



Loyola Consumer Law Review
2002

Feature Article

***251 INNOVATIVE CLASS ACTION TECHNIQUES - THE USE OF RULE 23(B)(2) IN CONSUMER CLASS ACTIONS**

[Thomas R. Grande \[FN1\]](#)

Copyright © 2002 by Loyola University of Chicago School of Law; Thomas R. Grande

Table of Contents

I.	Introduction.	252
II.	History and Elements of Rule 23(b)(2).	252
III.	Relief Available Under Rule 23(b)(2).	261
IV.	Innovative Uses of Rule 23(b)(2).	264
V.	Case Example: <i>Kalima v. State of Hawaii</i> .	267
VI.	Conclusion.	270
	Appendix A: Federal Rule 23 and Advisory Committee Notes	272
	Appendix B: Selected Federal Appellate Cases Regarding 23(b)(2)	284

***252 I. Introduction**

[Federal Rule of Civil Procedure 23\(b\)\(2\) \[FN1\]](#) (“23(b)(2)”) is intended for cases where broad, class-wide

injunctive or declaratory relief is necessary to redress a group-wide injury. [FN2] After its adoption in 1966, legal services organizations and employment lawyers widely used 23(b)(2) throughout the 1970s and 1980s to enforce federal social welfare legislation and civil rights laws. [FN3] Since the 1991 amendments to the federal civil rights laws providing for recovery of monetary damages, in addition to declaratory, injunctive, and equitable relief, several courts have restricted the use of 23(b)(2) in civil rights cases. These decisions, however, illustrate the potential to use 23(b)(2) as an innovative class action technique, which should be considered by consumer lawyers in consumer rights cases.

This article first provides an overview of the history and elements of [Rule 23\(b\)\(2\)](#), including a brief discussion of the advantages and disadvantages of using a 23(b)(2) class. It next discusses the type of relief obtainable through the use of a 23(b)(2) class and summarizes the use of 23(b)(2) classes under several consumer statutes. It then suggests several innovative strategies that consumer lawyers can use in litigating 23(b)(2) class action claims. The article concludes by presenting a case summary of the author's innovative use of 23(b)(2) in a case seeking both declaratory and monetary relief.

II. History and Elements of [Rule 23\(b\)\(2\)](#)

As with its companion provisions of 23(b)(1) and 23(b)(3), to obtain class certification under 23(b)(2), plaintiffs must first satisfy the four requirements of [Rule 23\(a\)](#): numerosity, commonality, typicality, and adequacy of representation. [FN4] Once the 23(a) requirements are satisfied, two elements must be met under [Rule 23\(b\)\(2\)](#): 1) the party opposing the class must have acted on grounds generally applicable to the class; and 2) final injunctive or *253 corresponding declaratory relief must be requested. [FN5]

[Rule 23\(b\)\(2\)](#) differs both substantively and procedurally from the more commonly used damages class under [Rule 23\(b\)\(3\)](#). [FN6] Substantively, claims in 23(b)(2) cases are for “final injunctive and declaratory relief,” [FN7] while claims in 23(b)(3) may also encompass individualized monetary damages. [FN8] Also, in contrast to a [Rule 23\(b\)\(3\)](#) action, which must meet the elements of predominance and superiority, 23(b)(2) requires only that the party opposing the class acts the same toward the class and that some class members seek final injunctive relief. [FN9] Although rarely emphasized by litigants and the court, the omission of the elements of predominance and superiority is important because it means that class certification should be granted even where common issues do not predominate, and where the class action mechanism is not necessarily the most superior method of resolving the dispute. Omission of these two substantive requirements makes 23(b)(2) classes subject to a less stringent certification standard and illustrates a significant advantage in obtaining class certification. [FN10]

[Rule 23\(b\)\(2\)](#) also has procedural advantages over 23(b)(3). For example, [Rule 23\(b\)\(3\)](#) allows for individualized monetary damages, requires best practicable notice for all class members, and allows class members the opportunity to opt-out [FN11] of the case. [FN12] In contrast, 23(b)(2) classes are mandatory, no personal notice is required to be given to class members, and no-opt out right is provided. [FN13]

*254 From the defendant's perspective, a 23(b)(2) action is advantageous because the judgment binds all class members, whether or not they oppose the class action or are damaged by the defendant's wrongful conduct. [FN14] Thus, the defendant can be assured that any future plaintiffs bringing the same claims will be barred by res judicata.

From the plaintiff's perspective, the absence of required notice is a significant advantage because notice can

be so expensive and time-consuming as to render valid claims unworthy of pursuing. No pre-judgment notice is required at all, and post-judgment notice may be given to the class representatives only. [FN15] However, as shown below, the absence of notice requirements raises a possible concern regarding the Seventh Amendment right to a jury trial.

A. Acting or Refusing to Act on Grounds Generally Applicable to the Class

Rule 23(b)(2) authorizes certification of a class action where “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate and final injunctive or corresponding declaratory relief with respect to the class as a whole” [FN16] Although the party opposing the class must have acted or refused to act on grounds generally applicable to all class members, the conduct in question does not need to be directed at or damaging to each member of the class. [FN17] The Advisory Committee Notes accompanying the 1966 amendment to 23(b)(2) state that “action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.” [FN18]

Thus, if there is a policy that is generally applicable to the entire class, it need not be opposed by all members of the class or *255 even affect all members of the class. [FN19] As long as the policy is applicable to all members of the class, this element is satisfied. Courts have interpreted this requirement to mean that the party opposing the class must have acted either in a consistent manner toward class members, such that the defendant's actions are part of a pattern of activity, or in such a way that there is a regulatory scheme common to all class members. [FN20]

The above Advisory Committee Note highlights another advantage of 23(b)(2). The key inquiry to be made is whether the defendant's conduct would affect all persons similarly situated, such that the defendant's acts apply generally to the whole class. [FN21] While the normal inquiry regarding a 23(b)(3) class focuses on the effect of the wrongful conduct on each individual class member, the inquiry in a 23(b)(2) class is just the opposite. [FN22] Under 23(b)(2), it is the conduct of the defendant - not the effect of the conduct on the plaintiff - that is at issue. [FN23] A court's inquiry focuses on the defendant's conduct; individualized facts regarding the plaintiffs are not relevant to whether or not the defendant acted on grounds that are generally applicable to the class.

Because the rule specifies that the party opposing the class must have “acted” or “refused to act,” the plain language of the rule seems to contemplate that the wrongful action has already taken place. [FN24] However, the Advisory Committee Notes make clear that “threatened” action may also provide a basis for relief. [FN25] Thus, the injunctive remedy under 23(b)(2) may be used both for past actions or inactions, which plaintiffs seek to stop or mandate, as well as for future actions or inactions, which plaintiffs ask to be stopped or mandated in the future.

***256 B. Final Injunctive Relief**

The second basic requirement of class certification under 23(b)(2) is that “final relief of an injunctive nature or a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole” must be appropriate. [FN26] The plain language of 23(b)(2) makes clear that it is only appropriately used for final injunctive relief, and thus, temporary restraining orders and preliminary injunctions do not qualify. [FN27]

Injunctive relief may encompass a broad range of conduct that plaintiffs are trying to restrain or mandate. For example, if a governmental entity or private corporation fails “to perform a legal duty,” such wrongful action is subject to redress under 23(b)(2). [FN28]

Rule 23(b)(2) class actions were designed specifically for civil rights cases seeking broad declaratory or injunctive relief for a numerous and amorphous class of persons against whom a common policy of discrimination was directed. [FN29] Nonetheless, the Advisory Committee Notes specify that no limits exist as to the type of actions that may be enjoined under 23(b)(2). [FN30] The Notes provide examples of proper 23(b)(2) injunctive cases, such as price discrimination by wholesalers against a class of retailers and antitrust violations by patent holders. [FN31]

Although 23(b)(2) refers to requests for injunctive and *257 declaratory relief, “[o]nce the conduct of the defendant makes such injunctive or declaratory relief appropriate, the full panoply of the court’s equitable powers is introduced.” [FN32] Thus, the type of injunctive relief to which 23(b)(2) applies becomes extremely broad-based if the term “injunction” is interpreted to mean “equitable,” as the commentators suggest. Interpreting “injunction” to mean “equitable” opens up the full array of potential equitable claims, including claims for equitable accounting, disgorgement, restitution, constructive trust, equitable estoppel, and rescission. This reading of 23(b)(2) makes it an extremely valuable and flexible tool, depending on the type of claims being asserted.

For example, the backpay relief for employment discrimination classes under Title VII is generally characterized as equitable restitution rather than legal damages. [FN33] A claim for damages, of course, may only be pursued under Rule 23(b)(3); a claim for restitution, although having the same effect, is appropriately litigated under 23(b)(2). This doctrine has been firmly embraced by most circuits and has been cited with approval by the United States Supreme Court. [FN34]

Similarly, 23(b)(2) equitable remedies have been held applicable in securities actions [FN35] and welfare rights cases. [FN36] More recently, the Eastern District of Pennsylvania affirmed the equitable remedy of rescission under the Truth in Lending Act in a 23(b)(2) class. [FN37] Significantly, nothing in 23(b)(2) restricts consumer lawyers from asserting broader equitable remedies, such as equitable accountings, unjust enrichment, or disgorgement. [FN38] Indeed, the United States Supreme Court, in ruling on what constitutes money damages, as opposed to equitable relief where money is awarded, commented favorably on disgorgement as an equitable remedy in *258 Title VII cases. [FN39] The Court focused on the broad discretionary power of the trial court to grant equitable remedies. [FN40]

C. Corresponding Declaratory Relief

The allowance under 23(b)(2) for claims involving “final injunctive relief or corresponding declaratory relief” raises the question of what type of declaratory relief is allowed to be pursued under its provisions. [FN41] The Advisory Committee defined “corresponding declaratory relief” as referring to a remedy that, “as a practical matter ... affords injunctive relief or serves as a basis for later injunctive relief.” [FN42] This standard has been interpreted to mean that the declaration should correspond to an injunction. [FN43] While a close nexus exists between injunctive and declaratory relief and while parties seeking a declaration of their rights commonly also seek an injunction, Rule 23(b)(2) does not require both forms of relief to be sought. [FN44] Thus, class certification may be requested and granted in cases where only declaratory relief is sought. [FN45]

Although many courts, including the United States Supreme Court, [FN46] have stated that either injunctive

or declaratory relief may be obtained under [Rule 23\(b\)\(2\)](#), the type of declaratory relief available under 23(b)(2) appropriately turns on the effect of the judicial directive. [\[FN47\]](#) If the requested relief is a declaration that a statute is unconstitutional or that a business practice is unfair or deceptive, the resulting judicial declaratory directive would have the effect of “enjoining” either the enforcement of the statute or the commitment *259 of the offending practice. [\[FN48\]](#) In such an instance, the effect of the judicial directive is injunctive in nature [\[FN49\]](#) and therefore, plainly contemplated by [Rule 23\(b\)\(2\)](#). [\[FN50\]](#) On the other hand, if the declaration simply lays the basis for a damage award rather than injunctive relief, certification of declaratory relief under [Rule 23\(b\)\(2\)](#) is not appropriate. [\[FN51\]](#)

In evaluating how to properly assert a claim for declaratory relief, both federal and state declaratory relief statutes must be reviewed. The Federal Declaratory Judgment Act [\[FN52\]](#) is the basis for a relatively small number of cases seeking class certification. [\[FN53\]](#) The Court of Appeals for the Fifth Circuit, one of the few circuit courts to consider the issue, ruled that the substantive statutes underlying a claim for declaratory relief must satisfy the 23(b)(2) criteria in order to qualify as a class under the Declaratory Judgment Act. [\[FN54\]](#)

*260 An avenue that also should be fully explored, however, is the state declaratory judgment statutes, which may be much broader and more liberal than the corresponding Federal Declaratory Judgment Act. For example, Hawaii law on declaratory judgments [\[FN55\]](#) is applicable whenever a non-exclusive statutory remedy is given. In an environmental case that the author argued before the Hawaii Supreme Court, the court was asked to construe a provision in the Hawaii Coastal Zone Management statute, which provided that “[n]othing in this section shall restrict any right that any person may have to assert any other claim or bring any other action.” [\[FN56\]](#) The Hawaii Supreme Court ruled that:

Hawaii Revised Statute [(“HRS”) section] 205A-6 therefore clearly allowed [the plaintiffs] to bring a generic *261 declaratory action under [\[HRS section\] 632-1](#) without the need to proceed under [\[HRS section\] 205A-6](#). Additionally, because [the plaintiffs] petitioned for declaratory relief under [\[HRS section\] 632-1](#), the sixty-day time limit contained in [sec. 205A-6\(d\)](#) was inapplicable. Accordingly, the circuit court had jurisdiction over [the plaintiffs' HRS section] 632-1 petition for declaratory relief in the instant case. [\[FN57\]](#)

The significance of this ruling is that the court allowed a separate cause of action that could be asserted beyond the statutory limitations period contained in the Coastal Zone Management statute. Similar opportunities exist under the broad declaratory relief that may be granted under state declaratory judgment acts.

III. Relief Available Under [Rule 23\(b\)\(2\)](#)

A. Injunctive and Declaratory Relief

Cases involving governmental constitutional challenges, [\[FN58\]](#) statutory schemes, [\[FN59\]](#) as well as private actions directed at a protected class [\[FN60\]](#) have traditionally been the types of actions brought under 23(b)(2). [\[FN61\]](#) One advantage of bringing a claim under 23(b)(2) is that once liability has been determined, the court has the power to immediately enjoin a defendant's unlawful practices.

Additionally, a grant of injunctive or declaratory relief is beneficial for plaintiff's counsel. The grant of injunctive relief may assist counsel in obtaining attorney's fees because it provides a strong basis for permitting all requested attorney's fees.

B. Monetary Damages

The Advisory Committee Notes make clear that damages are recoverable under [Rule 23\(b\)\(2\)](#), but such relief must neither be “exclusive” nor “predominate.” Specifically, the Committee states:

**262 This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole is appropriate The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages. [FN62]*

As mentioned above, the early use of [Rule 23\(b\)\(2\)](#) consisted primarily of civil rights cases. Monetary damages were limited to elements of damage that were restitutionary and therefore, equitable in nature, such as back pay. Because of this, monetary damages could be obtained in 23(b)(2) cases.

