NOTES

OBTAINING DISCOVERY FROM ABSENT CLASS MEMBERS IN FEDERAL RULE OF CIVIL PROCEDURE 23(b)(3) CLASS ACTIONS

I. INTRODUCTION

Federal Rule of Civil Procedure 23,[1] which authorizes class actions, "has

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1. FED. R. CIV. P. 23 provides:

(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

precipitated more judicial decisions and comment than any other Civil Rule regardless of its longevity on our books."[2] Rule 23 has again caused judicial controversy; this time the controversy centers around obtaining discovery in class actions.

Federal Rule of Civil Procedure 23(b)(3) allows class actions to be maintained where "questions of law or fact common to the members of the class predominate over any questions affecting only individual members"[3] and where certain other conditions are met.[4] Plaintiffs in this type of class action may be divided into three distinct groups: those who are actively in-

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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 him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(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) Dismissial 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.

2. Newberg, *Preface* to H. NEWBERG, CLASS ACTIONS: A MANUAL FOR LITIGATION AT FEDERAL AND STATE LEVELS at ix (1977).

3. *See* note 1 *supra*.

4. *See* FED. R. CIV. P. 23(b)(3)(A)-(D), *supra* note 1.

volved in the litigation, those who opt out under Federal Rule of Civil Procedure 23(c)(2)(A)[5] and who are not bound by the result of the litigation,[6] and those who are not actively participating in the litigation but who are bound by the result[7]—the "absent class members."

Recently, the question has arisen whether discovery can be obtained from these absent class members in Federal Rule of Civil Procedure 23(b)(3) class actions. The Federal Rules of Civil Procedure do not explicitly deal with the problem;[8] however, recently the courts have begun to address this issue.[9] The cases that have been decided reveal "varying degrees of judicial approval of discovery from absent class members."[10] This Note will examine the case law as it has developed and analyze the bases for these decisions.

II. Case Law

The first case to deal directly with the issue of whether discovery can be obtained from absent class members was *Brennan v. Midwestern United Life Insurance Co.*[11] The class action was initiated by Brennan alleging that Midwestern had violated section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)-5.[12] The plaintiff requested damages for herself and all others who did not receive the Midwestern stock which they had purchased.[13] In a bench trial, the district court found for the plaintiff and all members of her class.[14]

Before the trial, Midwestern filed requests under Rules 33[15] and 34[16] of the Federal Rules of Civil Procedure for answers to interrogatories and for production of documents from the plaintiff and each member of her class.[17] The court granted this motion and the order was mailed to all class members, setting March 1, 1967, as the deadline for compliance.[18] At the pretrial conference in April, 1967, the judge stated that the claim of anyone who had not complied with the order within twenty days would be dismissed with

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5. *See* note 1 *supra.*

6. *See* Fed. R. Civ. P. 23(c)(3), *supra* note 1.

7. *See* Fed. R. Civ. P. 23(c)(2) -(c)(3), *supra* note 1.

8. *See* note 1 *supra.*

9. The first case dealing directly with the issue at the appellate level was decided in 1971. Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972).

10. Freeman, *Current Issues in Class Action Litigation*, 70 F.R.D. 251, 277 (1976).

11. 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972).

12. *Id.* at 1001.

13. *Id.*

14. Brennan v. Midwestern United Life Ins. Co., 286 F. Supp. 702 (N.D. Ind. 1968), *aff'd*, 417 F.2d 147 (7th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970).

15. Fed. R. Civ. P. 33 allows a party to serve interrogatories on any other party.

16. Fed. R. Civ. P. 34 allows a party to request any other party to provide documents or records to the party making the request.

17. 450 F.2d at 1002.

