

Chicago-Kent College of Law

From the Selected Works of Joan E. Steinman

March, 1981

The Party Status of Absent Plaintiff Class Members: Vulnerability to Counterclaims

Joan E. Steinman, *Chicago-Kent College of Law*

The Party Status of Absent Plaintiff Class Members: Vulnerability to Counterclaims

JOAN STEINMAN*

Class action suits often involve large numbers of plaintiffs who rarely participate in the litigation, and whose status as parties under the Federal Rules of Civil Procedure remains unclear. Professor Steinman proposes a method by which courts can determine whether certain protections or obligations normally reserved for parties should apply to these absent class members. Using the "core characteristics" of parties that Professor Steinman has drawn from the case law, courts will be able to determine the party status of absent plaintiffs in accordance with the policies underlying both the particular federal rule at issue and the rule that governs class actions. Applying her proposed analysis to the question whether absent plaintiffs should be subject to counterclaims, Professor Steinman concludes that in virtually all cases such treatment would be inconsistent with the purposes of the federal rules and the class action device itself.

The absent members of a plaintiff class certified under rule 23 of the Federal Rules of Civil Procedure¹ exist in limbo, neither full-fledged parties with all of the rights and obligations attending that status, nor complete strangers to the litigation. Federal courts have produced widely divergent characterizations and treatments of absent class members.² For some purposes, courts have held the absent members of a plaintiff class to be parties, or

*Assistant Professor of Law, Illinois Institute of Technology Chicago-Kent College of Law. A.B. 1969, University of Rochester; J.D. 1973, Harvard University. I would like to thank Paul Sheldon, Krista Johns, and other law students of I.I.T. Chicago-Kent College of Law, for their research assistance in the preparation of this article.

1. Throughout this article all references to rules are to the Federal Rules of Civil Procedure unless explicitly stated otherwise. The term "absent," when used to refer to members of the plaintiff class, includes those class members who enter an appearance as well as those who do not. It excludes, however, the named representative parties and any class members who formally intervene in the action.

2. See, e.g., *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1105 (5th Cir. 1977) (class members generally considered derivative rather than direct parties); *Pearson v. Ecological Science Corp.*, 522 F.2d 171, 176 (5th Cir. 1975) (referring to absent class members as nonparty class members), *cert. denied*, 425 U.S. 912 (1976); *Brennan v. Midwestern United Life Ins. Co.*, 450 F.2d 999, 1005 (7th Cir. 1971) (referring to absent class members as absent parties), *cert. denied*, 405 U.S. 921 (1972); *Norman v. McKee*, 431 F.2d 769, 774 (9th Cir. 1970) (referring to absent class members as unnamed plaintiffs and absent parties), *cert. denied*, 401 U.S. 912 (1971); *Watson v. Branch County Bank*, 380 F. Supp. 945, 960 (W.D. Mich. 1974) (absent class members merely permissive parties), *rev'd mem.*, 516 F.2d 902 (6th Cir. 1975); *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 485, 489 (S.D.N.Y. 1973) (absent class members not parties for purposes of counterclaims); *Guy v. Abdulla*, 57 F.R.D. 14, 16, 18 (N.D. Ohio 1972) (referring to defendant class members as absent parties); *Katz v. Carte Blanche Corp.*, 53 F.R.D. 539, 541 n.3 (W.D. Pa. 1971) (class members properly "non-nominal" parties, not non-parties), *rev'd on other grounds*, 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974).

have treated them as such. In other contexts courts have concluded that they are not parties, or have treated them differently from parties. Occasionally, in analyzing whether absent plaintiffs are parties for a specific purpose, different courts have reached completely different conclusions.³ Most courts make little effort to reconcile the varying determinations of the issue whether an absent class member is a party. Courts often rely upon precedent, or disregard it, without examining whether the rationale of a prior court is applicable to the particular legal problem at issue.⁴ They concentrate solely on the functions and policies of a particular rule or doctrine, without any consideration of the "party" characteristics of the absent class member.⁵

This article focuses on the absent members of plaintiff classes certified under rule 23(b)(3).⁶ It identifies the core characteristics of a "party" to litigation, and uses these characteristics to assist courts in reaching uniformly reasoned decisions that are consistent with a coherent portrait of the absent plaintiff class member. The article then proposes a procedure for courts to follow in determining whether an absent member is a party for purposes of whatever specific rule or doctrine is applicable to the circumstances of the case.

Under this proposal, a court first should analyze the particular procedural rule or judicial doctrine in question, including the policies underlying it, to

3. Compare *Fischer v. Wolfinbarger*, 55 F.R.D. 129, 132 (W.D. Ky. 1971) (discovery directed at class members not named as plaintiffs improper because absentees not parties for purposes of rule 33) and *Wainwright v. Kraftco Corp.*, 54 F.R.D. 532, 534 (N.D. Ga. 1972) (same) with *Brennan v. Midwestern United Life Ins. Co.*, 450 F.2d 999, 1006 (7th Cir. 1971) (absent class members may be required to submit to discovery as parties if necessary), *cert. denied*, 405 U.S. 921 (1972).