The guidance as to what constitutes “final relief relat[ing] ... predominately to money damages” [\[FN63\]](#) is conflicting. Some courts follow the language of the Advisory Committee Notes, stating that so long as monetary relief is not the exclusive or predominant remedy sought, a 23(b)(2) class seeking money damages is appropriate. [\[FN64\]](#) Other courts permit the award of class-wide monetary relief by holding that such relief is ancillary to the primary prayer for injunctive relief. [\[FN65\]](#) This issue is of particular interest in court rulings on medical monitoring relief, with courts issuing conflicting rulings on whether medical monitoring is equitable or legal in nature. [\[FN66\]](#)

Prior to 1991, civil rights actions provided for 23(b)(2) class certification so long as the monetary relief was not the exclusive or predominant relief sought. [\[FN67\]](#) Judges often divided the trial of these cases into two stages - liability and equitable or damages relief. Civil **263* rights attorneys and their clients gained enormous practical benefits under [Rule 23\(b\)\(2\)](#). They avoided both the stricter certification requirements of predominance and superiority under 23(b)(3) and the potentially costly notification requirements. [\[FN68\]](#)

Since the 1991 Civil Rights Act amendments, which allowed for compensatory emotional distress and punitive damages under Title VII, however, some courts have ruled that unless the damages flow directly from the injunction, [Rule 23\(b\)\(2\)](#) is not available. [\[FN69\]](#) Instead, plaintiffs must meet the burdensome requirements of predominance and superiority under 23(b)(3), as well as comply with the mandatory notice requirements. [\[FN70\]](#)

C. Circuit Court Decisions on Whether Monetary Damages Predominate

The Fifth Circuit has imposed the most stringent restriction on obtaining monetary damages under a 23(b)(2) class based upon the 1991 Civil Rights amendments. [\[FN71\]](#) While the Fifth Circuit decision grew out of the expense of statutory remedies, its decision has implications in other potential (b)(2) litigation.

In *Allison v. Citgo Petroleum Corp.*, the Fifth Circuit ruled that money damages were not appropriately awarded under 23(b)(2) unless such damages are “incidental to the requested injunctive or declaratory relief.” [\[FN72\]](#) In such a situation, the damages should be similar in nature to a group remedy and able to be calculated on an “objective” basis that requires no further hearing or inquiry into the circumstances of each individual class member's situation. [\[FN73\]](#) In 1999, the Court of Appeals for the Seventh Circuit issued a similar decision and adopted the Fifth Circuit's reasoning. [\[FN74\]](#)

Most recently, however, the Court of Appeals for the Second Circuit rejected the Fifth and Seventh Circuits' analysis by holding that the more appropriate test is an ad-hoc balancing test that focuses *264 on whether the injunctive or declaratory relief predominates. [FN75] One requirement under the Second Circuit's test is that the injunctive or declaratory relief sought must be both reasonably necessary and appropriate if the plaintiffs were to succeed based on the merits of the case. [FN76]

Although both the Seventh and Second Circuits reached different results as to which standards should apply to determine whether money damages predominate, both courts outlined several creative means by which 23(b)(2) may be used in place of, or in conjunction with, a 23(b)(3) damages class. [FN77] Several of these alternatives are outlined in the following section.

IV. Innovative Uses of Rule 23(b)(2)

As discussed above, courts have identified several innovative strategies for using 23(b)(2) that afford significant opportunities for creative consumer lawyers. [FN78] These creative strategies are as follows: 1) 23(b)(2) certification with court-ordered notice and opt-out requirements; 2) hybrid, also called split or divided, certification; 3) sequential certification; and 4) partial certification. These options make the availability of 23(b)(2) attractive in numerous factual and legal circumstances. Such situations include consumer actions under federal Truth in Lending Act ("TILA"), Fair Debt Recovery and Collection Act ("FDRCA") and consumer actions under state unfair and deceptive trade practices ("UDAP") statutes. Consumer lawyers use these and similar statutes to enjoin wrongful conduct, as well as compensate consumers who have suffered pecuniary injury. Using strategies which initially focus on stopping the wrongful conduct through injunctive or declaratory relief may achieve significant results early in the litigation and may set the stage for a later monetary damages claim.

A. 23(b)(2) Certification with Court-Ordered Notice and Opt-Out

One option that may be considered in a 23(b)(2) class is providing for notice and opt-out for the class, while still seeking certification under 23(b)(2). Courts have held that it is within the *265 district court's discretion to order pre-judgment notice and an opportunity to opt-out in 23(b)(2) cases. [FN79] This approach has the advantage of seeking certification under the less stringent 23(b)(2) standards, while preserving a class member's due process or Seventh Amendment right to a jury trial in cases involving monetary damages. Providing notice and offering an opt-out preserves an individual's right to jury trial and right to proceed individually. While the propriety of providing notice and opt-out in a Rule 23(b)(2) class is unsettled and not yet ruled upon by the Supreme Court, [FN80] obtaining certification under the 23(b)(2) standards may be a beneficial option that should be carefully considered by plaintiffs' counsel.

B. Hybrid Certification

A second approach is hybrid certification, [FN81] which means that a class is certified for liability purposes as a 23(b)(2) class, while a separate certification is pursued under 23(b)(3) for damages. [FN82] Hybrid certification has the advantage of deferring notice and opt-out until a finding of liability has been made. Shifting the costs of notification to the defendant may be possible at that stage, since liability has been established. Thus, many suits may be feasible that plaintiffs' attorneys would have found too cost-prohibitive to bring under 23(b)(3) otherwise. [FN83] Another advantage is that injunctive and *266 declaratory relief may be available

under 23(b)(2) in order to stop the defendant's challenged practices immediately, before the issue of damages is determined. In practice, to pursue hybrid class certification, plaintiffs' attorneys should file a separate motion to bifurcate the 23(b)(2) claims from the 23(b)(3) claims, while simultaneously filing a motion for class certification. [FN84]

C. Sequential Certification

Sequential certification refers to two related actions being brought in the same lawsuit. This usually occurs by the certification of 23(b)(3) claims at the conclusion of the liability issues under 23(b)(2). [FN85] This approach may be applicable where the prospects for certification of a 23(b)(3) class are remote or where 23(b)(3) class certification would be impossible. For example, a 23(b)(2) action could be brought on behalf of a class of prisoners who are wrongfully detained after either acquittal or dismissal of the charges. A challenge to the governmental policy of detention is appropriately pursued under the 23(b)(2) remedy for all those who have been or will be detained. After the policy has been enjoined, a separate action under 23(b)(3) may be brought to obtain monetary relief for those wrongfully retained after acquittal. This action may be in the same lawsuit or in a separate action. The initial motion for class certification should describe this sequential certification strategy for the court.

D. Partial Certification

An option closely related to hybrid certification is partial certification to determine a particular issue. Courts have the power to certify classes for particular issues under Rule 23(c)(4)(a), which provides that “an action may be brought or maintained as a class *267 action with respect to particular issues.” [FN86] This approach has been validated by the Second Circuit, in its ruling that a trial court erred in failing to certify a 23(b)(2) class for determining the issue of whether a defendant's conduct constituted a practice or pattern of activity for the purposes of an employment discrimination statute. [FN87] The primary difference in that case is that the pattern or practice claim required the jury to resolve a disputed factual issue. [FN88] This issue formed the basis for subsequent injunctive relief, thus preserving the right to trial by jury. The focus on the defendants' conduct under a 23(b)(2) certification and the use of certification for resolution of a particular issue allows greater flexibility in litigating the claim and potentially may be easier for the court to initially resolve a dispositive issue in the case.

V. Case Example: *Kalima v. State of Hawaii* [FN89]

Kalima v. State of Hawaii is a sequential class action filed on behalf of 2,700 Native Hawaiians who alleged a breach of trust by the State of Hawaii in its administration of a land program. [FN90] Although the factual and legal claims in *Kalima v. State of Hawaii* [FN91] are unique, this case illustrates one way in which Rule 23(b)(2) may be used in an innovative manner.

The case was appropriate for the prosecution of two separate but interrelated class actions. The first claim was brought under 23(b)(2) and was certified on behalf of all Native Hawaiians who filed a claim with an administrative panel and suffered a breach of trust violation. [FN92] The second and subsequent claims were brought under 23(b)(3) for Native Hawaiian claimants who waited an unreasonable amount of time to be awarded a homestead. [FN93]

***268 A. Background**

Native Hawaiians, *kanaka ma'oli*, are the only Native American group not recognized by the federal government as an indigenous native group. [FN94] As a result, Native Hawaiians have no independent government and no independent land base. Instead, in 1921, Congress established a Hawaiian Home Lands Trust, designed to rehabilitate Native Hawaiians by giving them residential and farm lots owned by the government, but leased to the natives. [FN95] When Hawaii became a state in 1959, the State of Hawaii assumed the responsibility of the trust. [FN96]

Native Hawaiians were unable to obtain redress for the state's breaches of the trust until 1991, when the state waived its sovereign immunity and granted Native Hawaiians the right to seek monetary damages through jury trials. [FN97] Before a lawsuit could be filed, however, the claimants had to file their claims with a claims panel, which then rendered non-binding advisory opinions to the claimants. [FN98]

Over 2,700 Native Hawaiians submitted claims to the panel, more than half of which involved those who waited an unreasonably long period of time to be awarded their homestead. [FN99] By the time the claims panel sunsetted in 2000, it had processed only two of the 2,721 claims, and thus, only those two were eligible to sue directly in court. [FN100] The State of Hawaii took the position that because the claims panel had not processed the remaining claims, the preconditions to file suit were not fulfilled, and therefore, the state's *269 waiver of sovereignty immunity was rescinded. [FN101]

B. Sequential Certification

Although a majority of the 2,721 claims were similarly based on natives being forced to wait an unreasonably long period of time for their homestead, forty percent of the claims were individual claims for construction deficiencies, failure to comply with infrastructure requirements, and other similar individualized claims. In order to proceed as a class on behalf of all claimants, plaintiffs' counsel devised a dual certification model. The complaint was filed with two separate claims on behalf of two separate classes. [FN102] The first claim sought certification of a 23(b)(2) class for declaratory relief, which requested the court's declaration that the State could not object to lawsuits filed by the claimants on the basis that the claims panel failed to complete its work. [FN103] The relief sought was final injunctive relief. The court was being asked to rule, through a declaration, that all claimants had the right to sue. [FN104] The second claim sought monetary damages on behalf of a 23(b)(3) class. [FN105]

The court found the existence of the 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation and also found that the requirements necessary for a 23(b)(2) class were met. [FN106] The court held that the State had "acted ... on grounds generally applicable to the class" by disputing and refusing to recognize the right of all but two of the claimants to pursue a lawsuit for damages. [FN107] The plaintiffs simultaneously moved for summary judgment on their claim that they had the right to sue for money damages in a trial court based on the Hawaii Declaratory Judgment *270 Act. [FN108] The court agreed, granting the plaintiffs' motion. [FN109]

C. Advantages of Sequential Certification

The primary advantage of sequential certification in this case was the ability to obtain broad equitable relief,

the right to sue, on a class-wide basis for breach of trust claims, which in some cases were highly individualized. Approximately forty percent of the claimants asserted breaches of trust which likely could not be proven on a class-wide basis. These individuals and families asserted construction claims, infrastructure claims, and other real and personal property claims unique and unsuitable for class treatment. However, the one claim that they did have in common, both among themselves and with the second group of claimants who waited an unreasonable length of time to be awarded a homestead, was the right to sue. Once having secured the right to sue through the 23(b)(2) class, these claims could be litigated individually.

The second group of claimants, which comprised about sixty percent of the class, waited an unreasonable length of time to be awarded a homestead. This group had both common liability and damage claims, which are being pursued on a class-wide basis under [Rule 23\(b\)\(3\)](#). Thus, the case secured a much broader injunctive impact by its division into two separate types of claims, which were litigated separately. Sequential certification also took advantage of the easier 23(b)(2) standard for certification, which granted equitable relief to a broader class of persons than those who had injuries appropriate for class-wide treatment.

VI. Conclusion

Congress enacted [Rule 23\(b\)\(2\)](#) to establish a procedure to resolve actions involving primarily either injunctive, declaratory, or both types of relief for a large class. As such, the rule is a natural instrument of choice for challenges in the arenas of pattern or practice employment discrimination, system-wide problems in welfare and benefits cases, fair debt practices, constitutionality of statutes or programs, and many others. Even monetary relief may be sought under 23(b)(2) if it is equitable in nature or incidental to the requested injunctive or declaratory relief.

[Rule 23\(b\)\(2\)](#) affords consumer lawyers many advantages in ***271** class actions suits. First, because of the nature of 23(b)(2), the procedural requirements are much less stringent than those of 23(b)(3), namely because of the lack of notice and opt-out requirements. By avoiding the costly notice requirements, consumer lawyers are able to bring claims that would have been either too risky or cost-prohibitive under 23(b)(3). Second, [Rule 23\(b\)\(2\)](#) affords consumer lawyers the opportunity to obtain significant class-wide relief without having to meet the more stringent requirements of predominance and superiority. Third, proceeding under 23(b)(2) allows the court to order injunctive relief immediately upon a finding of liability, thereby instantly stopping a defendant's unlawful practice. Finally, because the analysis under 23(b)(2) requires the court to focus on the defendant's conduct, the facts of the plaintiffs' individualized cases are minimized, which may be helpful in fair debt, prisoner, and other cases where the plaintiffs may not be perceived as "innocent."

The 1991 Title VII amendments allowing monetary damages in civil rights cases had the practical result of removing many Title VII cases from the pure 23(b)(2) analysis. In order to cope with this change in law, courts have begun devising innovative uses of 23(b)(2), from which consumer lawyers and consumers alike can greatly benefit. Such innovative uses include 23(b)(2) certification with court-ordered notice and opt-out, 23(b)(2) and (b)(3) hybrid certification, partial certification under 23(b)(2), and sequential certification. Using these creative case structures, consumer lawyers can make the most of the less stringent requirements of 23(b)(2) for determining liability, even in cases where individualized monetary damages are sought. These strategies allow consumer lawyers to bring class litigation that they may not have the resources to bring under a pure 23(b)(3) action.

[FN1]. Thomas Grande is a partner at Davis Levin Livingston Grande in Honolulu, Hawaii, where he represents consumers in class and group actions in state and federal courts and relators under state and federal false claims acts (qui tam actions). He is co-chair of the American Bar Association Section of Litigation Subcommittee on State Class Action Law and is co-chair of the Association of Trial Lawyers of America Qui Tam Litigation Group. He is a frequent speaker and author on class actions and litigation under the False Claims Act. Mr. Grande is Editor-in-Chief of the ABA Survey of State Class Action Law, a summary of class action law in the fifty states, which is distributed annually at the ABA's National Class Action Institutes and which is published as a special supplement in NEWBERG & CONTE, *NEWBERG ON CLASS ACTIONS* (3d ed. 1992). The author would like to thank Kelly Henry-Turner of the *Loyola Consumer Law Review* for her assistance in preparing Appendix B. He can be reached at tgrande@davislevin.com.

[FN1]. FED. R. CIV. P. 23 (b)(2), *reprinted in* App. A.

[FN2]. *Robinson v. Metro-North Commuter R.R., Co.*, 267 F.3d 147, 162 (2d Cir. 2001).

[FN3]. *See, e.g., Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1554 (11th Cir.), *cert. denied*, 479 U.S. 883 (1986); *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 447 (5th Cir. 1973).

[FN4]. FED. R. CIV. P. 23(a), *reprinted in* App. A.

[FN5]. *Id.* at 23(b).

[FN6]. *Compare* FED. R. CIV. P. 23(b)(2) *with* FED. R. CIV. P. 23(b)(3), *reprinted in* App. A.

[FN7]. FED. R. CIV. P. 23(b)(2), *reprinted in* App. A.

[FN8]. *Id.* at 23(b)(3).

[FN9]. *Compare* FED. R. CIV. P. 23(b)(2) *with* FED. R. CIV. P. 23(b)(3), *reprinted in* App. A.