18. *Id.*

prejudice.[19] In June, 1967, the trial judge ordered those who had not complied with the discovery requests to show cause why their claims should not be dismissed with prejudice on or before July 14, 1967.[20] After the July 14 deadline, Midwestern moved to dismiss with prejudice the claims of those class members who failed to respond to the discovery requests or to the show-cause order.[21] The court granted the motion and dismissed the claims with prejudice.[22] The parties whose claims were dismissed challenged the dismissal after judgment was entered under Rule 60(b)[23] of the Federal Rules of Civil Procedure.[24]

The Seventh Circuit upheld the trial court, ruling that absent class members could be subjected to party discovery rules.[25] The Seventh Circuit stated that absent class members could not be required to undergo discovery "as a matter of course"[26] but ruled that a trial judge has discretion to authorize party discovery techniques if he determines that "justice to all parties requires that absent parties furnish certain information."[27] Before allowing discovery, the trial court must insure that certain conditions are met.[28] First, the requested information must actually be needed for trial preparation and the discovery devices cannot "be used to take unfair advantage of 'absent' class members."[29] Second, notice must adequately inform class members of the discovery order and the possible consequences of noncompliance with it.[30] The court ruled that both requirements were met in

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19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. FED. R. CIV. P. 60(b) provides:

    (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken . . . .
24. 450 F.2d at 1003.
25. *Id.* at 1006.
26. *Id.* at 1005.
27. *Id.*
28. *Id.* at 1006.
29. *Id.*
30. *Id.*

this case.[31] Judge Stevens[32] dissented on two grounds.[33] First, he agreed with the movants that the absent members were not parties to the litigation and thus were not subject to judgment,[34] and second, he felt that the representation of counsel had been inadequate.[35]

The cases immediately following *Brennan* reached contrary results. In *Fischer v. Wolfinbarger*[36] and *Wainwright v. Kraftco Corp.*,[37] both district courts held that interrogatories could not be obtained from absent class members.[38] In *Fischer*, the court stated that "it is not intended that the members of the class should be treated as if they were parties plaintiff subject to the normal discovery procedures" because this would impale Rule 23.[39] The court distinguished *Brennan* on the ground that in *Brennan* the plaintiff's counsel joined the defendant's counsel in requesting discovery,[40] while in this case the plaintiff's counsel vigorously opposed discovery.[41] The court in *Wainwright* specifically rejected the *Brennan* approach and adopted the *Fischer* approach.[42] The court stated that Rule 23 does not suggest that class members are parties and indicated that they should not be treated as such.[43] Since Rules 33[44] and 34[45] contemplate discovery only from parties, discovery was not allowed against class members other than the parties plaintiff.[46]

Subsequent cases fit into three basic categories:[47] those allowing discovery in class actions, those allowing discovery in class actions but denying it in the specific case and those denying discovery in class actions.

The first group follows the *Brennan* approach and allows discovery. This approach has been adopted by the D.C. Circuit[48] as well as by the Seventh Circuit. The D.C. Circuit has taken the position that the courts have the authority to permit reasonable discovery under Rule 23(d)[49] and they

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31. *Id.*
32. Now Justice Stevens of the United States Supreme Court.
33. 450 F.2d at 1006-07.
34. *Id.*
35. *Id.* at 1007.
36. 55 F.R.D. 129 (W.D. Ky. 1971).
37. 54 F.R.D. 532 (N.D. Ga. 1972).
38. 54 F.R.D. 534; 55 F.R.D. at 132.
39. 55 F.R.D. at 132.
40. *Id.* at 133.
41. *Id.*
42. 54 F.R.D. at 534.
43. *Id.*
44. *See* note 15 *supra*.
45. *See* note 16 *supra*.
46. 54 F.R.D. at 534.
47. Robertson v. National Basketball Ass'n, 67 F.R.D. 691, 699 (S.D.N.Y. 1975).
48. Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977); United States v. Trucking Employers, Inc., 72 F.R.D. 101 (D.C. Cir. 1976).
49. 72 F.R.D. at 104.