4. See *In re Four Seasons Sec. Laws Litigation*, 525 F.2d 500, 504 (10th Cir. 1975) (in deciding whether absent class members may file rule 60(b) motions, court merely mentioned cases holding absentees parties for some purposes, nonparties for others); *National Super Spuds, Inc. v. New York Mercantile Exch.*, 75 F.R.D. 40, 45 (S.D.N.Y. 1977) (in deciding whether absent class members subject to counterclaims, court simply "not convinced" by cases holding absentees not parties).

5. See *Van Gemert v. Boeing Co.*, 590 F.2d 433, 440 n.15 (2d Cir. 1978) (whether given procedural rule should be applied to those not named as plaintiffs depends on function of the rule), *aff'd*, 444 U.S. 472 (1980). See also 87 HARV. L. REV. 470, 473 n.19 (1973) (courts apply rule 23 to absent class members according to competing policy considerations).

6. See FED. R. CIV. P. 23(b)(3). Concentration on rule 23(b)(3) classes was chosen for several reasons. First, more class actions are certified under rule 23(b)(3) than under 23(b)(1) or 23(b)(2). C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 72, at 352 (3d ed. 1976). Moreover, (b)(3) is the "most expansive and controversial" category of class actions. 2 NEWBERG ON CLASS ACTIONS § 2475v (1977).

Second, the (b)(3) class, and consequently the absent (b)(3) class member, are relatively new procedural inventions. Prior to the amendment of rule 23 in 1966, the "spurious" class action, which involved several rights affected by a common question of law or fact, was not a true class action. This "spurious" action adjudicated the rights and liabilities of only the named parties and intervenors. Advisory Committee's Notes to *Amendments to Federal Rules of Civil Procedure*, 39 F.R.D. 69, 98-99 (1966) [hereinafter *Advisory Committee's Notes*]. Consequently, (b)(3) class members closely resemble the persons who bore least similarity to traditional plaintiffs of any ostensible class members under old rule 23. Amended rule 23 made the (b)(3) class action one that results in judgments including those whom the court finds to be members of the class. *Id.* at 99; see FED. R. CIV. P. 23(c)(3) (providing scope of judgment). These factors make it particularly interesting to investigate the extent to which (b)(3) class members have been treated as parties and the extent to which they remain something other than parties.

Third, (b)(3) absent plaintiffs have been the focus of some of the most difficult questions regarding whether absent class members should be treated as parties. This is true, for example, of the question whether counterclaims may be asserted against absent members.

The article will compare the situation of absent class members of plaintiff classes certified under rules 23(b)(1) and (b)(2), and consider how the conclusions reached in this article should be modified with respect to them.

determine which of the core party characteristics the rule implicates. Having identified the qualities of a party most pertinent to the particular rule, a court applying the proposed analysis should determine whether, and to what extent, absent members of a plaintiff class share these qualities. If an absent class member shares the pertinent qualities, the court should consider the absentee a party. The court should then examine the purposes and policies of rule 23 to determine what adjustments, if any, are necessary to ensure that granting party status to an absent plaintiff will not defeat the effectiveness of the class action.⁷

Judicial failure to give careful consideration to the party status of absent class members has important implications for the future utility of class actions. In the absence of such scrutiny, class action defendants have developed tactics that encourage absent plaintiffs to "opt out" of the litigation.⁸ Among these tactics, the threat of counterclaims is particularly troubling. The possibility of counterclaims not only induces potential plaintiffs to abandon the action, but also imperils the manageability of the class suit to the extent that courts may be unwilling to certify the proposed class.⁹ The success of this technique in inducing potential plaintiffs to abandon class action suits, and in inducing courts to disallow such suits, threatens the objectives of the entire class action procedure.

As an important illustration, the article's suggested analysis will be used to determine whether absent members of a plaintiff class certified under rule 23(b)(3) should be vulnerable to counterclaims asserted under rule 13. After discussing the present law governing counterclaims in class actions, the article integrates the policies of rule 13 with the core characteristics traditionally attributed to parties. This analysis suggests that some absent class members qualify as "opposing parties" under rule 13. Nevertheless, the final step of the procedure demonstrates that the purposes and policies of rule 23 preclude the allowance of counterclaims against absent plaintiffs except under extraordinary circumstances. Finally, the article explores the effects of this conclusion, and recommends necessary changes in the law governing counterclaims in class actions, and in the Federal Rules of Civil Procedure.

