . . the better course is to decide the issue in each case on the basis of the relevant factors."[70]

The fourth approach to the allocation of notice expense, the balancing test, implicitly rejects a mechanical resolution. Courts using this approach examine a variety of policy considerations to determine which party must bear what portion of the cost. The three major cases that have outlined this approach are *Dolgow v. Anderson*,[71] *Berland v. Mack*,[72] and *Eisen IV*.[73]

In *Dolgow*, four stockholders brought a class action against a corporation and its principal officers for manipulating stock prices by misleading investors. The court required the defendant corporation to notify its shareholders of the class action, stating three reasons for so doing: the fiduciary obligation of the corporation to its shareholders, the benefits of the res judicata judgment for the defendant corporation against all the members of the class, and the defendant's ability to bear the cost of notice.[74]

The court in *Berland* expanded on the *Dolgow* opinion and expressly utilized the balancing test, thereby rejecting a rule that either the plaintiff or the defendant must always pay the notice costs. In *Berland*, 18 stockholders had brought an action alleging fraud by the defendant in the purchase of securities. The factors considered by the court in the determination of who should bear the notice costs included:

> . . . the apparent merit or lack of merit in the claim, the defendant's desire to take advantage of the broader *res judicata* effect of a class action, the number of named plaintiffs and their financial responsibility, the value and percentage of their holdings as compared with those of the entire class, the ability of the plaintiffs to make the initial outlay, and . . . the cost of notice.[75]

The court then allocated the expense of furnishing the plaintiff with the names and addresses of potential class members to the defendant and allocated the expense of sending the notice to the plaintiff.

In *Eisen IV* the court accepted the *Berland* balancing test and considered the serious nature of the antitrust claims, the public interest in redressing an injury to a large number of persons, and the strong basis for pre-

69. Eisen v. Carlisle & Jacquelin, 479 F.2d at 1023 (Oakes, J. dissenting) (denial of en banc hearing). Judge Oakes stated: "Certainly given the importance of the class action as a means for the little man to bring wealthy or powerful interests into court, Eisen's inability to bear the costs of mailing notice . . . should not necessarily terminate the class action character of this suit." *See also* O'Laughlin, *Eisen v. Carlisle & Jacquelin, Frankenstein Monster Posing as a Class Action?*, 33 U. PITT. L. REV. 868, 879 (1972).

70. Berland v. Mack, 48 F.R.D. 121, 132 (S.D.N.Y. 1969). *Accord*, BOARD OF EDITORS OF THE FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION 51 (1973); 7A WRIGHT & MILLER § 1788, at 168.

71. 43 F.R.D. 472 (E.D.N.Y. 1968).

72. 48 F.R.D. 121 (S.D.N.Y. 1969).

73. 52 F.R.D. 253 (S.D.N.Y. 1971).

74. 43 F.R.D. at 498. One commentator has contended that the court required all three of these justifications to place the burden on the defendant. Note, *supra* note 62, at 155.

75. 48 F.R.D. at 132. Judge Mansfield used the same test in Korn v. Franchard Corp., 50 F.R.D. 57, 60-61 (S.D.N.Y. 1970).

suming merit to the plaintiff's claims in its determination.[76] In the subsequent hearing in *Eisen V*, the court determined that the defendant must bear 90 per cent of the cost of notice.[77] *Eisen VI*, however, reversed this decision, accepting an unsupported conclusionary ruling that the plaintiff must pay.

The balancing test employed by *Berland* and *Eisen IV* is consistent with both the underlying policy considerations for class actions and the flexible attitude toward the construction of rule 23. The test considers the interests of the judiciary, the plaintiffs, the defendants, and the public. Unlike the conclusionary result test or the arbitrary imposition of the notice costs on the plaintiffs, this test is consistent with the rule 23 requirements of a case-by-case evaluation of the issue and the use of judicial discretion. This balancing test has resulted in the apportionment of notice costs between the defendant and the plaintiff in some cases,[78] while in other cases, the entire burden has been placed upon the plaintiff.[79]

A number of policy considerations can be weighed in this case-by-case analysis. One of the major considerations is the apparent merit in the plaintiff's claim.[80] The purpose of this consideration is to avoid frivolous or vexatious suits which may swamp the court with numerous meritless actions. Although there are few judicial guidelines in this area, at least one authority has suggested that when a court examines the merit of a claim against a corporate defendant, it must also examine the importance of the class action in preventing overreaching by corporate officials.[81]

A second policy consideration is the res judicata effect of a final judgment of the plaintiff class' rights against the defendant.[82] "[T]he defend-

76. 52 F.R.D. at 270. The court did not accept the holding of *Eisen III* (that Eisen should pay the notice costs) because of a footnote in Green v. Wolf Corp., 406 F.2d 291, 301 n.15 (2d Cir. 1968), that stated that the broad question of whether a plaintiff should pay for notice is still an open one. 52 F.R.D. at 269.