have imposed requirements similar to the requirements imposed in *Brennan*. First, the information requested must be relevant to the determination of common questions.[50] Second, the requests must be in good faith and not "undertaken with the purpose or effect of harassment of absent class members or of altering the membership of the opposing class."[51] Finally, the information requested must not be obtainable from representative parties.[52] This approach was also accepted by the District Court for the District of Columbia in a case in which claims of three absent members were dismissed for failing to comply with discovery procedures.[53] The court did not set any standards, but simply cited *Brennan*.[54]

The second group of cases recognizes the general principle that discovery can be had from absent class members, but does not allow it in the specific case. Thus, the Seventh Circuit, following *Brennan*, did not allow discovery in *Clark v. Universal Builders, Inc.*[55] While the court adopted the *Brennan* test, it placed the burden of proof on the party requesting discovery and ruled that the burden of proof was not met.[56] The court held that the trial court had not determined whether the information was necessary or whether it was merely a ploy to reduce class membership.[57] Since the trial court had not made a determination of these factors, the appellate court held that it was error to allow discovery.[58]

Similar approaches have been adopted by district courts in *Bisgeier v. Fotomat Corp.*,[59] *Gardner v. Awards Marketing Corp.*[60] and *Hopson v. Schilling*.[61] In *Bisgeier*, the court held that the information requested did not pass the *Brennan* tests.[62] The interrogatories related only to the identity of claimants and the amount of the claim and to other information having "no conceivable relevance."[63] The court also determined that the interrogatories might be a tactic to take advantage of the absent members or to reduce the size of the class.[64] In *Gardner*, the court recognized the principle that interrogatories may be submitted to a class only where there is a

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50. 566 F.2d at 187; 72 F.R.D. at 104.
51. 72 F.R.D. at 104. *Accord*, 566 F.2d at 187.
52. 566 F.2d at 187.
53. Bishop v. Jelleff Assocs., 398 F. Supp. 579, 594 (D.D.C. 1974).
54. *Id.*
55. 501 F.2d 324, 340 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974).
56. *Id.* The court also noted that the burden for one desiring to take depositions was an even higher one than if interrogatories were requested. *Id.* at 341.
57. *Id.* at 340.
58. *Id.* The court also commented that they did not feel that the defendants could show that their interrogatories were meritorious under any circumstances. *Id.*
59. 62 F.R.D. 118, 120 (N.D. Ill. 1973).
60. 55 F.R.D. 460 (D. Utah 1972).
61. 418 F. Supp. 1223, 1241 (N.D. Ind. 1976).
62. 62 F.R.D. at 120.
63. *Id.*
64. *Id.* at 121.

"strong showing of necessity or at least of likely material aid in the resolution of common issues."[65] The court ruled that there was not a showing of necessity or likely material aid.[66] The court also held that the usual discovery techniques would be adequate to develop the common issues in this case.[67] Furthermore, the court stated that this was not a situation where it was necessary to identify the claimants or process the claims before trial.[68] In *Hopson*, plaintiffs challenged Indiana's poor relief law both facially and as applied.[69] The court certified both the plaintiff and the defendant classes for the challenge to the law on its face,[70] but denied class status for the challenge of the statute as applied.[71] The motion for discovery from the absent defendants was denied because a challenge to the facial validity did not require any evidence of what the trustees actually did.[72]

While the same standards were adopted, a slightly different approach was taken by the court in *Robertson v. National Basketball Association*.[73] The court recognized the *Brennan* standards as appropriate and applied them.[74] The court ruled that the necessary showing of relevance had been made.[75] However, to prevent the discovery device from being abused, two limitations were placed on discovery by the court.[76] First, the court limited the number of individuals to whom interrogatories could be sent.[77] Second, the court would not exact compliance with the order by threat of dismissal under 37(d)(2).[78]

The third group of cases is represented by *Fischer* and *Wainwright*. In those cases, discovery of absent class members was not allowed. This view has found some implicit support in cases that have held that absent members are not parties for other purposes.[79]

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65. 55 F.R.D. at 463.
66. *Id.*
67. *Id.* at 464.
68. *Id.* at 463.
69. 418 F. Supp. at 1227-28.
70. *Id.* at 1238.
71. *Id.* at 1239.
72. *Id.* at 1241.
73. 67 F.R.D. 691 (S.D.N.Y. 1975).
74. *Id.* at 700.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 700-01. FED. R. CIV. P. 37(d)(2) provides:

> (d) Failure of Party to attend at Own Deposition or Serve Answers to interrogatories or respond to request for inspection. If a party . . . fails . . . (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it make take any action authorized under paragraphs (A), (B), and (C) of subdivisions (b)(2) of this rule . . . .