I. VULNERABILITY TO COUNTERCLAIMS

In recent years vulnerability to counterclaims has become one of the most significant risks attendant upon becoming a member of a plaintiff class in a rule 23(b)(3) class action. Following the 1966 amendments to rule 23, defendants apparently failed to perceive the possibility of asserting counter-

7. If a class member does not pass the threshold test of a "party" under the first two steps of the foregoing analysis, a court should not hold him to be a party for purposes of the specific rule or judicial doctrine in controversy. Acting within the broad discretionary powers afforded by rule 23(d), a court might nonetheless afford to absentees some rights in the class action or impose upon them some obligations that are normally concomitant to party status. If a court understands that the absent class member would not be treated as a party independently of rule 23, this understanding should aid the court in determining how far to go in affording rights or imposing duties.

8. See note 15 *infra* and accompanying text (discussing defense tactics that encourage plaintiffs to opt out of litigation).

9. See note 17 *infra* and accompanying text (discussing denial of class certification on grounds of unmanageability).

claims against absent plaintiffs. Beginning in 1970, however, defendants have sought with increasing frequency to plead counterclaims against absent members of a plaintiff class.¹⁰ This tactic has been used most often in two types of plaintiff class actions. In the first type, arising under the Truth in Lending Act,¹¹ the defendant creditors counterclaim for the underlying debts in alleged default.¹² In the second type, antitrust cases, defendants allege that plaintiff class members are delinquent in their accounts, in breach of contract, or guilty of antitrust violations and related common law torts such as fraud.¹³ It is possible that this tactic may become prevalent in other rule 23(b)(3) actions as well.¹⁴

The attractiveness of the counterclaim from the defendants' perspective increases the likelihood that its use will grow if the courts permit.¹⁵ Moreover, the filing, or even the threat of filing, counterclaims has persuaded some courts to deny certification of proposed (b)(3) plaintiff classes¹⁶ based upon a finding either that common questions do not predominate or that the class action is not a superior method of adjudication.¹⁷ This amounts to a

10. See *In re Sugar Indus. Antitrust Litigation*, 73 F.R.D. 322, 349 (E.D. Pa. 1976) (counterclaim against absent class members dismissed because absentees not parties for rule 13; counterclaim may be asserted only if absentee intervenes or files claim); *Lah v. Shell Oil Co.*, 50 F.R.D. 198, 200 (S.D. Ohio 1970) (court denied certification of class because of threat of counterclaims against plaintiff class, lack of common facts, and manageability problems).

Counterclaims also have been asserted against named plaintiffs, suing on their own behalf and on behalf of a class, and against class members who have intervened formally in the action. See *Perry v. Beneficial Fin. Co.*, 81 F.R.D. 490, 493 (W.D.N.Y. 1979) (counterclaim against absent class members dismissed because distinct legal and factual issues raised; counterclaim against named plaintiffs allowed because logical relation between claims); *Gilbert v. General Elec. Co.*, 59 F.R.D. 267, 272 (E.D. Va. 1973) (counterclaim allowed against named plaintiff union as individual party); *Klinzing v. Shakey's Inc.*, 49 F.R.D. 32, 35 (E.D. Wis. 1970) (counterclaims against individual named plaintiffs allowed because they are "real opponents").

11. 15 U.S.C. § 1640 (1976).

12. See, e.g., *Perry v. Beneficial Fin. Co.*, 81 F.R.D. 490, 492 (W.D.N.Y. 1979) (defendant creditor counterclaimed against named and unnamed proposed plaintiff class members for alleged default); *George v. Beneficial Fin. Co.*, 81 F.R.D. 4, 6 (N.D. Tex. 1977) (same); *Turoff v. Union Oil Co.*, 61 F.R.D. 51, 52 (N.D. Ohio 1973) (same).

13. See, e.g., *National Super Spuds, Inc. v. New York Mercantile Exch.*, 75 F.R.D. 40, 42 (S.D.N.Y. 1977) (antitrust defendant counterclaimed against members of plaintiff class for counter-conspiracy to influence commodities market); *In re Sugar Indus. Antitrust Litigation*, 73 F.R.D. 322, 348 (E.D. Pa. 1976) (antitrust defendant counterclaimed against members of plaintiff class for statutory and common-law violations including price-fixing, fraud, and debts owed); *Herrmann v. Atlantic Richfield Co.*, 72 F.R.D. 182, 185 (W.D. Pa. 1976) (antitrust defendant counterclaimed against members of plaintiff class for debts owed); *Cotchett v. Avis Rent A Car Sys., Inc.*, 56 F.R.D. 549, 551 (S.D.N.Y. 1972) (same).

14. See *Rollins v. Sears, Roebuck & Co.*, 71 F.R.D. 540, 542 (E.D. La. 1976) (dictum) (court noted possibility that counterclaims may deter class actions in areas other than Truth in Lending, such as securities).

15. See *Lobell, Defending a Truth in Lending Lawsuit*, U.C.C.L.J. 236, 260-61 (1973) (illustrating great potential of counterclaims as defensive technique in Truth in Lending suits). The use of counterclaims to intimidate plaintiffs is evident from defendants' efforts to persuade courts to inform absent class members of potential counterclaims. 87 HARV. L. REV. 470, 474 n.22 (1973); see *Gardner v. Gold Strike Stamp Co.*, [1971] Trade Cases ¶ 73,461, at 89,883 (D. Utah 1970) (defendant's request to notify class members of possible counterclaims denied because such notice would discourage participation in class action).