77. 54 F.R.D. at 573.

78. *E.g.*, Lamb v. United Security Life Co., 59 F.R.D. 25, 42 (S.D. Iowa 1972); Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971); Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969).

79. *E.g.*, Feder v. Harrington, 52 F.R.D. 178 (S.D.N.Y. 1970); Korn v. Franchard Corp., 50 F.R.D. 57 (S.D.N.Y. 1970), *rev'd on other grounds*, 456 F.2d 1206 (2d Cir. 1972).

80. Feder v. Harrington, 52 F.R.D. 178, 185 (S.D.N.Y. 1970) ("considerable doubt" about the prospects of the plaintiff's success in the action); Berland v. Mack, 48 F.R.D. 121, 132 (S.D.N.Y. 1969) ("a *prima facie* meritorious" case). *See* Cole v. Schenley Indus., 60 F.R.D. 81, 86 n.26 (S.D.N.Y. 1973). Although accepting *Eisen VI*, the *Cole* court stated that using a balancing test, plaintiff's claims were open to considerable doubt. *See also* Ostapowicz v. Johnson Bronze Co., 54 F.R.D. 465, 466 (W.D. Pa. 1972); Lamb v. United Security Life Co., 59 F.R.D. 25, 40 (S.D. Iowa 1972); Buford v. American Fin. Co., 333 F. Supp. 1243, 1250 (N.D. Ga. 1971).

81. *See* Weinstein, *supra* note 67, at 437.

82. Lamb v. United Security Life Co., 59 F.R.D. 25, 41 (S.D. Iowa 1972) (defendants, by their resistance to the class action, showed they were not concerned with the res judicata effects); Dudley v. Southeastern Factor & Fin. Corp., 57 F.R.D. 177, 180 (N.D. Ga. 1972); Miller v. Alexander Grant & Co., [1971-1972 Transfer Binder] C.C.H. FED. SEC. L. REP. ¶ 93,287 at 91,624 (E.D.N.Y. 1971); Feder v. Harrington, 52 F.R.D. 178, 185 (S.D.N.Y. 1970) (defendants vigorously opposed class action); Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 270 (S.D.N.Y. 1971); Berland v. Mack, 48 F.R.D. 121, 132-33 (defendant desired res judicata advantages). *See* Cole v. Schenley Indus., 60 F.R.D. 81, 87 n.26 (S.D.N.Y. 1973). Although accepting *Eisen VI*, the *Cole* court said that under the balancing test, defendant's vigorous opposition to the action showed no concern for the res judicata effects. *See also* Alameda Oil Co.

ant may have an interest in having all the members of the plaintiff class bound by the decree and may therefore be required to share in the burden of providing notice to absentees."[83] Some commentators, however, do not give much weight to this consideration. First, they argue that the defendant would much rather have no action at all than have all the members of the class bound by the judgment.[84] Second, they contend that in many cases most of the members of the plaintiff class are unaware of the litigation or of any remedy that may exist for the alleged injuries. A powerful defendant can deal with the few individual suits that arise either by delaying tactics or settlements, either of which will probably be less expensive than the costs of a class action.[85] Finally, these commentators assert that after a settlement or favorable judgment in a class action, absent members of the class may still be able to bring another action if they can defeat the res judicata effect of the decree by arguing that they were inadequately represented by the representative plaintiff.[86]

Although these arguments have some merit, they overlook the fact that consideration of the res judicata effect of the judgment should be used in some cases. In a case in which the defendant, as well as the plaintiff, prefers to have the suit litigated as a class action, this consideration is important because the defendant actually would rather have the binding effect of a class action judgment than the risks of inconsistent judgments in multiple individual suits. Furthermore, when the representative plaintiffs are a large proportion of the total class, and the representative plaintiffs appear to represent adequately the total class, the danger of absent members defeating the res judicata effect of the judgment is slight. Thus each court should evaluate considerations of res judicata in view of the facts of the particular case.