79. *See* Lamb v. United Security Life Co., 59 F.R.D. 44, 48 (S.D. Iowa 1973) (absent

While the Supreme Court has never spoken on this exact issue, the Court has made some relevant comments in a different context. In *American Pipe & Construction Co. v. Utah*,[80] the Court dealt with the issue of whether the statute of limitations bars claims of absent members when class action status has been denied. In ruling that the claims were not barred by the statute the Court stated that:

> [P]otential class members are mere passive beneficiaries of the action brought in their behalf. Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case.[81]

The implication from the Court's comment that absent class members may be required to do something, is clear. It is not clear, however, if that something includes submitting to discovery.

These cases show that two divergent views exist. The *Brennan* view stresses liberal discovery rights[82] and the discretion vested in the trial judge to manage a class action.[83] *Fischer* and *Wainwright* stress the general policies underlying Rule 23. This view contends that Rule 23 does not make absent members parties and thus they should not be required to submit to discovery under Rules 33 and 34.

III. Bases for Decisions

A. *"Proof of Claim" Precedents*

Some courts have required that absent members who do not opt out under Rule 23(c)(2) "take some affirmative action to remain in the class as a condition of participating in the award."[84] Usually absent plaintiffs will be required to file a proof of claim form.[85] The court will often rule that failure

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members are not parties and cannot be liable for court costs if the action is unsuccessful); Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 485, 488-89 (S.D.N.Y. 1973) (absent members are not parties under Rule 23 for the purpose of having counterclaims asserted against them).

80. 414 U.S. 538 (1974).

81. *Id.* at 552.

82. *See* 4A J. Moore, Federal Practice ¶ 33.02 (2d ed. 1969).

83. *See* Fed. R. Civ. P. 23(c), 23(d)(1)-(d)(4).

84. Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 324 (1972).

85. *See* Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 403-04 (S.D. Iowa 1968), *aff'd on other grounds*, 409 F.2d 1239 (8th Cir. 1969); Minnesota v. United States Steel Corp., 44 F.R.D. 559, 577 (D. Minn. 1968); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 459 (E.D. Pa. 1968); Harris v. Jones, 41 F.R.D. 70, 74-75 (D. Utah 1966). This procedure is also approved by Professor Moore. 3B J. Moore, Federal Practice ¶ 23.55 at 23-455-59 (2d ed. 1969).

to file the form will bar recovery.[86] The court in *Gardner v. Awards Marketing Corp.*[87] allowed discovery apparently solely on the basis of these precedents.[88] While not specifically relying on these cases as precedent, the court in *Brennan* noted that this type of discovery had been allowed by some courts.[89] The issue then is whether these proof of claim cases have any value as precedent in the discovery area. Three factors which reduce their value as precedent have been cited.[90]

The first factor is that contrary authority exists.[91] Although this is true,[92] this factor alone should not distract from the precedential value of the cases. There are very few areas of the law that are so well settled that no contrary authority exists.

The second factor that undermines the value of these cases as precedent is the "questionable nature of some of the policy considerations expressed in these decisions."[93] While it may be true that the policy considerations in some decisions are not the most well reasoned,[94] that does not mean that all of the policy considerations are not persuasive. Simply because one case or one argument in a case is not well reasoned, should not detract from the validity of other cases or other arguments founded on more solid policy considerations.