16. See note 17 *infra* (cases denying certification because of numerous potential counterclaims).

17. See, e.g., *George v. Beneficial Fin. Co.*, 81 F.R.D. 4, 8 (N.D. Tex. 1979) (class certification denied because threat of hundreds of counterclaims would hamper efficiency in managing case); *Carter v. Public Fin. Corp.*, 73 F.R.D. 488, 496 (N.D. Ala. 1977) (class certification denied because compulsory

significant victory for the defendants. Furthermore, even if the court certifies the class, plaintiff class members may opt out of the suit if threatened with counterclaims or with related discovery demands.¹⁸ Such a result reduces the defendants' financial exposure and increases their bargaining power in settlement negotiations.¹⁹ The growing use of counterclaims against class members renders the issue of class members' vulnerability to counterclaims an appropriate one for testing and illustrating the analytical method that this article proposes.

No federal appellate court has decided whether absent class members should be vulnerable to counterclaims. The district courts are divided; some decisions indicate that defendants may not counterclaim against absent class members,²⁰ while the majority of cases that apparently authorize counterclaims against members of the plaintiff class really do not address the issue. In many class actions brought under the Truth in Lending Act or the antitrust laws courts simply *assumed* that defendants may assert counterclaims against absent class members. These courts considered the likelihood or existence of

counterclaims rendered class action inferior method of resolving dispute); *Berkman v. Sinclair Oil Corp.*, 59 F.R.D. 602, 609 (N.D. Ill. 1973) (class certification denied because plethora of small counterclaims would make proceeding wholly unmanageable); *Rodriguez v. Family Publications Serv., Inc.*, 57 F.R.D. 189, 193 (C.D. Cal. 1972) (class certification denied because compulsory counterclaims raised new individual issues so that common questions not predominant). The argument of unmanageability, however, does not always succeed. See *In re Independent Gasoline Antitrust Litigation*, 79 F.R.D. 552, 559 (D. Md. 1978) (class certification granted despite defendant's threat of counterclaims because no insurmountable manageability problems); *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litigation*, 78 F.R.D. 622, 626 (W.D. Wash. 1978) (class certification granted because counterclaims involved common questions and thus posed no barrier to class action). Under rule 23(b)(3), an action may be maintained as a class action only if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3).

18. Although the discovery available against a member of the plaintiff class is narrowly limited, as an individual counter-defendant the class member would presumably be vulnerable to all the discovery normally allowed against a party defendant.

19. See 87 HARV. L. REV. 470, 479 n.46 (1973).

Once a significant number of class members subject to the counterclaims are excluded, defendants may decide to contest an action they would have otherwise settled. . . . More typically, narrowing the size of the class will lead to a smaller settlement, but will not substantially reduce the amount each remaining class member would recover.

Id.

20. The court in *Dennis v. Saks & Co.*, 20 Fed. R. Serv. 2d 994 (S.D.N.Y. 1975), dismissed defendants' counterclaims against absent class members. In so doing, however, it relied on *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 485 (S.D.N.Y. 1973), for the proposition that absentees are not parties for purposes of rule 13. 20 Fed. R. Serv. 2d at 999. This is an overly broad interpretation of *Donson*. See notes 23-37 *infra* and accompanying text (discussing *Donson*).

counterclaims in deciding other issues such as whether to certify the proposed class²¹ or whether the counterclaims were compulsory.²²

The two most thoughtful district court decisions to address the issue illustrate the problems courts have faced in determining the party status of absent class plaintiffs. In *Donson Stores, Inc. v. American Bakeries Co.*,²³ a group of retail grocers brought a class action under the Clayton Act²⁴ alleging a conspiracy to fix the price of bread. The defendants counterclaimed against unspecified members of the class, alleging price discrimination in violation of certain provisions of the Robinson-Patman Act.²⁵ The plaintiffs then moved to dismiss the counterclaims for failure to state a claim upon which relief could be granted.²⁶ The United States District Court for the Southern District of New York held that the absent class members were not parties for purposes of rule 13,²⁷ but nonetheless stated that were the defendants' liability to be established, the court would entertain counterclaims against individual class members.²⁸ The court made clear that the initial notice of the class action required by rule 23(c)(2) should inform class members of these potential counterclaims.²⁹