A third policy consideration is the fiduciary relationship between the defendant and the plaintiff. The authorities that suggest this consideration argue that in an action by shareholders against a corporation, the defendant corporation may properly be required to pay notice costs since it owes a fiduciary duty to its owners, the shareholders.[87] The court in *Berland v. Mack* rejected this consideration, perceiving a danger in allowing a single member of a class, one shareholder in a corporation, to bring a claim and to demand that the corporation pay the notice costs. The court doubted whether "most shareholders expressly or impliedly consent to such a use of corporate funds for the vindication of an issue as to fiduciary duty because it is raised by one of them."[88] Furthermore, the court argued, if the corporation prevails in the case, a single shareholder may not be able to reimburse the corporation for its initial outlay of notice costs. The *Berland* court correctly analyzed the dangers in actions against a corporation by one share-

v. Ideal Basic Indus., 326 F. Supp. 98, 105 (D. Colo. 1971); Dolgow v. Anderson, 43 F.R.D. 472, 499 (E.D.N.Y. 1968).

83. *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 938 (1958).

84. Ward & Elliott, *The Contents and Mechanics of Rule 23 Notice*, 10 B.C. IND. & COM. L. REV. 557, 566 (1969).

85. Note, *supra* note 62, at 155.

86. *Id.* at 156.

87. *See* Cusick v. N.V. Nederlandsche Combinatie Voor Chem. Indus., 317 F. Supp. 1022, 1025 n.6 (E.D. Pa. 1970). *See also* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1009 n.5 (2d Cir. 1973); Lamb v. United Security Life Co., 59 F.R.D. 25, 39 (S.D. Iowa 1972); Dolgow v. Anderson, 43 F.R.D. 472, 499 (E.D.N.Y. 1968).

88. 48 F.R.D. at 132.

holder. If the representative plaintiffs contain numerous stockholders, however, the possibility that the fiduciary relationship will be used to bring a frivolous suit is diminished.

A fourth policy consideration is the interest of the public in the class action. In *Eisen IV*, the court stated that because of the serious nature of the antitrust claims and the questions of public confidence in the stock market, the plaintiff need not pay all the costs of notice.[89] This rationale is consistent with the policies underlying class actions and is especially important in a case in which a large segment of the public has been injured, but each individual injury is small.

Authorities have suggested many other policy considerations, foremost among which is whether the defendant has the ability to provide notice at slight expense.[90] Other suggested considerations include the number of named plaintiffs and their financial responsibility, the value and percentage of the representative plaintiff's holdings as compared to those of the entire class, the ability of the plaintiffs to make the initial outlay of funds, the cost of notice, the ratio of the cost of notice to the total anticipated recovery, the traditional or nontraditional nature of the class action,[91] the ability of the plaintiffs to bring individual suits within the statute of limitations,[92] the ability of the plaintiffs to reimburse after recovery,[93] and the benefits of notice to the defendant.[94]

89. 52 F.R.D. at 270. *See also* Lamb v. United Security Life Co., 59 F.R.D. 25, 41 (S.D. Iowa 1972); 1973 WIS. L. REV. 301, 308.

90. Lamb v. United Security Life Co., 59 F.R.D. 25, 41 (S.D. Iowa 1972) (defendant communicates with stockholders from time to time). *See* Eisen v. Carlisle & Jacquelin, 479 F.2d at 1009 n.5; Cusick v. N.V. Nederlandsche Combinatie Voor Chem. Indus., 317 F. Supp. 1022, 1025 n.6 (E.D. Pa. 1970); Dolgow v. Anderson, 43 F.R.D. 472, 499-500 (E.D.N.Y. 1968); Ward & Elliott, *supra* note 84, at 566; 1973 WIS. L. REV. 301, 308; *Developments in the Law, supra* note 83, at 938 n.462.