The third factor which negates the precedential value of the proof of claim cases is the difference between that device and discovery.[95] By its very nature, discovery relates to the merits of the case. Proof of claim forms, however, are used to determine the size of the class and to determine whether the named representatives will adequately represent the class, i.e., manageability considerations.[96] In addition, proof of claim forms determine individual questions of damage after the common questions have been

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86. *See* cases cited note 85 *supra*. *But see* Korn v. Franchard Corp., 50 F.R.D. 57, 59-60 (S.D.N.Y. 1970).

87. 55 F.R.D. 460 (D. Utah 1972).

88. *Id.* at 462. The court stated that it was "not questioned" that discovery should be allowed, merely citing proof of claim cases as precedent. *Id.*

89. Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972).

90. *See* Note, *Party Discovery Techniques: A Threat to Underlying Federal Policies*, 68 Nw. U.L. Rev. 1063, 1072 (1974) [hereinafter cited as Northwestern Note].

91. *Id.*

92. *See* B&B Investment Club v. Kleinert's Inc., 62 F.R.D. 140, 148-49 (E.D. Pa. 1974); Korn v. Franchard Corp., 50 F.R.D. 57, 60 (S.D.N.Y. 1970); Berman v. Narragansett Racing Ass'n, 48 F.R.D. 333 (D.R.I. 1969).

93. Northwestern Note, *supra* note 90, at 1073.

94. *See, e.g.*, Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 459 (E.D. Pa. 1968) (the court expressed a concern about "one way intervention"). *See also* Northwestern Note, *supra* note 90, at 1073.

95. Northwestern Note, *supra* note 90, at 1073-74.

96. *E.g.*, Korn v. Franchard Corp., 50 F.R.D. 57, 59 (S.D.N.Y. 1971); Harris v. Jones 41 F.R.D. 70, 75 (D. Utah 1966).

decided.[97]

While taken alone these factors may not represent a serious attack on the validity of proof of claim precedents. Taken as a group, however, with the additional consideration of the vast difference between a simple proof of claim form and numerous interrogatories, the precedential value does appear to be diminished. In any event, this is a very technical argument that should not be dispositive of the issue.[98]

B. *The Rules*

The logical place to turn is to the rules themselves. Rule 23 enables the court to conduct a class action, while the discovery rules allow one party to obtain information from another party. The courts, however, have relied on both Rule 23 and the discovery rules[99] in allowing some form of discovery from absent members. The penalties for noncompliance have been imposed under either Rule 23 or under Rule 37.

1. *Rule 23*

Subdivisions (c)(2) and (d) of Rule 23 have been relied on by the courts in requiring discovery and sanctioning noncompliance.[100] Subdivision (c)(2) requires that the absent class members be notified that the class members will be excluded on their request and that the judgment will bind those who do not request exclusion.[101] One court has ruled that Rule 23(c)(2) does not prohibit the use of the proof of claim procedure because the rule "does not limit the matters that may be included within the notice."[102] The notes of the Advisory Committee, however, make it clear that the purpose of the rule is merely to provide notice.[103] Giving notice is certainly totally different from requiring discovery.

Subdivisions (d)(1), (d)(4) and (d)(5) of Rule 23 clearly cannot be used as authority for requiring discovery.[104] Therefore, the courts that find authority for requiring information from absent members must rely on subdi-

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97. *See Proposed Rules of Civil Procedure*, 39 F.R.D. 69, 103 (1966).

98. The view that a highly technical argument may not be dispositive was also expressed in NORTHWESTERN Note, *supra* note 90, at 1070.

99. FED. R. CIV. P. 33-34, 37.

100. Cases relying on Rule 23(c)(2) include: Minnesota v. United States Steel Corp., 44 F.R.D. 559, 577 (D. Minn. 1968); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 403 (S.D. Iowa 1968). The cases citing Rule 23(d) include: Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1004 (7th Cir. 1971); United States v. Trucking Employers, Inc., 72 F.R.D. 101, 104 (D.D.C. 1976); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 403 (S.D. Iowa 1968); Harris v. Jones, 41 F.R.D. 70, 74-75 n.9 (D. Utah 1966).