21. See, e.g., *Axelrod v. Saks & Co.*, 77 F.R.D. 441, 447 (E.D. Pa. 1978) (class certification granted because even assuming *arguendo* that absent class members opposing parties, counterclaims not numerous enough to hamper manageability); *Carter v. Public Fin. Corp.*, 73 F.R.D. 488, 496 (N.D. Ala. 1977) (class certification denied because potential counterclaims would render class action unmanageable); *Turoff v. Union Oil Co.*, 61 F.R.D. 51, 58-59 (N.D. Ohio 1973) (same); *Partain v. First Nat'l Bank*, 59 F.R.D. 56, 59 (M.D. Ala. 1973) (class certification granted because potential assertion of counterclaims should not defeat class action); *AAMCO Automatic Transmissions, Inc. v. Tayloe*, 67 F.R.D. 440, 450 (E.D. Pa. 1975) (class certification granted because assuming counterclaims against absent class members properly raised, action still manageable); *Berkman v. Sinclair Oil Corp.*, 59 F.R.D. 602, 609 (N.D. Ill. 1973) (class certification denied because plethora of potential small counterclaims would render class action unmanageable); *Cotchett v. Avis Rent A Car Sys., Inc.*, 56 F.R.D. 549, 551 (S.D.N.Y. 1972) (same).

22. See, e.g., *Perry v. Beneficial Fin. Co.*, 81 F.R.D. 490, 493 (W.D.N.Y. 1979) (focus on whether potential counterclaims against absent plaintiffs compulsory, assuming properly raised); *Axelrod v. Saks & Co.*, 77 F.R.D. 441, 447-48 (E.D. Pa. 1978) (same); *AAMCO Automatic Transmissions, Inc. v. Tayloe*, 67 F.R.D. 440, 450 (E.D. Pa. 1975) (same). Counterclaims that are compulsory under rule 13 are within the ancillary subject matter jurisdiction of a federal court; there need be no basis of subject matter jurisdiction independent of the principal claim in order for a federal court to adjudicate the counterclaim. *Baker v. Gold Seal Liquors Inc.*, 417 U.S. 467, 469 & n.1 (1974). An independent basis of subject matter jurisdiction over permissive counterclaims, however, must exist. *Federman v. Empire Fire & Marine Ins. Co.*, 597 F.2d 798, 812 (2d Cir. 1979). A permissive counterclaim in the form of a defensive set-off is an exception to this rule; if not asserted as a basis for affirmative relief, the permissive counterclaim does not require independent grounds for federal jurisdiction. *Binnick v. AVCO Fin. Serv., Inc.*, 435 F. Supp. 359, 366 (D. Neb. 1977); *United States ex rel. Kashulines v. Thermo Contracting Corp.*, 437 F. Supp. 195, 199 (D.N.J. 1976). See generally 3 MOORE'S FEDERAL PRACTICE ¶¶ 13.15, 13.19[1] (2d ed. 1980); 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 1414, 1422 (1971).

23. 58 F.R.D. 485 (S.D.N.Y. 1973).

24. 15 U.S.C. § 15 (1976).

25. See *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. at 487 (defendants alleged violations of 15 U.S.C. §§ 13(a), 13(f) (1976)).

26. *Id.*

27. *Id.* at 489. It also found that the counterclaims could not be maintained against absent class members as a defendant class because those claims were based on individual competitive violations and none of the allegations required by rule 23, such as common questions of law or fact and typicalness of claims, had been made. *Id.* For further discussion of this aspect of the case, see 87 HARV. L. REV. 470, 470-72 (1973).

28. 58 F.R.D. at 489-90.

29. *Id.* at 490.

The *Donson* court reasoned that absent class members are not parties for purposes of rule 13 because of their right passively to await the outcome of the suit while the class representatives carry on the adversary contest,³⁰ and because of the potential for abuse of counterclaims as a tactical device to encourage absent class members to opt out.³¹ In order to avoid prejudice to the defendants, however, the court approved the handling of counterclaims if and when the defendants' liability was established.³² As one commentator observed, the court determined by implication that class members become parties for purposes of rule 13 only when they file claims for damages.³³

Some courts have endorsed *Donson's* resolution of the problem.³⁴ A few courts have construed *Donson* as holding that absent class members are not parties until they are "specified"—identified by name—³⁵ and hence have held that any absentees so identified are opposing parties subject to counterclaims even though they have not filed individual claims for damages.³⁶ Although ostensibly intended to "prevent emasculation of the class action device" by a multiplicity of counterclaims,³⁷ this highly questionable reading of *Donson* would cause a court to exclude all specified members from the plaintiff class. This interpretation seems to invite the very abuse of counterclaims as a tactical device to encourage plaintiffs to opt out that the *Donson* court sought to avoid.³⁸

Four years after *Donson*, in *National Super Spuds v. New York Mercantile Exchange*,³⁹ another judge in the same district court went a step beyond *Donson* to hold that absent class members are opposing parties subject to counterclaims.⁴⁰ In *Super Spuds* the plaintiffs had sued on behalf of themselves and all other persons who had sold certain potato futures contracts

30. *Id.* at 489. The district court relied on *Korn v. Franchard*, 456 F.2d 1206, 1210 (2d Cir. 1972) (drafters of rule 23 assumed that many class members might not be personally enthusiastic in enforcing their rights), for its conclusion that absent class members have the right to be passive. 58 F.R.D. at 489.