91. Lamb v. United Security Life Co., 59 F.R.D. 25, 40 (S.D. Iowa 1972). *See also* Ostapowicz v. Johnson Bronze Co., 54 F.R.D. 465, 466 (W.D. Pa. 1972) (ability of plaintiffs to make the initial outlay of funds); Feder v. Harrington, 52 F.R.D. 178, 184-85 (S.D.N.Y. 1970) (number of named plaintiffs and their financial responsibility; ability of plaintiffs to make the initial outlay of funds; the cost of notice); Berland v. Mack, 48 F.R.D. 121, 132 (S.D.N.Y. 1969) (number of named plaintiffs and their financial responsibility; value and percentage of the representative plaintiff's holdings as compared to those of the entire class; ability of plaintiffs to make the initial outlay of funds; the cost of notice). *See* Korn v. Franchard Corp., 50 F.R.D. 57, 60 (S.D.N.Y. 1970) (the cost of notice); O'Laughlin, *supra* note 69, at 879 (the cost of notice); Ward & Elliott, *supra* note 84, at 565 (ability of plaintiffs to make the initial outlay of funds); Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338, 359 (1971) (ratio of cost of notice to total anticipated recovery); Comment, *Recovery of Damages in Class Actions*, 32 U. CHI. L. REV. 768, 781 n.69 (1965) (ability of plaintiffs to make the initial outlay of funds).

92. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 270 (S.D.N.Y. 1971). If the statute of limitations has tolled for individual suits, the consideration of a binding res judicata effect on other plaintiffs' claims is of little importance.

93. Feder v. Harrington, 52 F.R.D. 178, 185 (S.D.N.Y. 1970). *See* Berland v. Mack, 48 F.R.D. 121, 132 (S.D.N.Y. 1969).

94. Sagers v. Yellow Freight Sys., Inc., 16 FED. RULES SERV. 2D 671, 679 (N.D. Ga. July 21, 1972). In *Sagers*, a black employee brought an action against his employer and union, challenging the seniority provisions of a collective bargaining agreement. The court held that since the notice to the union members would apprise both members of the class (black employees) and white workers, the defendant should share in the cost of notice. The court suggested that since the white workers might help

To evaluate these policy considerations in the context of a particular case, some authorities have recommended that the court hold a preliminary hearing to determine the allocation of notice costs.[95] Most authorities, however, reject this suggestion because of its emphasis on the merits of the case.[96] In the one major case that adopted a preliminary hearing, *Eisen IV*, the court stated that it could not determine which party should bear the expense of notice, and it recommended that evidence be presented at a hearing, *Eisen V*, to facilitate its decision.[97] The court analogized this procedure to a hearing before the granting of a preliminary injunction, in which the court evaluates the merits of the plaintiff's case before imposing a burden on the defendant. Additionally, the hearing serves two other functions. If the court decides that the action is frivolous, and the plaintiff decides not to continue the action, a hearing before the notice is sent will eliminate the adverse effects of notice on the parties and the need for extensive discovery.[98]

These arguments in favor of a preliminary hearing, however, emphasize only one consideration in the allocation of notice costs: the merits of the case. The court might examine other policy considerations, but, as in a hearing for a preliminary injunction, the main issue remains the likelihood of success at trial. The emphasis on the merits of the case is the major shortcoming of the preliminary hearing; most courts have directed this same criticism toward the use of a preliminary hearing to determine the propriety of a class action.[99] They argue that under rule 23 the only question is whether the rule's requirements are met, not whether the plaintiff can prevail on the merits. Thus, a preliminary hearing on the merits to determine whether a class action can be maintained is beyond the scope of rule 23.

If a preliminary hearing on the issue of class determination is beyond the scope of rule 23, it is also outside the boundaries of rule 23 on the

the defendants in the suit, notice was a benefit to the defendants, as well as the plaintiff.

95. Zachary v. Chase Manhattan Bank, 52 F.R.D. 532, 535 (S.D.N.Y. 1971); Eisen v. Carlisle & Jacquelin, 52 F.R.D. at 270; Dolgow v. Anderson, 43 F.R.D. 472, 500 (E.D.N.Y. 1968); O'Laughlin, *supra* note 69, at 881; 1973 WIS. L. REV. 301, 309-11.

96. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1015-16 (2d Cir. 1973); Lamb v. United Security Life Co., 59 F.R.D. 25, 40-41 (S.D. Iowa 1972); Feder v. Harrington, 52 F.R.D. 178 (S.D.N.Y. 1970); Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969).