[FN10]. Even though predominance and superiority are not required under 23(b)(2), to the extent that those elements are met, the argument in favor of certification is greatly strengthened.

[FN11]. "Opting out" means a class member has the right to exclude themselves from the class and not be bound by the class action, thus reserving the right to pursue their individual claim independently.

[FN12]. FED. R. CIV. P. 23(b)(3), *reprinted in* App. A.

[FN13]. *See id.* at 23(b)(2).

[FN14]. 7A WRIGHT, MILLER & KANE, *FEDERAL PRACTICE & PROCEDURE* § 1775 (1994).

[FN15]. *See id.*

[FN16]. FED. R. CIV. P. 23(b)(2), *reprinted in* App. A.

[FN17]. *See id.*

[FN18]. FED. R. CIV. P. 23 advisory committee's note (1966 Amendments), *reprinted in* App. A. *See*

4 NEWBERG & CONTE, *NEWBERG ON CLASS ACTIONS* § 4.11 (3d ed. 1992).

[FN19]. Of course, the class representative must be personally aggrieved in order to satisfy the requirement of typicality and adequacy. *E.g.*, *John Does 1-100 v. Boyd*, 613 F. Supp. 1514, 1529 (D. Minn. 1985) (holding that plaintiffs are not appropriate class representatives where they could not show the likelihood of arrest and improper search).

[FN20]. WRIGHT ET AL., *supra* note 14, § 1775.

[FN21]. *Id.*

[FN22]. Compare FED. R. CIV. P. 23(b)(2) with FED. R. CIV. P. 23(b)(3), reprinted in App. A.

[FN23]. FED. R. CIV. P. 23(b)(2), reprinted in App. A.

[FN24]. *Id.*

[FN25]. FED. R. CIV. P. 23 advisory committee's note (1966 Amendments), reprinted in App. A.

[FN26]. FED. R. CIV. P. 23 advisory committee's note (1966 Amendments), reprinted in App. A.

[FN27]. FED. R. CIV. P. 23(b)(2), reprinted in App. A.

[FN28]. NEWBERG & CONTE, *supra* note 18, § 4.11.

[FN29]. FED. R. CIV. P. 23 advisory committee note (1966 Amendments), reprinted in App. A.

[FN30]. *See id.*

[FN31]. FED. R. CIV. P. 23 advisory committee's note (1966 Amendments), reprinted in App. A. The advisory committee's notes state:

Subdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the "tying" condition.

[FN32]. NEWBERG & CONTE, *supra* note 18, § 4.14.

[FN33]. *See Curtis v. Loether*, 415 U.S. 189, 197-98 (1974).

[FN34]. *Id.* (commenting on the appropriateness of back pay and disgorgement as equitable remedies based upon discretion of court).

[FN35]. *Brandt v. Owens-Illinois, Inc.*, 62 F.R.D. 160, 168 (S.D.N.Y. 1973) (equitable action to compel declaration of a dividend).

[FN36]. *White v. Beal*, 413 F. Supp. 1141, 1152 (E.D. Pa. 1976) (class-wide restitution of welfare payments was wrongfully withheld), *aff'd*, 555 F.2d 1146 (3d Cir. 1977).

[FN37]. *Williams v. Empire Funding Corp.*, 183 F.R.D. 428 (E.D. Pa. 1998).

[FN38]. See FED. R. CIV. P. 23(b)(2), *reprinted in* App. A.

[FN39]. *Curtis*, 415 U.S. at 197.

[FN40]. *Id.*

[FN41]. FED. R. CIV. P. 23(b)(2), *reprinted in* App. A.

[FN42]. FED. R. CIV. P. 23 advisory committee's note (1966 Amendments), *reprinted in* App. A.

[FN43]. *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 98 F.R.D. 254, 271 (D. Del. 1983).

[FN44]. WRIGHT ET AL., *supra* note 14, § 1775.

[FN45]. *Gravenstein v. Champion*, 540 F. Supp. 7, 12 (D. Alaska 1981) (action brought by union members challenging union's policy requiring members to either perform picket duty or pay fees in lieu of picketing).

[FN46]. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1999) (“Rule 23(b)(2) permits class actions for declaratory or injunctive relief where ‘the party opposing the class has acted or refused to act on grounds generally applicable to the class.’”).

[FN47]. WRIGHT ET AL., *supra* note 14, § 1775.

[FN48]. *Id.*

[FN49]. *E.g.*, *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000) (stating that declaratory relief sought under federal Declaratory Relief Act must serve as a basis for later injunctive relief) (citing FED. R. CIV. P. 23 advisory committee note).

[FN50]. *E.g.*, *Sounder v. Brennan*, 367 F. Supp. 808, 814-15 (D.D.C. 1973) (granting 23(b)(2) class certification for declaration that patient-workers in non-federal institutions for the mentally ill are covered under minimum wage and overtime compensation provisions of the Fair Labor Standards Act because the result of the declaration was to direct the Secretary of Labor to implement reasonable enforcement efforts).

[FN51]. *E.g.*, *Sarafin v. Sears, Roebuck & Co.*, 446 F. Supp. 611, 615 (D. Ill. 1978) (denying 23(b)(2) class certification for a declaration that defendant violated the Truth in Lending Act because the result of the declaration was to lay the basis for a later damage award).

[FN52]. 28 U.S.C. § 2201(a) (2001):

In a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

[FN53]. A Westlaw search for the federal Declaratory Judgment Act, 23 U.S.C. § 2201, and [Federal Rule of Civil Procedure 23\(b\)\(2\)](#) (“2201 /p 23(b)(2)”) resulted in only two circuit court of appeals cases and twenty-nine district court cases that involved 23(b)(2) classes based upon § 2201 (last searched on Apr. 23, 2002).

[FN54]. [Bolin](#), 231 F.3d at 978-79 (“The extent to which the declaratory relief sought satisfies [Rule 23\(b\)\(2\)](#) is thus no greater than the extent to which the substantive statutes underlying the claim for declaratory relief satisfy [Rule 23\(b\)\(2\)](#).”).

[FN55]. [HAW. REV. STAT. § 632-1 \(2001\)](#) provides:

In cases of actual controversy, courts of record, within the scope of their respective jurisdictions, shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed, and no action or proceeding shall be open to objection on the ground that a judgment or order merely declaratory of right is prayed for; provided that declaratory relief may not be obtained in any district court, or in any controversy with respect to taxes, or in any case where a divorce or annulment of marriage is sought. Controversies involving the interpretation of deeds, wills, other instruments of writing, statutes, municipal ordinances, and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.

Relief by declaratory judgment may be granted in civil cases where an actual controversy exists between contending parties, or where the court is satisfied that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation, or where in any such case the court is satisfied that a party asserts a legal relation, status, right, or privilege in which the party has a concrete interest and that there is a challenge or denial of the asserted relation, status, right, or privilege by an adversary party who also has or asserts a concrete interest therein, and the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding. Where, however, a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed; but the mere fact that an actual or threatened controversy is susceptible of relief through a general common law remedy, a remedy equitable in nature, or an extraordinary legal remedy, whether such remedy is recognized or regulated by statute or not, shall not debar a party from the privilege of obtaining a declaratory judgment in any case where the other essentials to such relief are present.

[FN56]. [Hawaii's Thousand Friends v. City and County of Honolulu](#), 858 P.2d 726, 731 (Haw. 1993) (quoting [HAW. REV. STAT. § 205A-6\(e\)\(1993\)](#)).

[FN57]. *Id.* at 731.

[FN58]. *E.g.*, [Marcera v. Chinlund](#), 595 F.2d 1231 (2d Cir. 1979) (civil rights case).

[FN59]. *E.g.*, [Baby Neal v. Casey](#), 43 F.3d 48 (3d Cir. 1994) (welfare benefits case).

[FN60]. *E.g.*, [Lilly v. Harris-Teeter Supermarket](#), 720 F.2d 326 (4th Cir. 1983) (employment discrimination action).

[FN61]. *See generally* [WRIGHT ET AL.](#), *supra* note 14, § 1775.

[FN62]. [FED. R. CIV. P. 23](#) advisory committee's note (1966 Amendments), *reprinted in* App. A (emphasis ad-

ded).

[FN63]. *Id.*

[FN64]. *See Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 780 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986).

[FN65]. *Elliott v. Weinberger*, 564 F.2d 1219, 1228 (9th Cir. 1977) (action regarding government benefits).

[FN66]. *Compare Gibbs v. E.I. DuPont De Nemours & Co.*, 876 F. Supp. 475, 481 (W.D.N.Y. 1995) (holding that a court-administered medical monitoring fund is injunctive in nature) *with Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 100 (W.D. Mo. 1997) (holding that a 23(b)(2) class is not appropriate when a medical monitoring fund would be established, since it is not truly injunctive relief).

[FN67]. *E.g., Probe*, 780 F.2d at 780.

[FN68]. Brad Seligman & Jocelyn D. Larkin, *Lessons in Class Certification*, TRIAL, Oct. 1991, at 40-41.

[FN69]. *Id.* (citing *e.g., Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998), *reh'g en banc petition denied with clarification*, 151 F.3d 402, 434 (1998)).

[FN70]. *Id.* (citing *e.g., Allison*, 151 F.3d at 415).

[FN71]. *Allison*, 151 F.3d at 415.

[FN72]. *Id.*

[FN73]. *Id.*

[FN74]. *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 897 (7th Cir. 1999).

[FN75]. *Robinson*, 267 F.3d at 163.

[FN76]. *Id.*

[FN77]. *See Jefferson*, 195 F.3d at 896; *Robinson*, 267 F.3d at 162 n.7.

[FN78]. *See Jefferson*, 195 F.3d at 896; *Robinson*, 267 F.3d at 162 n.7.

[FN79]. *See, e.g., Williams v. Burlington N.*, 832 F.2d 100, 103-04 (7th Cir. 1987) (finding that district court did not abuse its discretion in not bifurcating the 23(b)(2) class certification between equitable and monetary phases where the district court employed safeguards which were the functional equivalent as those under 23(b)(3)); *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 962 (3d Cir. 1983) (affirming district court's approval of settlement, which was contested partially because of inadequate notice and holding that in class actions brought under 23(b)(2), pre-settlement notice is entirely discretionary with the trial court under 23(d)); *Kyriazi v. W. Elec. Co.*, 647 F.2d 388, 395 (3d Cir. 1981) (holding that the court has discretion to bar claims for individual injunctive or monetary relief on behalf of 23(b)(2) class members who failed to file timely proofs of claim ("opting in" requirement) and holding district court acted within its discretion in fashioning notice).

[FN80]. *E.g., Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed as improvidently gran-*

ted, 511 U.S. 117 (1994).

[FN81]. Hybrid certification is sometimes also referred to as “split” or “divided” certification.

[FN82]. MANUAL FOR COMPLEX LITIGATION §§ 30.17, 33.54 (3d ed. 1995); *Jefferson*, 195 F.3d at 897-98.

[FN83]. Seligman & Larkin, *supra* note 68, at 40-41.

[FN84]. *Jefferson*, 195 F.3d at 897-98.

[FN85]. *Kalima v. Hawai'i*, No. 99-4771-12 VSM (Haw. 1st Cir. Ct. 2000) (note that the language and interpretation of Hawai'i Rule of Civil Procedure 23 is identical to that of FED. R. CIV. P. 23), *reprinted in* Symposium, *2001 Class Action Symposium of the National Consumer Law Center*. A CD-ROM compilation of materials is available by order through the National Consumer Law Center at http://www.nclc.org/manuals/class_actions.html and includes the following sample pleadings: Complaint; Plaintiffs Motion for Class Certification; Order Granting Plaintiffs' Motion for Class Certification; Plaintiffs' Motion for Partial Summary Judgment and Declaratory Relief on Count I of the Complaint (Right to Sue); Findings of Fact; Conclusions of Law; and Order Granting Plaintiffs' Motion for Partial Summary Judgment on Count I of the Complaint.

[FN86]. FED. R. CIV. P. 23(c)(4)(a), *reprinted in* App. A.

[FN87]. *Robinson*, 267 F.3d at 162.

[FN88]. *Id.*

[FN89]. *Kalima v. Hawai'i*, No. 99-4771-12 VSM (Haw. 1st Cir. Ct. 2000).

[FN90]. *Id.*

[FN91]. *Id.*

[FN92]. *Id.*

[FN93]. *Id.*

[FN94]. In the 1890s, the Queen of Hawai'i was overthrown and a provisional government was established. Hawaii became a territory of the United States two years later. Because the United States did not directly overthrow the Native Hawaiian government, Native Hawaiians are not recognized as an indigenous tribe by the United States and therefore have no sovereignty rights.

[FN95]. Hawaiian Homes Commission Act of 1920, 42 HAW. REV. STAT.. § 108 (1921).

[FN96]. Hawai'i Admission Act, §§ 4-5, Pub. L. 86-3, 73 Stat. 4 (1959).

[FN97]. HAW. REV. STAT. § 674-1 (2001).

[FN98]. *Id.*

[FN99]. STATE OF HAWAII HAWAIIAN HOME LANDS TRUST INDIVIDUAL CLAIMS REVIEW PANEL, REPORT TO THE GOVERNOR AND THE 1997 HAWAII LEGISLATURE, Table II (some claimants waited over fifty years from the time of their application to receive a house or farm lot).

[FN100]. 1994 Haw. Sess. Laws Act 129, § 298.

[FN101]. *Kalima v. Cayetano*, No. CV 99-00671 HG-LEK (D. Haw. 1999) (action filed in federal court to affirmatively enjoin the state to extend the deadlines to exercise a statutory right to sue; the State of Hawaii asserted that there was no right to sue, providing the actual controversy required for declaratory judgment relief obtained in *Kalima v. Hawai'i*, No. 99-4771-12 VSM (Haw. 1st Cir. Ct. 2000)).

[FN102]. *Kalima v. Hawai'i*, No. 99-4771-12 VSM (Haw. 1st Cir. Ct. 2000).

[FN103]. *Id.*

[FN104]. *Id.*

[FN105]. *Id.*

[FN106]. *Id.*

[FN107]. *Id.*

[FN108]. *Kalima v. Hawai'i*, No. 99-4771-12 VSM.

[FN109]. *Id.*

***272 Appendix A: Federal Rule 23 and Advisory Committee Notes**

FED. R. CIV. P. 23: Class Actions

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

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

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

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

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

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

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available

methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

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

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified *273 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 the member desires, enter an appearance through counsel.

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

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

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Notes of Advisory Committee on 1966 amendments

Difficulties with the original rule. The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called “true” category was defined as involving “joint, common, or secondary rights”; the “hybrid” category, as involving “several” rights related to “specific property”; the “spurious” category, as involving “several” rights affected by a *274 common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action. Thus the judgments in “true” and “hybrid” class actions would extend to the class (although in somewhat different ways); the judgment in a “spurious” class action would extend only to the parties including intervenors. See Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Geo LJ 551, 570-76 (1937).