101. *See* note 1 *supra*.

102. 281 F. Supp. at 403.

103. *See Proposed Rules of Civil Procedure*, 39 F.R.D. 69, 104-05 (1966).

104. *See* note 1 *supra*.

visions (d)(2) or (d)(3).[105] Subdivision (d)(2) allows the court to give the absent class members notice to keep them informed.[106] The court is also permitted to invite intervention and presentation of claims from absent members.[107] Being allowed to invite members to intervene and present claims, however, is totally different from requiring intervention and the presentation of claims.[108] Rule 23 (d)(3) allows the court to impose conditions on intervenors or representative parties. By definition absent class members are not representative parties. They are clearly also not intervenors.[109] Therefore, this section furnishes no basis for imposing discovery on absent members.

The courts are in dispute about what the spirit of Rule 23 requires. One court has stated that although the language of Rule 23 does not specifically allow discovery of absent class members, the spirit of the rule would allow that procedure.[110] Another court has stated that Rule 23 would be useless if discovery was allowed from absent members.[111] Thus, while Rule 23 does not specifically allow discovery from absent class members, it does not specifically prohibit such discovery. Clearly there is some debate as to what the spirit of the rule requires.

2. *The Discovery Rules*

The discovery rules speak of allowing discovery of parties,[112] and Rule 37 speaks of sanctioning parties who fail to comply with the discovery rules.[113] Since these rules cover only parties, the issue is whether absent class members are parties. Some courts have held that absent members are parties[114] while others have held that they are not parties, and thus, not subject to discovery.[115]

The rules themselves do not indicate whether absent members should be parties. Whether an absent member is called a party or not is merely a conclusion of the court, based on the competing policy considerations sur-

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105. *See* Note, *Requests for Information in Class Actions*, 83 YALE L.J. 602, 607 (1974) [hereinafter cited as YALE Note].

106. *See* note 1 *supra*.

107. *See* note 1 *supra*.

108. *See* YALE Note, *supra* note 105, at 607-08, where it is contended that allowing discovery would require that the absent members who respond be treated as intervenors. This would transform the class action into a massive permissive joinder action. *Id.* at 607.

109. *See* FED. R. CIV. P. 24.

110. Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972).

111. Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972).

112. *See* notes 16 and 17 *supra*.

113. *See* note 78 *supra*.

114. *See* 450 F.2d at 1004-05. In *Brennan* the court referred to the absent members as "absent parties." *Id.* at 1005.

115. 54 F.R.D. at 534; Fischer v. Wolfinbarger, 55 F.R.D. 129, 132 (W.D. Ky. 1971).

rounding the rules.[116] Thus, it is necessary to examine these competing policy considerations.

C. *Competing Policy Considerations*

1. *Protection of Absent Members*

Clearly one thing that should be considered is protection of absent members of the class. One of the purposes of Rule 23 is to allow an individual with a small claim that would not otherwise be prosecuted to have a vehicle for recovery.[117] This policy is apparently undermined by allowing discovery of absent class members. Consequently, this procedure may reduce the incentive of the small claimant to press his claim. While proof of claim forms may be relatively simple, interrogatories are often complex.[118] The absent members may not desire to spend the time necessary to respond to the interrogatories.[119] In addition, with the complexity of interrogatories it is almost certain that legal advice would be needed to answer them. This could easily cost more than the potential recovery.

It has been recognized by the courts that discovery can be "a tactic to take undue advantage of the class members or . . . a strategem to reduce the number of claimants."[120] The courts have held that it is their duty to prevent such abuse of the discovery technique.[121] It is in fact a requirement of the "*Brennan* test" that the information must actually be needed and that discovery not be used to harass the absent members.[122] Considering the protection extended to absent members by the courts and the availability of the class' counsel to aid in answering interrogatories, however, it appears that plaintiffs do not suffer any real harm when discovery is allowed.