97. Eisen v. Carlisle & Jacquelin, 52 F.R.D. at 269. The preliminary hearing was reported in *Eisen V*, 54 F.R.D. 565 (S.D.N.Y. 1972).

98. 1973 WIS. L. REV. 301, 309. The author suggests that stock prices may be adversely affected as a result of notice.

99. Courts rejecting a preliminary hearing to determine if a class action can be maintained are Miller v. Mackey Int'l, Inc., 452 F.2d 424, 427-29 (5th Cir. 1971); Katz v. Carte Blanche, 52 F.R.D. 510, 512-13 (W.D. Pa. 1971); City of Philadelphia v. Emhart Corp., 50 F.R.D. 232, 234-35 (E.D. Pa. 1970); Mersay v. First Republic Corp. of America, 43 F.R.D. 465, 469 (S.D.N.Y. 1968). *See also* Kahan v. Rosentiel, 424 F.2d 161, 169 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970). Even the judge in *Eisen IV* rejected this type of hearing in Fogel v. Wolfgang, 47 F.R.D. 213 (S.D.N.Y. 1969). The Second Circuit in *Eisen VI* followed *Miller* when it rejected the *Eisen V* hearing on notice costs. 479 F.2d at 1015-16.

A case that required a preliminary hearing before determining whether a class action was maintainable was Milberg v. Western Pac. R.R., 51 F.R.D. 280, 282 (S.D.N.Y. 1970), *appeal dismissed*, 443 F.2d 1301 (2d Cir. 1971).

issue of allocation of notice costs. In many instances, a preliminary hearing on allocation is identical to a hearing on the question of whether the class action can be maintained. If the plaintiff cannot continue the action without an apportionment of notice costs, a determination on the merits that the plaintiff must pay all the expenses effectively terminates the action. As a result, a hearing to determine allocation of notice costs is turned into a rule 12 motion to dismiss or a rule 56 motion for summary judgment.[100]

As an alternative to the four previously discussed approaches to problems of allocation of notice cost, Chief Judge Lumbard, in a dissenting opinion in *Eisen III*, suggested an entirely different approach to the whole issue of public interest class actions. He rejected the use of the class action device in a case in which "almost everybody is a potential member of the class." Instead, he recommended that in cases in which a small injury has been inflicted on a large number of persons, the potential plaintiffs should use the administrative remedies of public agencies.[101] This approach eliminates the notification of large numbers of persons and thereby removes most questions of the allocation of notice expenses. The class action approach to these public interest cases, however, has advantages over a purely administrative approach. Public agencies do not have a personal interest at stake in the case and may not vigorously pursue all the available remedies.[102] In contrast, the personally interested members of the class may more forcefully press their case.[103]

If public interests are to be fully protected, courts must allow large public interest class actions. Although Judge Lumbard's suggestion eliminates the problems of allocating notice expense, it also leaves many public injuries without a realistic means of redress. And as long as the class action remains an option in these cases, problems of apportionment of notice cost will continue. Since many of these cases concern public interest matters, the payment of notice from public funds is not unreasonable, especially in cases in which the class action is the only means available for resolving the dispute. Legislation to provide courts with these funds should receive serious consideration. Until these funds are appropriated, however, courts should reject mechanical tests that require plaintiffs or defendants to pay notice costs and should use a balancing test to consider the interests of the judiciary, the plaintiffs, the defendants, and the public in the action. This approach is consistent with the policy considerations underlying class actions and rule 23's policy of judicial flexibility.*

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100. Lamb v. United Security Life Co., 59 F.R.D. 25, 40 (S.D. Iowa 1972).

101. 391 F.2d at 571, 572 (Lumbard, C.J. dissenting).

102. "There is no tradition of public service in America and little development of a true civil servant attitude in America." Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 720 (1941).

103. Also, many injuries arise for which no administrative or governmental remedy is possible. Recently, the Ninth Circuit held that the state, as parens patriae representing its citizens, could not bring an action against a food company for price fixing. State of California v. Frito-Lay, Inc., 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973). Since the court found that the state could not sue for money damages suffered by individuals, the only alternative for an injured party was a class action. Under Judge Lumbard's view, if the class action is too large for the representative class members to pay for notice, the case could not be litigated.

*This comment was written before the Supreme Court's decision in *Zahn v. International Paper Co.*, 94 S. Ct. 505 (1973). In *Zahn* the Court