In practice the terms “joint,” “common,” etc., which were used as the basis of the [Rule 23](#) classification proved obscure and uncertain. See Chafee, *Some Problems of Equity*, 245-46, 256-57 (1950); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U of Chi L Rev 684, 707 & n 73 (1941); Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 Corn LQ 327, 329-36 (1948); *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 Harv L Rev 874, 931 (1958); Advisory Committee's Note to Rule 19, as amended. The courts had considerable difficulty with these terms. See, e.g., [Gullo v Veterans' Coop. H. Assn.](#) 13 FRD 11 (DDC 1952); [Shipley v Pittsburgh & L.E.R. Co.](#) 70 F Supp 870 (WD Pa 1947); [Deckert v Independence Shares Corp.](#) 27 F Supp 763 (ED Pa 1939), revd, 108 F2d 51 (3d Cir 1939), revd 311 US 282, 85 L Ed 189, 61 S Ct 229 (1940), on remand, 39 F Supp 592 (ED Pa 1941), revd sub nom [Pennsylvania Co. for Ins. on Lives v Deckert](#), 123 F2d 979 (3d Cir 1941) (see Chafee, *supra*, at 264-65).

Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions. First, we find instances of the courts classifying actions as “true” or intimating that the judgments would be decisive for the class where these results seemed appropriate but were reached by dint of depriving the word “several” of coherent meaning. See, e.g., [System Federation No. 91 v Reed](#), 180 F2d 991 (6th Cir 1950); [Wilson v City of Paducah](#), 100 F Supp 116 (WD Ky 1951); [Citizens Banking Co. v Monticello State Bank](#), 143 F2d 261 (8th Cir 1944); [Redmond v Commerce Trust Co.](#) 144 F2d 140 (8th Cir 1944), cert den 323 US 776, 89 L ed 620, 65 S Ct 188 (1944); [United States v American Optical Co.](#) 97 F Supp 66 (ND Ill 1951); [National Hairdressers' & C. Assn. v Philad Co.](#) 34 F Supp 264 (D Del 1940), 41 F Supp 701 (D Del 1940), affd mem, 129 F2d 1020 (3d Cir 1942). Second, we find cases classified by the courts as “spurious” in which, on a realistic view, it would seem fitting for the judgments to extend to the class. See, e.g., [Knapp v Bankers Sec. Corp.](#) 17 FRD 245 (ED Pa 1954), affd 230 F2d 717 (3d Cir 1956); [Giesecke v Denver Tramway Corp.](#) 81 F Supp 957 (D Del 1949); [York v Guaranty Trust Co.](#) 143 F2d 503 (2d Cir 1944), revd on grounds not here relevant, 326 US 99, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231, reh den 326 US 806, 90 L Ed 491, 66 S Ct 7 (1945) (see Chafee, *supra*, at 208); cf. [Webster Eisenlohr, Inc. v Kalodner](#), 145 F2d 316, 320 (3d Cir 1944), cert den 325 US 867, 89 L Ed 1986, 65 S Ct 1404 (1945). But cf. the early decisions, [Duke of Bedford v Ellis](#), [1901] AC 1; [Sheffield Waterworks v Yeomans](#), LR 2 Ch App 8 (1866); [Brown v Vermuden](#), 1 Ch Cas 272, 22 Eng Rep 796 (1866).

The “spurious” action envisaged by original [Rule 23](#) was in any event an anomaly because, although denominated a “class” action and pleaded as such, it *275 was supposed not to adjudicate the rights or liabilities of any person not a party. It was believed to be an advantage of the “spurious” category that it would invite decisions that a member of the “class” could, like a member of the class in a “true” or “hybrid” action, intervene on an ancillary basis without being required to show an independent basis of

Federal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations. See 3 Moore's Federal Practice, pars 23.10[1], 23.12 (2d ed 1963). These results were attained in some instances but not in others. On the statute of limitations, see [Union Carbide & Carbon Corp. v Nisley](#), 300 F2d 561 (10th Cir 1961), pet cert dism 371 US 801, 9 L Ed 2d 46, 83 S Ct 13 (1963); but cf. [P. W. Husserl, Inc. v Newman](#), 25 FRD 264 (SD NY 1960); [Athas v Day](#), 161 F Supp 916 (D Colo 1958). On ancillary intervention, see [Amen v Black](#), 234 F2d 12 (10th Cir 1956), cert granted 352 US 888, 1 L Ed 2d 84, 77 S Ct 127 (1956), dism on stip 355 US 600, 2 L Ed 2d 523, 78 S Ct 530 (1958); but cf. [Wagner v Kemper](#), 13 FRD 128 (WD Mo 1952). The results, however, can hardly depend upon the mere appearance of a "spurious" category in the rule; they should turn on more basic considerations. See discussion of subdivision (c)(1) below.

Finally, the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class. See Chafee, *supra*, at 230-31; Keeffe, Levy & Donovan, *supra*; [Developments in the Law](#), *supra*, 71 *Harv L Rev* at 937-38; Note, [Binding Effect of Class Actions](#), 67 *Harv L Rev* 1059, 1062-65 (1954); Note, [Federal Class Actions: A Suggested Revision of Rule 23](#), 46 *Colum L Rev* 818, 833-36 (1946); *Mich Gen Court R* 208.4 (effective Jan. 1, 1963); [Idaho R Civ P 23 \(d\)](#); [Minn R Civ P 23.04](#); [N Dak R Civ P 23\(d\)](#).

The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.

Subdivision (a) states the prerequisites for maintaining any class action in terms of the numerosness of the class making joinder of the members impracticable, the existence of questions common to the class, and the desired qualifications of the representative parties. See Weinstein, [Revision of Procedure: Some Problems in Class Actions](#), 9 *Buffalo L Rev* 433, 458-59 (1960); 2 [Barron & Holtzoff, Federal Practice & Procedure](#) § 562, at 265, § 572, at 351-52 (Wright ed 1961). These are necessary but not sufficient conditions for a class action. See, e.g., [Giordano v Radio Corp. of Am.](#) 183 F2d 558, 560 (3d Cir 1950); [Zachman v Erwin](#), 186 F Supp 681 (SD Tex 1959); [Baim & Blank, Inc. v Warren-Connelly Co., Inc.](#) 19 FRD 108 (SD NY 1956). Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.

Subdivision (b)(1). The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device. The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the persons whose joinder in an *276 action is desirable as stated in Rule 19(a), as amended. See amended Rule 19(a)(2) (i) and (ii), and the Advisory Committee's Note thereto; Hazard, [Indispensable Party: The Historical Origin of a Procedural Phantom](#), 61 *Colum L Rev* 1254, 1259-60 (1961); cf. 3 Moore, *supra*, par 23.08, at 3435.

Clause (A): One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class. The matter has been stated thus: "The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent

ways.” Louisell & Hazard, *Pleading and Procedure: State and Federal* 719 (1962); see [Supreme Tribe of Ben-Hur v Cauble](#), 255 US 356, 366-67, 65 L Ed 673, 41 S Ct 338 (1921). To illustrate: Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication. See [Maricopa County Mun. Water Con. Dist. v Looney](#), 219 F2d 529 (9th Cir 1955); [Rank v Krug](#), 142 F Supp 1, 154-59 (SD Calif 1956), on app, [State of California v Rank](#), 293 F2d 340, 348 (9th Cir 1961); [Gart v Cole](#), 263 F2d 244 (2d Cir 1959), cert den 359 US 978, 3 L Ed 2d 929, 79 S Ct 898 (1959); cf. [Martinez v Maverick Cty. Water Con. & Imp. Dist.](#), 219 F2d 666 (5th Cir 1955); 3 Moore, *supra*, par 23.11[2], at 3458-59.

Clause (B): This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would hardly have been practical, if indeed it would have been possible, to confine the effects of a validation of the reorganization to the individual plaintiffs. Consequently a class action was called for with adequate representation of all members of the class. See [Supreme Tribe of Ben-Hur v Cauble](#), 255 US 356, 65 L Ed 673, 41 S Ct 338 (1921); [Waybright v Columbian Mut. Life Ins. Co.](#), 30 F Supp 885 (WD Tenn 1939); cf. [Smith v Swormstedt](#), 16 How 288, 14 L Ed 942 (US, 1853). For much the same reason actions by shareholders to compel the declaration of a dividend, the proper recognition and handling of redemption or pre-emption rights, or the like (or actions by the corporation for corresponding declarations of rights), should ordinarily be conducted as class actions, although the matter has been much obscured by the insistence that each shareholder has an individual claim. See [*277Knapp v Bankers Securities Corp.](#), 17 FRD 245 (ED Pa 1954), *affd*, 230 F2d 717 (3d Cir 1956); [Giasecke v Denver Tramway Corp.](#), 81 F Supp 957 (D Del 1949); [Zahn v Transamerica Corp.](#), 162 F2d 36 (3d Cir 1947); [Speed v Transamerica Corp.](#), 100 F Supp 461 (D Del 1951); [Sobel v Whittier Corp.](#), 95 F Supp 643 (ED Mich 1951), *app diss*, 195 F2d 361 (6th Cir 1952); [Goldberg v Whittier Corp.](#), 111 F Supp 382 (ED Mich 1953); [Dann v Studebaker-Packard Corp.](#), 288 F2d 201 (6th Cir 1961); [Edgerton v Armour & Co.](#), 94 F Supp 549 (SD Calif 1950); [Ames v Mengel Co.](#), 190 F2d 344 (2d Cir 1951). (These shareholders' actions are to be distinguished from derivative actions by shareholders dealt with in new Rule 23.1). The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust. See [Boesenberg v Chicago T. & T. Co.](#), 128 F2d 245 (7th Cir 1942); [Citizens Banking Co. v Monticello State Bank](#), 143 F2d 261 (8th Cir 1944); [Redmond v Commerce Trust Co.](#), 144 F2d 140 (8th Cir 1944), cert den 323 US 776, 89 L Ed 620, 65 S Ct 187 (1944); cf. [York v Guaranty Trust Co.](#), 143 F2d 503 (2d Cir 1944), *revid on grounds not here relevant*, 326 US 99, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231 (1945).

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and pro-

portionate distribution of the fund, meets the problem. Cf. *Dickinson v Burnham*, 197 F2d 973 (2d Cir 1952), cert den 344 US 875, 97 L Ed 678, 73 S Ct 169 (1952); 3 Moore, *supra*, at par 23.09. The same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtor's assets are insufficient to pay all creditors' claims. See *Heffernan v Bennett & Armour*, 110 Cal App 2d 564, 243 P2d 846 (1952); cf. *City & County of San Francisco v Market Street Ry.*, 95 Cal App 2d 648, 213 P2d 780 (1950). Similar problems, however, can arise in the absence of a fund either present or potential. A negative or mandatory injunction secured by one of a numerous class may disable the opposing party from performing claimed duties toward the other members of the class or materially affect his ability to do so. An adjudication as to movie "clearances and runs" nominally affecting only one exhibitor would often have practical effects on all the exhibitors in the same territorial area. Cf. *United States v Paramount Pictures, Inc.*, 66 F Supp 323, 341-46 (SD NY 1946); 334 US 131, 144-48, 92 L Ed 1260, 68 S Ct 915 (1948). Assuming a sufficiently numerous class of exhibitors, a class action would be advisable. (Here representation of subclasses of exhibitors could become necessary; see subdivision (c)(3)(B).)

Subdivision (b)(2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The *278 subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See *Potts v Flax*, 313 F2d 284 (5th Cir 1963); *Bailey v Patterson*, 323 F2d 201 (5th Cir 1963), cert den 376 US 910, 11 L Ed 2d 609, 84 S Ct 666 (1964); *Brunson v Board of Trustees of School District No. 1, Clarendon Cty., S.C.*, 311 F2d 107 (4th Cir 1962), cert den 373 US 933, 10 L Ed 2d 690, 83 S Ct 1538 (1963); *Green v School Bd. of Roanoke, Va.*, 304 F2d 118 (4th Cir 1962); *Orleans Parish School Bd. v Bush*, 242 F2d 156 (5th Cir 1957), cert den 354 US 921, 1 L Ed 2d 1436, 77 S Ct 1380 (1957); *Mannings v Board of Public Inst. of Hillsborough County, Fla.*, 277 F2d 370 (5th Cir 1960); *Northcross v Board of Ed. of City of Memphis*, 302 F2d 818 (6th Cir 1962), cert den 370 US 944, 8 L Ed 2d 810, 82 S Ct 1586 (1962); *Frasier v Board of Trustees of Univ. of N.C.*, 134 F Supp 589 (MD NC 1955, 3-judge court), affd, 350 US 979, 100 L Ed 848, 76 S Ct 467 (1956). Subdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the "tying" condition.

Subdivision (b)(3). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would

achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. Cf. Chafee, *supra*, at 201.

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed. See *279 *Oppenheimer v F. J. Young & Co., Inc.*, 144 F2d 387 (2d Cir 1944); *Miller v National City Bank of N. Y.*, 166 F2d 723 (2d Cir 1948); and for like problems in other contexts, see *Hughes v Encyclopaedia Britannica*, 199 F2d 295 (7th Cir 1952); *Sturgeon v Great Lakes Steel Corp.*, 143 F2d 819 (6th Cir 1944). A “mass accident” resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. See *Pennsylvania R.R. v United States*, 111 F Supp 80 (DNJ 1953); cf. Weinstein, *supra*, 9 Buffalo L Rev at 469. Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions. See *Union Carbide & Carbon Corp. v Nisley*, 300 F2d 561 (10th Cir 1961), *pet cert dismissed*, 371 US 801, 9 L Ed 2d 46, 83 S Ct 13 (1963); cf. *Weeks v Bareco Oil Co.*, 125 F2d 84 (7th Cir 1941); *Kainz v Anheuser-Busch, Inc.*, 194 F2d 737 (7th Cir 1952); *Hess v Anderson, Clayton & Co.*, 20 FRD 466 (SD Calif 1957).

That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions. Cf. Weinstein, *supra*, 9 Buffalo L Rev at 438-54. Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery or the like. Currently the Coordinating Committee on Multiple Litigation in the United States District Courts (a subcommittee of the Committee on Trial Practice and Technique of the Judicial Conference of the United States) is charged with developing methods for expediting such massive litigation. To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition of maintaining the class action, that the court shall find that that procedure is “superior” to the others in the particular circumstances.

Factors (A)-(D) are listed, non-exhaustively, as pertinent to the findings. The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit. See *Weeks v Bareco Oil Co.*, 125 F2d 84, 88-90, 93-94 (7th Cir 1941) (anti-trust action); see also *Pentland v Dravo Corp.*, 152 F2d 851 (3d Cir 1945), and Chafee, *supra*, at 273-75, regarding policy of Fair Labor Standards Act of 1938, § 16(b), 29 USC § 216(b), prior to amendment by Portal-to-Portal Act of 1947, § 5(a). [The present provisions of 29 USC § 216(b) are not intended to be affected by [Rule 23](#), as amended.] In this connection the court should inform itself of any litigation actually pending by or

against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretical rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose *280 on the party opposing the class, or upon the court calendars, may also fairly be considered. (See the discussion, under subdivision (c)(2) below, of the right of members to be excluded from the class upon their request.)

Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought. Finally, the court should consider the problems of management which are likely to arise in the conduct of a class action.

Subdivision (c)(1). In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. The determination depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b).