31. 58 F.R.D. at 489.

32. *Id.* at 489-90. In support of their argument that absent members are not subject to counterclaims, the plaintiffs cited two district court opinions holding absent class members may not be ordered to answer interrogatories pursuant to rule 33, nor dismissed from a suit for failing to answer interrogatories. *Fischer v. Wolfenbarger*, 55 F.R.D. 129, 132 (W.D. Ky. 1971); *Wainwright v. Kraftco Corp.*, 54 F.R.D. 532, 534 (N.D. Ga. 1972). The *Donson* court mentioned these two opinions merely to recapitulate the plaintiffs' arguments and did not endorse the cases or their reasoning. 58 F.R.D. at 488-89.

33. 87 HARV. L. REV. 470, 471 n.7 (1973).

34. See *In re Sugar Indus. Antitrust Litigation*, 73 F.R.D. 322, 349 (E.D. Pa. 1976) (stating *Donson* gives correct rule); *Dennis v. Saks & Co.*, 20 Fed. R. Serv. 2d 994, 999 (S.D.N.Y. 1975) (construing *Donson* to hold absentees not parties for purposes of rule 13).

35. See *Rollins v. Sears, Roebuck & Co.*, 71 F.R.D. 540, 543 (E.D. La. 1976); *Turoff v. Union Oil Co.*, 61 F.R.D. 51, 59 (N.D. Ohio 1973).

36. In *Rollins v. Sears, Roebuck & Co.*, 71 F.R.D. 540 (E.D. La. 1976), the court held the specified absent members of the proposed plaintiff class subject to counterclaims but promptly excluded them from the proposed class. *Id.* at 543-44. In effect, the court prevented the absent plaintiffs from becoming opposing parties against whom counterclaims could be asserted. By contrast, the United States District Court for the Southern District of New York later gave identical treatment to countersued absentees who were identified by name and those who were not so identified. See *National Super Spuds, Inc. v. New York Mercantile Exch.*, 75 F.R.D. 40, 42 (S.D.N.Y. 1977) (counter-defendants, whether identified or not, all considered "absent" class members because neither named plaintiffs nor representative parties).

37. *Rollins v. Sears, Roebuck & Co.*, 71 F.R.D. 540, 543 (E.D. La. 1976).

38. See 58 F.R.D. at 489 (in reaching decision court noted that right to counterclaim readily subject to abuse as tactical device to encourage plaintiffs to opt out).

39. 75 F.R.D. 40 (S.D.N.Y. 1977).

40. *Id.* at 45.

between specified dates. They sought damages under the Commodity Exchange Act⁴¹ and Section 1 of the Sherman Act,⁴² alleging manipulative acts by the defendants designed to artificially depress trading prices.⁴³ One of the defendants counterclaimed against eight named absent members of the putative plaintiff class as well as against unidentified absent class members.⁴⁴ The district court denied plaintiffs' motion to dismiss the counterclaims, holding that the absent members of the proposed plaintiff class were, from the commencement of the lawsuit, opposing parties within the meaning of rule 13.⁴⁵

The court regarded as one and the same the questions whether absent class members are opposing parties within rule 13 and whether counterclaims should be permitted against them. While acknowledging that "the class action device allows class members to sit back and await the outcome," the court found more persuasive the argument that "class members agree to the prosecution of the action on their behalf, are bound by the resulting judgment, and are entitled to reap the benefits if the judgment is favorable."⁴⁶ Moreover, the court feared that a judicial doctrine barring counterclaims against absent class members might preclude altogether the assertion of claims arising out of the transaction or occurrence that was the subject matter of the class claim. The court noted that these counterclaims normally would be compulsory counterclaims under rule 13(a) and therefore would be lost if not asserted in the original action.⁴⁷

Although on its face the *Super Spuds* holding contradicts that of *Donson*, the *Super Spuds* court viewed its decision as departing but slightly from what *Donson* did, in contrast to what *Donson* said. The court regarded *Donson*'s postponement of the time when absent class members become opposing parties as simply a management technique to cope with the danger of tactical abuse by defendants and the concomitant emasculation of the class action device.⁴⁸ For numerous reasons, the *Super Spuds* court considered this type of management technique both unnecessary and ineffectual. First, on the facts before it, the court noted that it could avert the danger of tactical abuse by excluding from the class those persons against whom counterclaims would be filed.⁴⁹ Second, the court found that the *Donson* management technique did

41. 7 U.S.C. §§ 6b, 13 (1976).

42. 15 U.S.C. § 1 (1976).

43. 75 F.R.D. at 42.

44. *Id.* The defendant asserted its counterclaims against these members individually, and not as a class. *Id.* at 42 & n.7, 44. The counterclaims asserted that various members of the plaintiff class engaged in a counter-conspiracy to "squeeze" both the futures and cash market in order to force defaults by short sellers of the contracts. *Id.* at 42.

45. *Id.* at 45.