2. *Fairness to the Defendant*

The second consideration is fairness to the defendants. While in most cases the information from the absent members may not actually be

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116. *See, e.g.*, 450 F.2d at 1004-05; 54 F.R.D. at 534; 55 F.R.D. at 132. *See also* YALE Note, *supra* note 105, at 605-06.

117. *See, e.g.*, Korn v. Franchard Corp., 50 F.R.D. 57, 60 (S.D.N.Y. 1969). *See also* NORTHWESTERN Note, *supra* note 90, at 1075.

118. In *Wainwright*, for example, defendants sent 25 detailed interrogatories to plaintiffs, followed by a second set of interrogatories and a set of 63 requests for document production. 54 F.R.D. at 533.

119. In *Wainwright*, several absent plaintiffs asked to be dismissed as parties, because they could not justify the time spent in answering interrogatories. 54 F.R.D. at 534.

120. Dellums v. Powell, 566 F.2d 231, 236 (D.C. Cir. 1977) (quoting Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1005 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972)). *Accord*, Robertson v. National Basketball Ass'n, 67 F.R.D. 691, 700 (S.D.N.Y. 1975).

121. *E.g.*, 450 F.2d at 1005; 67 F.R.D. at 700.

122. 450 F.2d at 1006.

needed,[123] there are cases where that information is necessary.[124] Normally this information could be obtained from the representative members. It has been suggested that if that discovery was inadequate, the number of representative parties could be enlarged by requiring intervention of members who have the needed information.[125] This, however, would be just as great a burden, if not considerably more of one, on the members required to intervene.

It has also been suggested[126] that discovery could be obtained under Rules 30[127] and 31.[128] Rule 30 depositions of the absent members would clearly be impractical.[129] Written depositions might be possible for small classes; however, this would increase costs for the defendants.[130] Furthermore, there is the need to serve a copy of the questions on other parties.[131] Finally, it may be necessary to obtain a subpoena to compel the witness to attend.[132] Thus, it would appear more fair to the defendants to allow discovery of the absent members.

IV. Conclusion

While the general rule allowing discovery of absent class members has been attacked,[133] it is still clearly the rule in most jurisdictions that have considered the issue. It is also the most equitable approach. Moreover, it is more fair to defendants. In theory it should not be any more harmful to the plaintiffs than discovery under Rules 30 and 31 with the sanctions of Rule 45 available. This theory has been sustained by the courts' rigid application of the "*Brennan* test."[134] Since plaintiffs are not harmed in any prejudicial way and defendants are benefited by allowing discovery, it appears that the spirit of the Federal Rules requires that absent class members be subject to discovery.

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123. *See, e.g.*, Gardner v. Awards Marketing Corp., 55 F.R.D. 461, 463-64 (D. Utah 1972).

124. *See, e.g.*, 450 F.2d at 1005 wherein the plaintiff's counsel admitted that the information sought was relevant in determining liability of the defendant to the class.

125. Yale Note, *supra* note 105, at 614-15. This could be accomplished under Fed. R. Civ. P. 23(c)(1), (d)(3).

126. *See* Northwestern Note, *supra* note 90, at 1076.

127. Fed. R. Civ. P. 30 allows the taking of oral depositions of any person.

128. Fed. R. Civ. P. 31 allows the taking of written depositions of any person.

129. Northwestern Note, *supra* note 90, at 1077.

130. Schmertz, *Written Depositions Under Federal and State Rules as Cost-Effective Discovery at Home and Abroad*, 16 Vill. L. Rev. 7, 36 (1970).

131. Fed. R. Civ. P. 31(a).

132. Fed. R. Civ. P. 31(a) allows the use of a Rule 45 subpoena to compel attendance.

133. *See, e.g.*, Northwestern Note, *supra* note 90; Yale Note, *supra* note 105.

134. *See, e.g.*, Clark v. Universal Builders, Inc., 501 F.2d 324, 340-41 (7th Cir. 1974); Bisgeier v. Fotomat Corp., 62 F.R.D. 118 (N.D. Ill. 1973).