An order embodying a determination can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type. A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound. A negative determination means that the action should be stripped of its character as a class action. See subdivision (d)(4). Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the decision on the merits so that the litigation may cover as many interests as can be conveniently handled; the questions whether the intervenors in the nonclass action shall be permitted to claim “ancillary” jurisdiction or the benefit of the date of the commencement of the action for purposes of the statute of limitations are to be decided by reference to the laws governing jurisdiction and limitations as they apply in particular contexts.

Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court's discretion under subdivision (d)(2).

Subdivision (c)(2) makes special provision for class actions maintained under subdivision (b)(3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him.

The notice, setting forth the alternatives open to the members of the class, is to be the best practicable under the circumstances, and shall include individual notice to the members who can be identified through reasonable effort. (For further discussion of this notice, see the statement under subdivision (d)(2) below.)

Subdivision (c)(3). The judgment in a class action maintained as such to the end will embrace the class, that is, in a class action under subdivision (b)(1) or *281 (b)(2), those found by the court to be class members; in a class action under subdivision (b)(3), those to whom the notice prescribed by subdivision (c)(2) was directed, excepting those who requested exclusion or who are ultimately found by the court not to be members of the class. The judgment has this scope whether it is favorable or unfavorable to the class. In a (b)(1) or (b)(2) action the judgment “describes” the members of the class, but need not specify the individual members; in a (b)(3) action the judgment “specifies” the individual members who have

been identified and describes the others.

Compare subdivision (c)(4) as to actions conducted as class actions only with respect to particular issues. Where the class-action character of the lawsuit is based solely on the existence of a “limited fund,” the judgment, while extending to all claims of class members against the debtor. See ordinarily left unaffected the personal claims of nonappearing members against the debtor. See 3 Moore, *supra*, par 23.11[4].

Hitherto, in a few actions conducted as “spurious” class actions and thus nominally designed to extend only to parties and others intervening before the determination of liability, courts have held or intimated that class members might be permitted to intervene after a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. See, as to the propriety of this so-called “one-way” intervention in “spurious” actions, the conflicting views expressed in *Union Carbide & Carbon Corp. v Nisley*, 300 F2d 561 (10th Cir 1961), *pet cert dismissed*, 371 US 801, 9 L Ed 2d 46, 83 S Ct 13 (1963); *York v Guaranty Trust Co.*, 143 F2d 503, 529 (2d Cir 1944), *reversed on grounds not here relevant*, 326 US 99, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231 (1945); *Pentland v Dravo Corp.*, 152 F2d 851, 856 (3d Cir 1945); *Speed v Transamerica Corp.*, 100 F Supp 461, 463 (D Del 1951); *State Wholesale Grocers v Great Atl. & Pac. Tea Co.*, 24 FRD 510 (ND Ill 1959); *Alabama Ind. Serv. Stat. Assn. v Shell Pet. Corp.*, 28 F Supp 386, 390 (ND Ala 1939); *Tolliver v Cudahy Packing Co.*, 39 F Supp 337, 339 (ED Tenn 1941); *Kalven & Rosenfield*, *supra*, 8 U of Chi L Rev 684 (1941); *Comment*, 53 Nw UL Rev 627, 632-33 (1958); *Developments in the Law*, *supra*, 71 Harv L Rev at 935; 2 Barron & Holtzoff, *supra*, § 568; but cf. *Lockwood v Hercules Powder Co.*, 7 FRD 24, 28-29 (WD Mo 1947); *Abram v Sam Joaquin Cotton Oil Co.*, 46 F Supp 969, 976-77 (SD Calif 1942); *Chafee*, *supra*, at 280, 285; 3 Moore, *supra*, par 23.12, at 3476. Under proposed subdivision (c)(3), one-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment; this can be tested only in a subsequent action. See *Restatement, Judgments* § 86, comment (h), § 116 (1942). The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of res judicata are less likely to be raised at a later time and if raised will be more satisfactorily answered. See *Chafee*, *supra*, at 294; *Weinstein*, *supra*, 9 Buffalo L Rev at 460.

***282 Subdivision (c)(4).** This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its “class” character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class.

Subdivision (d) is concerned with the fair and efficient conduct of the action and lists some types of orders which may be appropriate.

The court should consider how the proceedings are to be arranged in sequence, and what measures should be taken to simplify the proof and argument. See subdivision (d)(1). The orders resulting from this consideration, like the others referred to in subdivision (d), may be combined with a pretrial order under Rule 16, and are subject to modification as the case proceeds.

Subdivision (d)(2) sets out a non-exhaustive list of possible occasions for orders requiring notice to

the class. Such notice is not a novel conception. For example, in “limited fund” cases, members of the class have been notified to present individual claims after the basic class decision. Notice has gone to members of a class so that they might express any opposition to the representation, see [United States v American Optical Co.](#), 97 F Supp 66 (ND Ill 1951), and 1950-51 CCH Trade Cases 64573-74 (par 62869); cf. [Weeks v Bareco Oil Co.](#), 125 F2d 84, 94 (7th Cir 1941), and notice may encourage interventions to improve the representation of the class. Cf. [Oppenheimer v F. J. Young & Co.](#), 144 F2d 387 (2d Cir 1944). Notice has been used to poll members on a proposed modification of a consent decree. See record in [Sam Fox Publishing Co. v United States](#), 366 US 683, 6 L Ed 2d 604, 81 S Ct 1309 (1961).

Subdivision (d)(2) does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion. 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. These indicators suggest that notice under subdivision (d)(2) may be particularly useful and advisable in certain class actions maintained under subdivision (b)(3), for example, to permit members of the class to object to the representation. Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c)(2), 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. See [Hansberry v Lee](#), 311 US 32, 85 L Ed 22, 61 S Ct 115, 132 ALR 741 (1940); [Mullane v Central Hanover Bank & Trust Co.](#), 339 US 306, 94 L Ed 865, 70 S Ct 652 (1950); cf. [Dickinson v Burnham](#), 197 F2d 973, 979 (2d Cir 1952), and studies cited at 979 n 4; see also [All American Airways, Inc. v Elderd](#), 209 F2d 247, 249 (2d Cir 1954); [Gart v Cole](#), 263 F2d 244, 248-49 (2d Cir 1959), cert den 359 US 978, 3 L Ed 2d 929, 79 S Ct 898 (1959).

*283 Notice to members of the class, whenever employed under amended [Rule 23](#), should be accommodated to the particular purpose but need not comply with the formalities for service of process. See [Chafee](#), supra, at 230-31; [Brendle v Smith](#), 7 FRD 119 (SD NY 1946). The fact that notice is given at one stage of the action does not mean that it must be given at subsequent stages. Notice is available fundamentally “for the protection of the members of the class or otherwise for the fair conduct of the action” and should not be used merely as a device for the undesirable solicitation of claims. See the discussion in [Cherner v Transitron Electronic Corp.](#), 201 F Supp 934 (D Mass 1962); [Hormel v United States](#), 17 FRD 303 (SD NY 1955).

In appropriate cases the court should notify interested government agencies of the pendency of the action or of particular steps therein.

Subdivision (d)(3) reflects the possibility of conditioning the maintenance of a class action, e.g., on the strengthening of the representation, see subdivision (c) (1) above; and recognizes that the imposition of conditions on intervenors may be required for the proper and efficient conduct of the action.

As to orders under subdivision (d)(4), see subdivision (c)(1) above.

Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action.

*284 Appendix B: Selected Federal Appellate Cases Regarding 23(b)(2)

U.S. Supreme Court Cases

[Cooper v. Fed. Reserve Bank of Richmond](#), 467 U.S. 867 (1984) (reversing Court of Appeals determination that employees' individual discrimination claims were barred by res judicata because of a previous 23(b)(2) class action suit finding that the employer did not engage in a pattern and practice of discrimina-

tion; holding that the previous judgment does bar the plaintiffs from bringing pattern or practice claims for the same period, but does not bar their individual claims, as the purpose of [Rule 23](#) would be frustrated if district court had to litigate each individual claim in a class action).

Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147 (1982) (reversing and remanding the Court of Appeals for the Fifth Circuit, which certified a 23(b)(2) class in this employment discrimination case; holding that the rule permitting “across-the-board” attacks on unequal employment practices to be maintained by a victim of racial discrimination was erroneous and found that the district court should identify questions of law or fact that are common to proposed class members and carefully evaluate the legitimacy of the named plaintiff’s plea that he was a proper class representative).

Califano v. Yamasaki, 442 U.S. 682 (1979) (affirming the circuit court and district court in finding that the 205(g) social security claim was properly certified under 23(b)(2)).

Quern v. Jordan, 440 U.S. 332 (1979) (recognizing, in a footnote, that in a 23(b)(2) class action, no notice is required, however, 23(d)(2) gives the district court discretion to order notice).

Swisher v. Brady, 438 U.S. 204 (1978) (holding that the district court was not deprived of the power to certify a class where defendants’ actions made four out of five named plaintiff’s claims moot and that a live controversy existed between unnamed members and state and reminded that district courts should decide certification questions as soon as practicable).

Baxter v. Palmigiano, 425 U.S. 308 (1976) (noting that where the district court treated the action as a class action but did not certify or identify a class, the suit was not a class action).

Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) (holding that the fact that the named class representative no longer has a claim does not make the case moot and that denial of seniority relief to unnamed class members cannot be justified as within a district court’s discretion on grounds that they did not file administrative charges with EEOC).

*285 First Circuit Court Cases

Palmigiano v. Sundlun, No. 94-1816, 1995 WL 378537 (1st Cir. June 27, 1995) (per curiam) (unpublished table opinion) (noting that if the district court had the discretion to allow individuals to opt-out of a 23(b)(2) class, refusal to do so would not be an error if only equitable relief is sought).

Navarro-Ayala v. Hernandez-Colon, 951 F.2d 1325 (1st Cir. 1991) (stating that notice of dismissal to a class representative, rather than to an entire class, is appropriate where there is a 23(b)(2) (“cohesive”) class).

Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29 (1st Cir. 1991) (“Once the class action court, affording the process that is due, determines that an objecting party will not be allowed to opt-out of a [Rule 23\(b\)\(2\)](#) class, the objector becomes subject to a resulting settlement, including any release granted therein, to the same extent as any designated class representative or consenting class member.”).

Dionne v. Bouley, 757 F.2d 1344 (1st Cir. 1985) (holding that the district court did not abuse its discretion in denying class certification on the grounds that injunctive or declaratory relief would inure to the benefit of all those who are similarly situated; rejecting the “necessity requirement” for injunctive certification of a class adopted by the Second, Fourth, Fifth, Sixth, Ninth and Tenth and rejected by the Seventh Circuit; adopting a similar standard that when the same relief may be obtained without certifying a class, a court may be justified in concluding that class relief is not “appropriate,” except where an individual claim may make a case moot or if the court is not burdened by the certification).

DeGrace v. Rumsfeld, 614 F.2d 796 (1st Cir. 1980) (granting 23(b)(2) class certification improvidently where the class representative did not seek reinstatement and only sought money damages).

Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978) (holding that a class was properly certified when com-

prised of all who voted by absentee or shut-in ballots in a primary election; “(T)he injunctive relief referred to (in the rule) does not require that the district court look into the particular circumstances of each member of the class.” (citing 3B JAMES W. MOORE & JOHN E. KENNEDY, *MOORE'S FEDERAL PRACTICE*, ¶ 23.40 at 23-653 to 23-654 (1977)).

Second Circuit Court Cases

In re Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124 (2d Cir. 2001) (recognizing and declining to decide the unsettled issue of whether class certification under 23(b)(2) is available where a putative class requests both injunctive and monetary relief since the court already determined that certification was available under 23(b)(3)).

Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147 (2d Cir. 2001) (holding that a disparate impact claim should be certified under 23(b)(2) as it does not violate the Seventh Amendment's guarantee to trial by jury; rejecting the bright-line incidental damages standard adopted by the Fifth Circuit in 23(b)(2) cases *286 where both injunctive relief and monetary damages are sought, as in civil rights cases after the 1991 amendments; adopting instead the following multi-factor ad hoc balancing standard in determining whether to certify a pattern or practice disparate treatment claim; stating that “[a] district court may allow Fed. R. Civ. P. 23(b)(2) certification if it finds in its informed sound judicial discretion that (1) the positive weight or value to the plaintiffs of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed, and (2) class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy[;]” further stating that in the Second Circuit “a district court shall at a minimum, satisfy itself of the following: (1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits[;]” further holding that even if certification was not appropriate under the ad hoc balancing standard, the pattern or practice disparate treatment claim should be bifurcated, and the liability stage should be certified under 23(b)(2)).

Marisol A. v. Giuliani, 126 F.3d 372 (2d Cir. 1997) (affirming the district court's certification of a 23(b)(2) class where deficiencies of a child welfare system stem from central and systematic failures, thus, injunctive relief is appropriate for the entire class despite each class member's varying individual experience; also holding, however, that sub-classes were needed and instructing the district court to ensure that each subclass satisfied 23(b)(2)).

Handschu v. Special Servs. Div., 787 F.2d 828 (2d Cir. 1986) (stating that because of the common interests of all of its members, a 23(b)(2) class seeking declaratory and injunctive relief is cohesive by nature, and notice to a representative class membership may be considered sufficient).

Plummer v. Chemical Bank, 668 F.2d 654 (2d Cir. 1982) (upholding the district court in requiring evidentiary support for a settlement proposed prior to 23(b)(2) certification, which requires no pre-certification notice to class members; also stating, in dicta, that “although [the issue of whether a class member can opt-out of a 23(b)(2) case] has not yet been before this Court, the tenor of the opinions in this Circuit has been that opting-out is permissible only in Rule 23(b)(3) cases.”).

Marcera v. Chinlund, 595 F.2d 1231 (2d Cir. 1979) (reversing district court's denial of 23(b)(2) class certification of prisoners state-wide, stating, “it is now settled that 23(b)(2) is an appropriate vehicle for injunctive relief against a class of local public officials” and that civil rights actions are “paradigmatic 23(b)(2) class suits” when the party opposing the class has acted or refused to act on the grounds generally applicable to the class and rejecting defendants' claims that variations among jails is relevant to liability), vacated by 442 U.S. 915 (1979), on remand to 91 F.R.D. 579 (W.D.N.Y. 1981) in light of *Bell v.*

Wolfish, 99 S. Ct. 1861 (1979) (finding prison practices were not unconstitutional).

Davis v. Smith, 607 F.2d 535 (2d Cir. 1978) (affirming the district court's denial of 23(b)(2) certification holding that “where retroactive monetary relief is not at issue *287 and the prospective benefits of declaratory and injunctive relief will benefit all members of a proposed class to such an extent that the certification of a class would not further the implementation of the judgment, a district court may decline certification.”).

Galvan v. Levine, 490 F.2d 1255 (2d Cir. 1973) (affirming the district court's denial of a motion for class action designation where the “state had made it clear that it understood judgment to bind it with respect to all claimants and had withdrawn challenged policy and where policy arguments against and practical difficulties in affording monetary restitution to persons outside categories recognized by the state were formidable.”).