46. *Id.*

47. *Id.*; see FED. R. CIV. P. 13(a) ("a pleading shall state as a counterclaim any claim . . . if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim"). The court's concern, in any event, would never justify allowing the assertion against absent class members of permissive counterclaims because a later assertion of such claims in an independent action would not be precluded. See *Mercoird Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 667 (1944) (failure to assert permissive counterclaim in first action between parties does not preclude assertion in second action). See generally 3 MOORE'S FEDERAL PRACTICE ¶ 13.18, at 13-453 (2d ed. 1980).

48. 75 F.R.D. at 43-44.

49. *Id.* The court indicated that while it did not know the number of plaintiffs against whom counterclaims might be filed, the group probably would not constitute a substantial proportion of the proposed class. *Id.* at 44.

not eliminate the abusive potential that derives from early notice of counterclaims. The *Super Spuds* court unequivocally concluded that notice of counterclaims should be included in the initial notice as a factor for class members to consider in determining whether to exclude themselves from the class.⁵⁰ *Donson* failed to reduce the potential for abuse because it too required that class members be informed of possible counterclaims in the initial notice to the class. The *Super Spuds* court believed that no greater pressure to opt out would be given by providing notice of *existing* counterclaims than by providing notice that the court would consider *potential* counterclaims against a class member if defendants' liability were established and a class member then filed a claim for damages.⁵¹

The court perceived no prejudice to plaintiffs from its ruling. Although the class representatives legitimately were concerned that the number and complexity of additional issues raised by the counterclaims might jeopardize their forthcoming motion for certification as a class, the *Super Spuds* court was confident that rules 23 and 42⁵² provided ample flexibility to manage the proceedings.⁵³ Moreover, the court expected that were the counterclaims to be dismissed, they would return to the court either in other pending lawsuits or in new actions.⁵⁴ In addition, the court believed that some issues raised by the counterclaims might be raised as affirmative defenses in the present action.⁵⁵ Thus, the court saw no point in dismissing the counterclaims because it inevitably would have to consider their treatment in conjunction with the other claims already asserted.⁵⁶

Although the *Super Spuds* court was correct to point out the similarities between its result and that in *Donson*, it did not appreciate the significant differences between the two cases. Both cases indicate that defendants may assert counterclaims against absent members of a plaintiff class. *Donson*, however, allowed these claims only against class members who filed claims for damages upon a finding of defendant's liability. *Donson's* postponement of absentees' status as opposing parties was more than a management technique; it determined which members of the plaintiff class would be vulnerable to liability and limited this group to those who individually took the active step of filing a claim for damages against the defendants. Thus, in dismissing the *Donson* procedures as a mere "technique for managing and organizing . . .

50. *Id.* at 43-44. In the author's view, this is the correct position. The notice should be timed and phrased so as to minimize the risks of intimidating and misleading absent class members, but it should inform the absentees of the litigation burdens that will be imposed upon them if they remain members of the plaintiff class, if they file an appearance or a claim for damages, if they intervene, or if they act in other specified ways. If the notice contains too little information, it may cause absentees to misjudge their financial or legal positions and render meaningless their right to opt out. See Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 326-27 (1973) (notice should inform class members of litigation burdens in balanced fashion); cf. 87 HARV. L. REV. 470, 476-78 (1973) (discussing dangers of confusion and intimidation if notice includes warning of counterclaims).

51. 75 F.R.D. at 44-45.

52. See FED. R. CIV. P. 42 (providing judge with power to order consolidation or separation of actions).

53. 75 F.R.D. at 43-45. The court later certified the proposed plaintiff class. *National Super Spuds, Inc. v. New York Mercantile Exch.*, 77 F.R.D. 361 (S.D.N.Y. 1977).

54. 75 F.R.D. at 44.

55. *Id.*

56. *Id.*

complex cases,"⁵⁷ the *Super Spuds* court overlooked the substantive basis underlying the *Donson* approach.

Under both cases a class member cannot actually recover against defendants unless he is willing to incur the risk of liability to the defendants and the burden of being sued in the court where the class action was commenced. That particular court may be both inconvenient to the plaintiff class member and a less hospitable forum than that in which the defendants might otherwise have had to sue to obtain both personal jurisdiction and venue. Under *Super Spuds*, however, the absentee must accept these burdens and run the risk of liability along with the risk that he will recover nothing on his own claim. Under *Donson* he takes no risks and suffers no burdens of defending unless and until defendants have been found liable to the plaintiff class.