Givens v. W. T. Grant Co., 457 F.2d 612 (2d Cir. 1972) (stating that separate and distinct claims of class members may not be aggregated in a class suit, pursuant to Fed. R. Civ. P. 23(b)(2), for purposes of satisfying the \$10,000 jurisdictional amount in controversy requirement of 28 U.S.C. § 1332), *vacated* by 409 U.S. 56 (1972), *opinion modified to remand to state court instead of dismissal*, 472 F.2d 1039 (1972).

Third Circuit Court Cases

Stewart v. Abraham, 275 F.3d 220 (3d Cir. 2001) (affirming the district court's certification of a class in a § 1983 civil rights case, finding that “it is generally recognized that civil rights actions seeking relief on behalf of classes like the putative class normally meet the requirements of Rule 23(b)(2)” and that the injunctive relief requested would benefit the whole class).

Barnes v. Am. Tobacco Co., 161 F.3d 127 (3d Cir. 1998) (affirming district court's 23(c) decertification of medical monitoring class under 23(b)(2) where plaintiff's medical monitoring claim required inquiry into individual issues of addiction, causation, the defenses of comparative and contributory negligence, the need for medical monitoring and the statute of limitations; emphasizing the cohesiveness requirement under Fed. R. Civ. P. 23(b) and holding that cohesiveness is even more crucial in 23(b)(2) cases than in 23(c)(3), because all unnamed class members are bound by the action without the opportunity to opt-out), *cert. denied*, 526 U.S. 1114 (1999).

Baby Neal v. Casey, 43 F.3d 48 (3d Cir. 1994) (holding that the district court abused its discretion in denying 23(b)(2) certification when all requirements under 23(a) were met; holding that under the 23(b)(2) inquiry, the injunction relief requested, requiring a state welfare agency to fix systemic failures and comply with state and constitutional law, was exactly the type of case contemplated by Fed. R. Civ. P. 23(b)(2) and all members of the class would benefit from the relief; “The injunctive class provision of Fed. R. Civ. P. 23 (b) 2 was designed specifically for civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons.”).

In re Sch. Asbestos Litig., 789 F.2d 996 (3d Cir. 1986) (affirming district court's denial of 23(b)(2) class certification where the district court found claims were *288 essentially for money damages despite plaintiff's phrasing it as injunctive relief and restitution; relying upon the advisory committee notes accompanying Rule 23(b)(2), which state that the Rule “does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.”).

Lusardi v. Xerox Corp., 747 F.2d 174 (3d Cir. 1984) (holding that the order conditionally certifying class under § 7(b) of the ADEA, 29 U.S.C. § 626, was a collateral order, not able to be appealed).

Walsh v. Great Atl. & Pac. Tea Co., 726 F.2d 956 (3d Cir. 1983) (affirming the district court's approval of the settlement contested partially because of inadequate notice; holding that in class actions

brought under Fed. R. Civ. P. 23(b)(2), Fed. R. Civ. P. 23(d) provides that pre-settlement notice is entirely discretionary with the trial court; stating that Fed. R. Civ. P. 23(e) mandates post-settlement notice but the form of notice “need only be such as to bring the proposed settlement to the attention of representative class members who may alert the court to inadequacies in representation, or conflicts in interest among subclasses, which might bear upon the fairness of the settlement.”).

Geraghty v. United States Parole Comm'n, 719 F.2d 1199 (3d Cir. 1983) (affirming district court's denial of class certification under 23(b)(2) on the question of legality of parole guidelines as applied because of too many individual case variations; “[A]lthough [this] class action was brought under Rule 23(b)(2), F. R. Civ. P., rather than under Rule 23(b)(3), F. R. Civ. P., thereby suggesting that individual case variation should not bar class-wide treatment of the application issue, we have previously committed to the district court the discretion to deny certification in Rule 23(b)(2) cases in the presence of ‘disparate factual circumstances.’”) (footnotes omitted), *cert. denied*, 465 U.S. 1103 (1984).

Kyriazi v. W. Elec. Co., 647 F.2d 388 (3d Cir. 1981) (affirming the district court by holding that the court has the discretion to bar claims for individual injunctive or monetary relief on behalf of 23(b)(2) class members who failed to file timely proofs of claim (“opting in” requirement) and holding that the district court acted within its discretion in fashioning notice; finding that the “hybrid” class action seeking both class-wide and individual relief should be treated under (b)(2) to enjoy its superior res judicata effect and to eliminate the procedural complications of (b)(3), which serve no useful purpose under (b)(2), such as notice and opting-out; further holding that “once liability against the defendant has been found, some appropriate notice must be given to the class members of their opportunity to obtain individual relief under Rule 23(d)(2)[;]” stating that the notice “must be sufficiently informative and give sufficient opportunity for response, to satisfy due process[;]” noting that the trial court may abuse its discretion if the notice “makes the request insufficiently specific for lay comprehension, or which otherwise imposes undue burdens of response on individual class members.”) (footnotes omitted).

Finberg v. Sullivan, 634 F.2d 50 (3d Cir. 1980) (vacating denial of class certification under 23(b)(2) by district court holding that rulings on plaintiff's substantive claims do not constitute a valid basis for denial; also holding that *289 “[c]ertification in suits for injunctive or declaratory relief under rule 23(b)(2) serves an important purpose that is not obviated by rulings against the named plaintiffs on the substantive claims. Because a risk of mootness often is present in these cases, certification ensures that the claims of unnamed plaintiffs will receive full appellate review.”).

Mattern v. Weinberger, 519 F.2d 150 (3d Cir. 1975) (affirming district court and holding that notice to the absent class members is not constitutionally required in an action maintained under Fed. R. Civ. P. 23(b)(2) and affirming class certification of all recoupment cases as not overly broad), *vacated by Mathews v. Mattern*, 425 U.S. 987 (1976), *remanded to Mattern v. Mathews*, 427 F. Supp. 1318 (E.D. Pa. 1977) (denying class certification), *rev'd*, *Mattern v. Mathews*, 582 F.2d 248 (3d Cir. 1978) (reversing and remanding in part for reconsideration of certification of class and holding that class could be maintained under 42 U.S.C. § 405(g)).

Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir. 1975) (affirming district court's class certification under 23(b)(2) and holding that a district court, having determined that a Title VII suit brought in good faith for injunctive relief may be maintained under (b)(2), is not required to redetermine whether the suit may be maintained under (b)(3) and whether it complies with the procedural requirements once it concludes on a motion for summary judgment that changed conditions make injunctive relief no longer appropriate).

Fourth Circuit Court Cases

In re A.H. Robins Co., 880 F.2d 709 (4th Cir. 1989) (affirming district court's certification of class under Fed. R. Civ. P. 23(b)(1), emphasizing that requirements for certification should be liberally construed in a mass tort context, especially where such certification would foster settlement), *cert. denied*, 493 U.S. 959 (1989).

Zimmerman v. Bell, 800 F.2d 386 (4th Cir. 1986) (affirming district court's denial of class certification under Fed. R. Civ. P. 23(b)(2) where plaintiff sought primarily monetary relief).

Lilly v. Harris-Teeter Supermarket, 720 F.2d 326 (4th Cir. 1983) (holding that class was properly certified with respect to both promotions and terminations in employment discrimination case where both parties concede that if the prerequisites of Rule 23(a) were met, these claims were properly maintainable in class action form under Rule 23(b)(2)).

Chisholm v. United States Postal Serv., 665 F.2d 482 (4th Cir. 1981) (affirming district court's certification of a 23(b)(2) class where the defendant objected that the class was overbroad, not fairly represented, and undefined in scope where black employees allegedly suffered from similar instances of employment discrimination regarding promotions).

*290 *Washington v. Finlay*, 664 F.2d 913 (4th Cir. 1981) (holding that trial court abused its discretion in certifying a class at the time of judgment, stating that “whatever the power of courts to certify class actions after judgment on the merits favoring a class ... there can be no comparable power to certify a class action only after, or contemporaneously with, judgment on the merits against a class—at least where, as here, there has been no notice to the putative class members with consequent opportunity to be heard on the certification question, and possibly not even under those circumstances.”), *cert. Denied*, 457 U.S. 1120 (1982).

Abron v. Black & Decker, Inc., 654 F.2d 951 (4th Cir. 1981) (reversing trial court's class certification where plaintiff's claim was a solitary one and she did not represent the class as defined; stating that “the majority holds that a representative never has standing to litigate issues on behalf of a class of employees whose complaints, while stemming from a common pattern or practice, differ in exact detail from the complaint of the representative, while I would permit such suits provided the plaintiff met the commonality, typicality, numerosity, etc. requirements of Rule 23.”) (Murnaghan, J., dissenting).

Stastny v. S. Bell Tel. & Tel. Co., 628 F.2d 267 (4th Cir. 1980) (reversing trial court's class certification as pre-mature, stating that “the broad remedial purposes of Title VII and the undoubted utility and fitness of the class action device for many Title VII actions do not relieve the obligation imposed by federal class action rules to inquire into the specific fitness, on its own facts, of each Title VII case for which class action status is sought.”).

Paxman v. Campbell, 612 F.2d 848 (4th Cir. 1980) (reversing district court's certification of class under 23(b)(2) where a class of defendants was named, not a single defendant; stating “to proceed under 23(b)(2) against a class of defendants would constitute the plaintiffs as ‘the party opposing the class,’ and would create the anomalous situation in which the plaintiffs' own actions or inactions could make injunctive relief against the defendants appropriate [;]” noting that its “holding in no way prevents the utilization of Rule 23(b)(2) in cases in which a class of plaintiffs brings suit against more than one Named defendant, each one of which has taken like action affecting directly the individual members of the plaintiff class.”), *cert. denied*, 449 U.S. 1129 (1981).

Sledge v. J. P. Stevens & Co., 585 F.2d 625 (4th Cir. 1978) (affirming the trial court's ruling that the dismissal of the individual claims of the named class representatives did not preclude consideration of the class complaint; citing various courts, including the Supreme Court, and “a line of employment discrimination cases in this circuit holds that the failure of the personal claims of the class representative does not debar the previously certified Rule 23(b)(2) class.”).

Lukenas v. Bryce's Mountain Resort, Inc., 538 F.2d 594 (4th Cir. 1976) (holding that the district court did not abuse its discretion in refusing to certify a class under 23(b)(2) where Rule 23(a) requirements were not met and the plaintiffs sought monetary relief).

*291 *Barnett v. W. T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975) (reversing district court and allowing class certification under 23(b)(2) where plaintiff's "suit is an 'across the board' attack on all discriminatory actions by defendants on the ground of race, and when so viewed it fits comfortably within the requirements of Rule 23(b)(2)[;]" finding that the trial court's narrowing of the class "under which Barnett could as a class representative challenge only those specific actions taken by the defendants toward him, would undercut the purposes of Title VII.").

Oxendine v. Williams, 509 F.2d 1405 (4th Cir. 1975) (reversing trial court's certification of class under 23(b)(2) where the class was represented by a pro-se prison inmate; holding that the "ability to protect the interests of a class depends in part on the quality of counsel" and that "a judgment against him may prevent the other inmates from later raising the same claims under Fed. R. Civ. P. 23(c)(2). It follows that unless he can fairly and adequately protect the interest of the class, he may not represent it.").

Hammond v. Powell, 462 F.2d 1053 (4th Cir. 1972) (reversing trial court's refusal to certify class on rationale that notice provisions of Rule 23(b)(3) were impracticable because class plainly comes within ambit of Rule 23(b)(2) so notice provisions do not apply).

Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971) (affirming district court's certification of a 23(b)(2) class where back pay was demanded; stating that "[t]he demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy [;]" adopting the Seventh Circuit's reasoning, finding no "justification for treating such a suit as a class action for injunctive purposes, but not treat it so for purposes of other relief. The clear purpose of Title VII is to bring an end to the proscribed discriminatory practices, and to make whole, in a pecuniary fashion, those who have suffered by it. To permit only injunctive relief in the class action would frustrate the implementation of the strong Congressional purpose expressed in the Civil Rights Act of 1964.").

Fifth Circuit Court Cases

Smith v. Texaco, Inc., 263 F.3d 394 (5th Cir. 2001) (holding that (1) employees met commonality requirement; (2) employees met typicality requirement; (3) plaintiff employees would fairly and adequately protect interests of purported class; (4) certification based upon party opposing class acting on grounds generally applicable to class was not appropriate; (5) even if punitive damages were available on class-wide basis, questions common to class did not predominate over questions affecting individual members, and certification based upon predominance and upon class action being superior thus was precluded; and (6) class action was not superior to other methods with respect to employees' claims, and certification based upon predominance and upon class action being superior thus was precluded).

James v. City of Dallas, 254 F.3d 551 (5th Cir. 2001) (affirming district court's certification of class under 23(b)(2) for process claims and holding that certification meets the standard enunciated in *Allison v. Citgo Petroleum*; describing such *292 standard as requiring that in order "[t]o maintain an action under Rule 23(b)(2), [injunctive] relief rather than monetary damages must be the 'predominant' form of relief the plaintiffs pursue [;]" further discussing the standard, stating that "[b]ased on ... [the predominance theory], the court held that 'monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief.' The *Allison* court explained that '[b]y incidental, we mean damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief.'").

Gates v. Cook, 234 F.3d 221 (5th Cir. 2000) (reversing trial court's refusal to allow substitution of

counsel where counsel did not give proper notice and opportunity to object to a settlement as required for 23(b)(2) classes).

Bolin v. Sears, Roebuck & Co., 231 F.3d 970 (5th Cir. 2000) (reversing district court's certification of class under 23(b)(2), finding that damages predominated over injunctive relief in a consumer action for violations of a bankruptcy stay; applying the standard enunciated in *Allison* and holding that injunctive or declaratory relief is not "appropriate" when the "final relief relates exclusively or predominantly to money damages[;]" further stating, "[t]hus, Rule 23(b)(2) contains two requirements: (1) behavior generally applicable to the class as a whole; (2) injunctive relief predominates over damages sought. Liability for incidental damages should not require additional hearings to resolve the disparate merits of each individual's case[;]" further holding that "to determine whether damages predominate, a court should certify a class on a claim-by-claim basis, treating each claim individually and certifying the class with respect to only those claims for which certification is appropriate.").

Washington v. CSC Credit Servs., Inc., 199 F.3d 263 (5th Cir. 2000) (reversing district court's certification of 23(b)(2) class where monetary relief predominates because monetary relief does not flow from the declaratory relief, but must be separately adjudicated in consumer action under FCRA).

Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998) (holding that 23(b)(2) certification is inappropriate where monetary relief predominates unless it is incidental to requested injunctive or declaratory relief; defining the standard as follows: "By incidental, we mean damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief. Ideally, incidental damages should be only those to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established. That is, the recovery of incidental damages should typically be concomitant with, not merely consequential to, class-wide injunctive or declaratory relief. Moreover, such damages should at least be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances. Liability for incidental damages should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations. Thus, incidental damages will, by definition, be more in the nature of a group remedy, consistent with the forms of relief intended for (b)(2) class actions.").

*293 *Forbush v. J.C. Penney Co.*, 994 F.2d 1101 (5th Cir. 1993) (reversed district court's refusal to certify 23(b)(2) class regarding ERISA claims; finding that the district court improperly imported the prerequisites of 23(b)(3) in its 23(b)(2) determination).

Howard v. City of Greenwood, 783 F.2d 1311 (5th Cir. 1986) (affirming trial court's denial of class certification under 23(b)(2) on the ground that the plaintiffs' action was inappropriate for class-based litigation under subdivision (b)(2) because the plaintiffs had no standing to seek injunctive relief).

Fleming v. Travenol Labs., Inc., 707 F.2d 829 (5th Cir. 1983) (affirming district court's refusal to certify a class under 23(b)(2) where the plaintiff did not meet her burden of showing that the numerosity requirement under 23(a) was met; explaining that the Supreme Court, in *General Telephone v. Falcon*, had limited "across the board" attacks under Title VII, and that specific compliance with the requirements of Rule 23 was required).

Woolen v. Surtran Taxicabs, Inc., 684 F.2d 324 (5th Cir. 1982) (reversing and remanding the district court's refusal to allow intervention in a class certified under 23(b)(2), where class members and intervenors are obviously antagonistic, such that intervenors are not fairly represented and may be bound by the action).

Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1981) (reversing trial court's denial of class

certification under 23(b)(2) because of plaintiffs' "lack of need[;]" holding that certification of a class under Rule 23(b)(2) is "especially appropriate where, as here, the claims of the members of the class may become moot as the case progresses[;]" further stating that "[t]he risk of mootness is great in this litigation and the issue raised is important not only to (appellant), but others similarly situated."

Parker v. United Steelworkers of Am., 642 F.2d 104 (5th Cir. 1981) (holding that though the class was certified for purposes of injunctive and declaratory relief, award of monetary damages was not automatically precluded), *abrogation recognized by Allison v. Citgo Petroleum Corp.*, 51 F.3d 402 (5th Cir. 1988).

Kincade v. Gen. Tire & Rubber Co., 635 F.2d 501 (5th Cir. 1981) (affirming district court's approval of settlement and holding that the rule denying the right to opt-out to class members in a Rule 23(b)(2) case that goes to trial is also applicable when the case is settled).

Penson v. Terminal Transp. Co., 634 F.2d 989 (5th Cir. 1981) (reversing district court's granting summary judgment motion in favor of employer; holding the plaintiff's action is not barred because the notice of the consent decree received by the plaintiff did not inform him of his right to "opt-out" of the 23(b)(2) class and pursue his individual suit; further clarifying the rules regarding opt-out in 23(b)(2) cases and holding "that although a member of a class certified under Rule 23(b)(2) has no absolute right to opt-out of the class, a district court may mandate such a right pursuant to its discretionary power under Rule 23[;]" stating that if the district *294 court, acting under its discretionary power, requires an opt-out right and notice, then the notice must comply with the terms of that requirement).

Crawford v. W. Elec. Co., 614 F.2d 1300 (5th Cir. 1980) (affirming trial court's refusal to certify a class where the plaintiffs failed to meet their burden on appeal of demonstrating facts in the record below that indicate, among other things, the typicality of their claims and their adequacy as representatives of the excluded members of the putative class).

Fowler v. Birmingham News Co., 608 F.2d 1055 (5th Cir. 1979) (affirming district court's dismissal of a plaintiff's claim where it was barred by prior resolution in a Rule 23(b)(2) case; holding that the plaintiff did not show he was adverse to class members in prior suit or that notice given was inadequate; recognizing that the discretion of the district court as to the mechanics of the notice process is subject only to the broad "reasonableness" standards imposed by due process).

Johnson v. Gen. Motors Corp., 598 F.2d 432 (5th Cir. 1979) (reversing district court's ruling that plaintiff's claim was barred by res judicata; holding that although notice was not necessary to bind absent class members in a 23(b)(2) class action seeking only injunctive and declaratory relief, due process did require notice before the individual monetary claims of absent class members could be barred so that, where the plaintiff had not received notice of the class action in the prior suit, even though he was an absent member of that class, the judgment in the prior suit did not bar, by res judicata, his claims for monetary relief in the instant suit).

Jones v. Diamond, 594 F.2d 997 (5th Cir. 1979) (holding that it is proper to consider class issues and a representative may still represent a class even where his claims have been disposed of; further holding that in a 23(b)(2) class, the court could award only injunctive and declaratory relief, therefore, the individual state law claims for damages were not cognizable).

Robinson v. Union Carbide Corp., 544 F.2d 1258 (5th Cir. 1977) (stating, and prefacing its discussion, that this Rule 23(b)(3) case would have better been brought under 23(b)(2) because it "compels inclusion and therefore promotes judicial economy, consistency of result, and binding adjudication more effectively than 23(b)(3).").

United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975) (refusing to consider the issue of whether the trial court properly refused to certify a class under 23(b)(2) because no party raised

or briefed issue; stating, however, that it found it “both ironic and puzzling the apparent assumption that class action treatment necessarily would have yielded the results sought by appellants[.]” since 23(b)(2) binds the entire class by a res judicata effect and notice is not mandatory) (footnote omitted).

Locke v. Bd. of Pub. Instruction, 499 F.2d 359 (5th Cir. 1974) (holding that a 23(b)(2) class action brought by teacher regarding a maternity leave policy was moot where the policy had been withdrawn, teacher re-hired, past benefits were not *295 awardable, and case was not of general public interest, and thus, the judgment was vacated).

Franks v. Bowman Transp. Co., 495 F.2d 398 (5th Cir. 1974) (reversing trial court and holding that Rule 23(b)(2) does not prohibit back pay awards to non-named class members in a class action under that subdivision of the rule), *rev'd on other grounds*, *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976).

Nix v. Grand Lodge of Int'l Ass'n of Machinists, 479 F.2d 382 (5th Cir. 1973) (upholding trial court's use of discretion to limit the class aspects of case to question the validity of a constitutional provision where there was a differing nature of each individual possible claim, problems involved in proving separate damages, and the only common question involved here was the legal question of the validity of the constitutional provision).

Carpenter v. Davis, 424 F.2d 257 (5th Cir. 1970) (reversing district court's dismissal of case and holding that the case was properly certified as a class action under 23(b)(2) where the plaintiffs were seeking injunctive and declaratory relief with regard to their arrest on a charge of selling obscene literature).

Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968) (reversing and remanding to district court finding that a 23(b)(2) class action is not moot where the plaintiff had been promoted, but system-wide racially discriminatory employment practices and plaintiffs' back pay differential was not addressed).

Sixth Circuit Court Cases

Pfenning v. Household Credit Servs., Inc., No. 00-4213, 2002 WL 534134 (6th Cir. Apr. 11, 2002) (holding that the district court erred in failing to construe federal Truth in Lending Act (TILA) liberally in plaintiff's favor in its dismissal of class action complaint; over-limit fee falls squarely within the statutory definition of “finance charge,” but because defendants relied on the plain meaning of conflicting statutes, they are not liable for damages, however, plaintiffs may proceed for equitable relief upon remand).

In re NLO, Inc., 5 F.3d 154 (6th Cir. 1993) (denying writ of mandamus seeking to vacate district court's ruling that class was certified under 23(b)(2) where the plaintiff's claim was for a court-supervised medical monitoring program; holding that class certification was not reviewable on mandamus as it was a directly appealable order and the district court's holding that medical monitoring was injunctive relief was not clearly erroneous as to warrant mandamus relief).

Clark Equip. Co. v. Int'l Union, Allied Indus. Workers, 803 F.2d 878 (6th Cir. 1986) (affirming district court's certification of 23(b)(2) class where certification was done after settlement was approved by the court; holding that “a tentative settlement can precede or be concurrent with class certification.”).

Penland v. Warren County Jail, 797 F.2d 332 (6th Cir. 1986) (reversing district court's refusal to certify class under 23(b)(2) where the class met the requirements *296 of Rule 23, the reason the district court gave for not certifying was that it was neither necessary to protect the interests of the desired class (and other inmates would benefit from injunctive relief if granted to the plaintiffs) nor the superior method for providing requested relief, and named plaintiffs had subsequently been released from jail).

Easter v. Jeep Corp., 750 F.2d 520 (6th Cir. 1984) (affirming district court's denial of relief to class in 23(b)(2) action holding that “the failure to provide prejudgment notice to individual class members does not violate Fed. R. Civ. P. 23(b)(2) or constitutional requirements of due process.”).

Thompson v. Bd. of Educ., 709 F.2d 1200 (6th Cir. 1983) (reversing trial court's refusal to decertify class where plaintiffs sought to proceed against several school boards which had each adopted their own challenged maternity leave policy; holding that “the language in Rule 23(b)(2) contemplated certification of a plaintiff class against a single defendant, not the certification of a defendant class.”).

Jordan v. Dellway Villa., Ltd., 661 F.2d 588 (6th Cir. 1981) (reversing trial court's order limiting members of a class who could recover damages even though Rule 23(b)(2) gives the district court broad discretion to limit classes where it is done for substantive, not procedural, reasons; finding that the trial court's order improperly excludes persons who may have been denied housing because of unlawful discrimination where a pattern and practice of discrimination was alleged).

Alexander v. Aero Lodge, 565 F.2d 1364 (6th Cir. 1977) (affirming district court's certification of 23(b)(2) class in Title VII action; holding that a request for back pay does not preclude certification under 23(b)(2); finding, similarly, that it was proper to certify under Rule 23(b)(2) even though “the discrimination may have been manifested in a variety of practices affecting different members of the class in different ways and at different times[;]” citing the Advisory Committee Notes and other circuits' decisions, holding that certification was proper where no prejudgment notice was sent because prejudgment notice of a (b)(2) class suit need not in all cases be sent to absent class members to comply with the requirements of due process), *superseded by statute on other grounds as stated in Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56 (1982).

Craft v. Memphis Light, Gas & Water Div., 534 F.2d 684 (6th Cir. 1976) (affirming district court's denial of class certification where the court, quoting the Eighth Circuit, determined that “[n]o useful purpose would be served by permitting this case to proceed as a class action” because “[t]he determination of the constitutional question can be made by the Court and the rules and regulations determined to be constitutional or unconstitutional regardless of whether this action is treated as an individual action or as a class action.”).

Amen v. Dearborn, 532 F.2d 554 (6th Cir. 1976) (remanding to the district court to re-consider whether plaintiffs had met the jurisdictional requirements of *297 federal court; construing *Zahn v. International Paper Company*, 414 U.S. 291 (1973), to prohibit aggregation whenever the class members assert “separate and distinct” claims or demands, irrespective of whether the district court certified the class under 23(b)(1), (b)(2), or (b)(3)).

Senter v. Gen. Motors Corp., 532 F.2d 511 (6th Cir. 1976) (holding that a discrimination case is maintainable as class action under 23(b)(2) where the district court did not certify it as a class action until determination was made on the merits and where the case alleged class-wide discrimination).

Weathers v. Peters Realty Corp., 499 F.2d 1197 (6th Cir. 1974) (reversing trial court's refusal to grant class certification under 23(b)(2), holding that the trial court should have confined itself to an analysis of whether the class met the requirements of the rule and should not have considered the likelihood of success on the merits; finding that 23(b)(2) was the proper classification for the civil rights housing discrimination claim, since a (b)(2) class may be broad in scope and if both injunctive and monetary relief is sought, it is permissible to have sub-classes).

Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973) (recognizing the issue but not deciding the premature question of whether a 23(b)(2) class action that allowed class-wide back pay, but where final injunctive relief was deemed inappropriate, may be sustained).

Caldwell v. Craighead, 432 F.2d 213 (6th Cir. 1970) (determining an issue of class certification in a freedom of speech case, where the district court neglected to do so; refusing to certify the class, stating “that the rights appellants are allegedly attempting to enforce in this action are individual rights arising out of a unique fact situation, and the class action technique is not designed to be used in these types of

cases.”).

Seventh Circuit Court Cases

Bishop v. Gainer, 272 F.3d 1009 (7th Cir. 2001) (holding that the trial court's refusal to consider back awards in 23(b)(2) class action does not violate Title VII principles because the lower court orders make it clear that the class was certified for injunctive and declaratory relief and not for purposes of back pay or other monetary relief; recognizing that back pay may arguably be contemplated by (b)(2) certification, but damages cannot be).

Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, 216 F.3d 577 (7th Cir. 2000) (holding that district court abused its discretion in certifying a class under 23(b)(2) in a Title VII case where monetary damages were not incidental; following *Jefferson v. Ingersoll International, Inc.*, 195 F.3d 894 (1999), and the Fifth Circuit's reasoning in *Allison v. Citgo*, 151 F.3d 402 (1998), finding that the trial court should have considered either providing class members with personal notice and opportunity to opt-out, or proceeding in entirety or partially under 23(b)(3)).

*298 *Crawford v. Equifax Payment Servs.*, 201 F.3d 877 (7th Cir. 2000) (holding that the district court abused its discretion in denying motions to intervene on the basis of untimeliness, which were filed 23 days after class certification, because delay should be measured from the date that intervenors learned of the representative's shortcoming and not the date on which they learned of the class action suit; reversing the district court's approval of a settlement where the case regarding the Fair Debt Collection Practices Act is for money damages and should be a 23(b)(3) class, not a 23(b)(2) case).

Blair v. Equifax Check Servs., Inc., 181 F.3d 832 (7th Cir. 1999) (affirming district court's certification of 23(b)(2) class in Fair Debt Collection Practices Act claim).

Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894 (7th Cir. 1999) (finding, on interlocutory appeal, that class certification under either 23(b)(3) or a hybrid 23(b)(2) and (3) was appropriate where substantial compensatory or punitive damages sought pursuant to the Supreme Court's declaration in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), that in actions for money damages, all class members are entitled to personal notice and an opportunity to opt-out; adopting the Fifth Circuit's reasoning in *Alison v. Citgo*, that if the monetary damages were incidental to injunctive and declaratory relief, certification under 23(b)(2) would be permissible).

Pabst Brewing Co. v. Corrao, 161 F.3d 434 (7th Cir. 1998) (stating that where neither party moved for class certification and the issue was not appealed, no facts were presented to help determine whether the class was properly certified; reserving any ruling about the effect of the decision on unnamed members of the putative class and treating the appeal as an individual case; noting, however, that a defendant class is precluded under Rule 23(b)(2)).

Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584 (7th Cir. 1993) (holding that the trial court did not abuse its discretion in denying class certification under (23(b)(2) where adequacy of representation was not established and it did not appear that the trial court impermissibly considered the merits of the claims in its class certification analysis).

Williams v. Burlington N., 832 F.2d 100 (7th Cir. 1987) (finding that the district court did not abuse its discretion in not bifurcating the 23(b)(2) class certification between equitable and monetary phases where the district court employed safeguards which were the functional equivalent as those under 23(b)(3)).

Fontana v. Elrod, 826 F.2d 729 (7th Cir. 1987) (affirming district court's dismissal of plaintiff's complaint, holding that plaintiffs were bound by the settlement of an earlier class action suit of which they were class members, even if they did not receive personal notice, and were barred by res judicata in bring-

ing a class action complaint on the same issues).

Henson v. E. Lincoln Township, 814 F.2d 410 (7th Cir. 1987) (affirming district court's denial to certify a defendant class under 23(b)(2) because the rule does not allow a defendant class).

*299 *Burns v. Elrod*, 757 F.2d 151 (7th Cir. 1985) (affirming the district court's denial of late claims to share in a settlement where the defendant made reasonable efforts to provide notice, even though not every class member received personal notice).

Simer v. Rios, 661 F.2d 655 (7th Cir. 1981) (affirming district court's denial of class certification under 23(b)(3) and noting that (b)(2) certification would not be appropriate where plaintiffs primarily seek monetary relief).

Vergara v. Hampton, 581 F.2d 1281 (7th Cir. 1978) (reversing district court's denial of class certification under 23(b)(2) where the sole purpose of the action is to determine a legal question regarding civil service employment which is common to every member of the proposed class; holding that the rule in the Seventh Circuit is "that class certification may not be denied on the ground of lack of need if the prerequisites of Rule 23 are met.").

Alliance to End Repression v. Rochford, 565 F.2d 975 (7th Cir. 1977) (holding that the trial court did not abuse its discretion in certifying classes; further holding that whatever "need" requirement exists under Rule 23 was satisfied in the case, the burdens of discovery should not be a factor, and "pattern or practice" of defendants' conduct is generally applicable to the class).

Ameritech Benefit Plan Comm. v. Comm'n Workers of Am., 220 F.3d 814 (7th Cir. 2000) (holding that the court would only decide the rights of named plaintiffs and intervenors in a declaratory judgment action where a defendant class was certified under 23(b)(2); recognizing the problems in a defendant class and following its decision in *Henson v. East Lincoln Township*, 814 F.2d 410 (7th Cir. 1987), holding that a defendant class is normally impermissible under Rule 23(b)(2)), *cert. denied*, 531 U.S. 1127 (2001).

Eighth Circuit Court Cases

Deboer v. Mellon Mortgage Co., 64 F.3d 1171 (8th Cir. 1995) (affirming court's certification of 23(b)(2) class holding that where (b)(1) or (b)(2) is applicable, (b)(3) should not be considered; stating that where "Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2).").

Paxton v. Union Nat'l Bank, 688 F.2d 552 (8th Cir. 1982) (reversing trial court's denial of certification of 23(b)(2) class and holding that two subclasses of employees who alleged discrimination and sought injunctive relief meet the 23(b)(2) requirements; further holding that the certification of a class should not be delayed because "[e]ven in (b)(2) class actions, however, 'a deliberate deferral of the (class) determination until full trial on the merits is fraught with serious problems of judicial economy, and of fairness to both sides.'" (quoting *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 275 (4th Cir. 1980)) (footnote omitted).

Bishop v. Comm. on Prof'l Ethics & Conduct of Iowa State Bar Ass'n, 686 F.2d 1278 (8th Cir. 1982) (reversing the trial court's certification of 23(b)(2) class postjudgment*300 where the class was certified without a hearing and the attorney was not a proper representative of the class; stating, that a post-judgment certification could be permissible under unusual circumstances, such as where the plaintiffs either filed the original complaint as a class action or moved to proceed as a class action prior to the decision on the merits, but the district court failed to formally certify the class under Rule 23(c)(1) or where the case had been tried as a class action and the district court had ordered class relief).

Coley v. Clinton, 635 F.2d 1364 (8th Cir. 1980) (reversing district court's refusal to certify a class because it was not based upon "the proper criteria in making this determination[;]" holding that "[i]t is ap-

parent that the prerequisites of [Rule 23\(a\)](#) have been met: the class is numerous, there are questions common to the class, the claims of the representative parties are typical, and no problem of adequate representation of the class appears on this record [T]he case falls squarely within the purpose of [Rule 23\(b\)\(2\)](#) to allow class actions vindicating civil rights.”).

Marshall v. Kirkland, 602 F.2d 1282 (8th Cir. 1979) (holding [Rule 23\(b\)\(2\)](#) class certification appropriate in a case involving employment practices; stating that “[t]hough [Rule 23\(b\)\(2\)](#) relates to class claims on which declaratory and injunctive relief is sought, this Court has observed in conformity with the majority of federal courts, that the fact pecuniary relief in the form of back pay is ‘sought incidental to injunctive relief will not preclude certification under [Rule 23\(b\)\(2\)](#)’” (quoting *Sperry Rand Corp. v. Larson*, 554 F.2d 868, 875 (8th Cir. 1977)); further stating that “it also seems evident that while entitlement to some forms of relief such as back pay or reinstatement must often proceed on an individual rather than a class basis, that fact should not prevent a district court from determining issues of individual relief incidental to class-wide issues in a [Rule 23\(b\)\(2\)](#) class action.”) (footnotes omitted).

United States Fidelity & Guar. Co. v. Lord, 585 F.2d 860 (8th Cir. 1978) (affirming district court's certification of a [Rule 23\(b\)\(2\)](#) class in an employment discrimination case; stating “[t]hat back pay may be a form of relief sought incidental to injunctive relief will not preclude certification under [Rule 23\(b\)\(2\)](#).”).

Cotton v. Hutto, 577 F.2d 453 (8th Cir. 1978) (affirming district court's denial of relief to plaintiffs, holding that a judgment in a class action suit brought under 23(b)(2) is binding on all class members unless they can show that their interests were not adequately represented by the class representatives).

Sperry Rand Corp. v. Larson, 554 F.2d 868 (8th Cir. 1977) (upholding the district court's discretion in certifying a class under [Rule 23\(b\)\(2\)](#) in a sexual discrimination employment case; holding that the district court was within its discretion in finding that former union officials were fair representatives of a class and ordering notice to all class members).

Ark. Educ. Ass'n v. Bd. of Educ., 446 F.2d 763 (8th Cir. 1971) (reversing district court's dismissal of a case, concluding “that a class action for injunctive relief and damages properly brought under [Rule 23\(a\)](#) and (b)(2) should not be dismissed *301 merely because a subsequent change in policy by the defendant has eliminated the necessity for future injunctive relief, leaving only the question of past damages for determination by the Court.”).

Ninth Circuit Court Cases

Mandujano v. Basic Vegetable Prods., Inc., 541 F.2d 832 (9th Cir. 1976) (reversing district court's approval of a proposed settlement, holding that the trial court was required to hold hearing on any substantial objections to proposed settlement before approving the proposed settlement; further holding that opposition of significant number of members of the class to a proposed settlement was a factor to be considered when approving it and that the district court should have considered explicitly the effect, if any, of the settlement on employees who were not members of the class).

United States v. S. Pac. Transp. Co., 543 F.2d 676 (9th Cir. 1976) (reversing trial court and finding no jurisdiction existed because individual claims of 23(b)(2) cannot be aggregated).

Soc'y for Individual Rights, Inc. v. Hampton, 528 F.2d 905 (9th Cir. 1975) (holding that the district court did not abuse its discretion in denying class relief of reinstatement with back pay because such relief was beyond injunctive or declaratory relief under 23(b)(2)).

Gibson v. Supercargoes & Checkers of Int'l Longshoremen's & Warehousemen's Union, 543 F.2d 1259 (9th Cir. 1976) (affirming district court's certification of a class under 23(b)(2), but narrowing the class and holding that “[a] class action may be maintained under [Federal Rule of Civil Procedure](#)

, alleging a general course of racial discrimination by an employer or union, though the discrimination may have been manifested in a variety of practices affecting different members of the class in different ways and at different times.”) (footnote omitted).

Souza v. Scalone, 563 F.2d 385 (9th Cir. 1977) (vacating and remanding trial court's interlocutory order that notice was not required to absent members of a class certified under 23(b)(2), to reconsider in light of the holding in *Elliott v. Weinberg*, 564 F.2d 1219 (9th Cir. 1977), that due process requires notice to absent class members “only when necessary to provide members an opportunity to signify whether representation by plaintiff was fair and adequate or to intervene to present additional claims or to otherwise come into the action.”).

Jordan v. Los Angeles County, 713 F.2d 503 (9th Cir. 1983) (finding, on remand from Supreme Court, that *General Telephone of Southwest v. Falcon*, 457 U.S. 147 (1982), did not prohibit across the board 23(b)(2) class formation when the alleged discrimination was in hiring techniques; further holding that the class nevertheless could not be certified because it did not meet numerosity requirements), *as amended by* 726 F.2d 1366 (9th Cir. 1994).

*302 *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000) (holding that a prior 23(b)(2) action did not bar the present 23(b)(3) case on airlines' weight requirements, in part because the prior action did not require individualized notice).

Linney v. Cellular Alaska P'ship, 151 F.3d 1234 (9th Cir. 1998) (affirming the district court's approval of proposed settlement and certification of a 23(b)(2) class where monetary damages were sought and the trial used its discretion to provide for opting-out; stating that the court was to conduct “a very limited review and will reverse only upon a strong showing that the district court's decision was a clear abuse of discretion.”).

Crawford v. Honig, 37 F.3d 485 (9th Cir. 1994) (affirming district court's determination that plaintiffs were not barred by res judicata because of a prior class action suit where notice to absent class members was not provided when the injunction was expanded beyond the scope and contemplation of a prior decision through settlement negotiations).

Nelsen v. King County, 895 F.2d 1248 (9th Cir. 1990) (affirming district court's denial of class certification under 23(b)(2) where the only claims remaining were for monetary relief).

Probe v. State Teachers' Ret. Sys., 780 F.2d 776 (9th Cir. 1986) (holding that district court did not abuse its discretion in certifying a class under 23(b)(2) where plaintiffs' request for monetary damages was incidental to injunctive relief and defendants were not prejudiced by an eighteen-month delay in bringing a motion for certification).

Williams v. Owens-Illinois, Inc., 665 F.2d 918 (9th Cir. 1982) (holding that the trial court did not abuse its discretion in refusing to consider a prayer for \$50 million in monetary damages as incidental to injunctive relief in a 23(b)(2) case, but erred in not considering back pay as equitable relief).

Dosier v. Miami Valley Broad. Corp., 656 F.2d 1295 (9th Cir. 1981) (affirming trial court's holding that the plaintiff was barred by res judicata of a prior 23(b)(2) class action despite the plaintiff's claim that he was not allowed to opt-out and was not adequately represented, although several of his claims did not fall under the settlement and thus, were not barred; further holding that due process does not require unnamed plaintiffs be given a chance to opt-out of 23(b)(2) class actions).

Yassini v. Crosland, 613 F.2d 219 (9th Cir. 1980) (reversing trial court's certification of a class action because of an absence of a common question of fact or law ripe for judicial determination).

EEOC v. Gen. Tel. Co., 599 F.2d 322 (9th Cir. 1979) (affirming district court's certification of Title VII claim under 23(b)(2), holding that “[s]ection 706 suits are generally found to be maintainable under Rule 23(b)(2).”).

Bauman v. United States Dist. Court, 557 F.2d 650 (9th Cir. 1977) (denying writ of mandamus on a claim contesting opt-out notice in under 23(b)(2), holding that an extraordinary need did not mandate the use of a mandamus; finding that a court *303 cannot determine that the district court's order was erroneous as a matter of law where there is no controlling authority and a split in authority on whether members of a 23(b)(2) class may exclude themselves from a class).

Tenth Circuit Court Cases

Barela v. United Nuclear Corp., 462 F.2d 149 (10th Cir. 1972) (affirming trial court's refusal to certify 23(b)(2) class where plaintiff's evidence was inadequate, but also holding that class members were not required to file individual claims with the EEOC in a discrimination suit and that Rule 23 is appropriate for discrimination practice and policy cases).

Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975) (reversing and remanding trial court's denial of certification of a class, holding that across the board discrimination complaints are eligible for Rule 23 class actions and that request for back pay may be included in 23(b)(2) cases).

Ryan v. Shea, 525 F.2d 268 (10th Cir. 1975) (declining to address defendant's contention that pre-judgment notice was required under 23(b)(2), but noting that district courts in the Tenth Circuit have ruled that in a class action brought under 23(b)(2) pre-judgment, notice is not required).

J.B. by Hart v. Valdez, 186 F.3d 1280 (10th Cir. 1999) (affirming trial court's denial of class certification where there is no common question of fact or law; refusing to find an allegation of systemic failures as appropriate for class action).

Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270 (10th Cir. 1977) (reversing trial court's denial of class certification, holding that in 23(b)(2) cases, the prerequisites of 23(a) should be liberally construed).

Adamson v. Bowen, 855 F.2d 668 (10th Cir. 1988) (reversing trial court's denial of class certification where trial court impermissibly imposed a predominance requirement in its 23(b)(2) analysis).

Eleventh Circuit Court Cases

Murray v. Auslander, 244 F.3d 807 (11th Cir. 2001) (vacating district court's certification of 23(b)(2) class and remanding for consideration in light of the court's holding to conduct an evidentiary inquiry to determine whether at least one named representative of the class has standing to bring a claim that is not moot; further holding that a predominance requirement analysis is not necessary in a 23(b)(2) class action; referring to the Fifth Circuit's decision in *Allison v. Citgo*, 151 F.3d 402 (1998), holding that monetary relief in 23(b)(2) is available if it is incidental to the injunctive or declaratory relief; defining "incidental" as meaning damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief).

Doe v. Bush, 261 F.3d 1037 (11th Cir. 2001) (holding that although the district court never certified a class, the court followed the Fifth Circuit and improperly found that an implied class existed), *cert. denied*, 122 S. Ct. 903 (2002).

*304 *Scott v. City of Anniston*, 682 F.2d 1353 (11th Cir. 1982) (reversing trial court's decertification of a 23(b)(2) class where the individual class representatives' claims were denied after certification of the class and trial on liability to class; following *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977), where the Supreme Court stated that class claims need not be "mooted or destroyed" if the class is certified before it is discovered that the named plaintiffs are inappropriate class representatives; agreeing with the Third Circuit's reasoning and holding that a suit brought as a (b)(2) action need not be reclassified as a (b)(3) class where the injunctive relief is no longer needed, due to the defendant's

change of action if the “cohesive characteristics of the class [that] are the vital core of a (b)(2) action ... are still intact in the suit.”).

Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546 (11th Cir. 1986) (reversing district court's decertification of a class where the district court abused its discretion in giving opt-out notice at the certification of a suit in a hybrid 23(b)(2) action, stating that opt-out notice in a hybrid case must be given at the monetary damage phase).

Howard v. McLucas, 782 F.2d 956 (11th Cir. 1986) (holding that the district court did not abuse its discretion in not including an opt-out provision in the consent decree).

Giles v. Ireland, 742 F.2d 1366 (11th Cir. 1984) (affirming trial court's certification of a 23(b)(2) class where the trial court limited the class to exclude orderlies, finding they didn't meet the commonality requirement of 23(a)).

Holmes v. Cont'l Can Co., 706 F.2d 1144 (11th Cir. 1983) (holding that the district court abused its discretion in refusing to provide notice of an opt-out procedure; holding that “because the merits of many monetary damages and back pay claims in this case are uniquely individual to particular class members, the right to opt-out of the class, normally accorded only in classes certified under [23(b)(3)], must be extended to members of this (b)(2) monetary relief class.”).

D.C. Circuit Court Cases

Eubanks v. Billington, 110 F.3d 87 (D.C. Cir. 1997) (holding that although the district court does have discretion to allow opt-out opportunity in 23(b)(2) class action, the district court did not abuse its discretion in refusing to allow opt-out opportunity to class members who opposed settlement where they failed to show special circumstances or unique claims).