Although both *Donson* and *Super Spuds* require that early notice of counterclaims be given to the class, the content of the notice is different under the two cases. The *Donson* notice may have a chilling effect on an absentee by informing him that making a claim for damages might result in the assertion of a counterclaim against him. Nevertheless, this is less chilling than the effect of being notified, as in *Super Spuds*, that the absentee may be held liable on a counterclaim if he remains in the class, regardless of the success or failure of his own claim.⁵⁸

Of course, absent class members who do not acquire actual notice of a class action and of actual or potential counterclaims will not opt out. As to them, it makes no real difference what the notice says. The *Donson* approach, however, prevents counterclaims from being asserted against class members who never learn of the class action. The decision in *Super Spuds* provides no such protection. Thus, *Donson* permits counterclaims against only those absentees whose acquiescence in the class action is manifested by the affirmative step of filing a claim; *Donson* precludes counterclaims against absent plaintiffs who, perhaps out of ignorance, have remained in the suit by inaction. Conversely, under *Super Spuds* class members utterly unaware of the litigation could discover their property levied upon to pay a judgment against them.⁵⁹

Some important considerations in the *Super Spuds* case may have been atypical: the defendants apparently planned to counterclaim against relatively few members of the plaintiff class and the court was convinced that it eventually would have to adjudicate these claims. The *Super Spuds* court was careful to lay the foundation for a later decision limiting its holding to such circumstances.⁶⁰ In cases where counterclaims are pleaded against a substantial number of the plaintiff class members, however, the danger that the class action device may be emasculated is present and it is no solution to exclude the countersued members. On the contrary, the *Super Spuds* severance procedure provides defendants with an incentive to file counterclaims against as many class members as they possibly can. Similarly, when the dismissal of counterclaims will put the counterclaims beyond the federal court's subject

57. *Id.* at 43.

58. See 87 HARV. L. REV. 470, 475 (1973) (postponing counterclaims until damage stage justifiable because once liability established, plaintiffs should be less intimidated by possibility of confronting counterclaim).

59. This conclusion assumes that due process would countenance such a result. See note 115 *infra* (questioning constitutionality of *Super Spuds* approach).

60. See 75 F.R.D. at 42 (absent class members are parties "in the context of this case"); *id.* at 45 ("this is an appropriate case for retaining jurisdiction over such counterclaims").

matter jurisdiction, the reasoning of *Super Spuds* concerning the inevitable adjudication of the counterclaims will not apply. Even if these factors did not limit the usefulness of *Super Spuds*, the court failed to justify basing the determination whether absent class members are rule 13 opposing parties on the number of countersued plaintiffs or the likelihood that the claims will reappear.

The differences between *Donson* and *Super Spuds* are at least as great as their similarities. At the root of these differences lies a divergent view of the most salient attributes of absent class members. *Donson* emphasizes the passivity of absent class plaintiffs, whereas *Super Spuds* focuses on class members' agreement to be class members and on the circumstance that they are bound by any resulting judgment. Neither court, however, explains why or how these factors might be relevant to the determination of whether absent members are opposing parties under rule 13 and whether they should be susceptible to counterclaims. *Donson* also fails to explain why class members should suddenly become rule 13 opposing parties when they file damage claims.

These precedents leave the law in an unsatisfactory state; the cases fail to address the problem with any systematic or uniform approach that would be applicable in other legal contexts. In particular, each court focused on different characteristics of absent plaintiff class members without explaining why they were relevant, and neither court made any reasoned use of precedent. The courts did not attempt to identify the characteristics of parties most pertinent to rule 13, or to determine whether absent plaintiff class members share those characteristics. This article offers an alternative analysis, which begins with an examination of rule 13. Although the analysis concludes that some absent class members are opposing parties, it goes on to explain why counterclaims should rarely, if ever, be permitted against them.

II. ABSENT PLAINTIFFS AS OPPOSING PARTIES UNDER RULE 13

Rule 13 allows parties to assert counterclaims against "opposing parties."⁶¹ The judicial discussion has focused on whether an absent class member is a party. Thus posed, however, the question is too broad. It tends to evoke an indiscriminate marshalling of ways in which unnamed plaintiffs have been treated as parties or as non-parties. The proper question is whether absent class members are parties subject to counterclaims within the meaning of rule 13.⁶² The resolution of this question depends upon the purposes and policies

61. Rule 13 provides in part:

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

FED. R. CIV. P. 13.

62. A determination of whether a party is an opposing party under rule 13 often rests on the presence or

underlying rule 13, as well as upon the extent to which these policies implicate the core attributes of parties that absent class members share. If absent class members partake of those attributes of party status most pertinent to the policies of rule 13, and if the allowance of counterclaims against absent plaintiff class members will further the policies of rule 13, then a reasoned analysis should conclude that they are parties for purposes of rule 13.⁶³

A. THE CORE PARTY CHARACTERISTICS

Although the term "party" is widely used in connection with judicial proceedings, courts have produced neither a precise meaning for the term nor a definitive test for determining party status. One court has recognized that "'party' is a . . . word of art which must be viewed in the context of the rule in which it appears as well as in the context of the other relevant Federal Rules of Civil Procedure."⁶⁴ In the context of absent plaintiffs, another court has acknowledged that "[i]t is apparent from the decisions that absent class members have been considered 'parties' for some purposes but not for others."⁶⁵

However elusive a precise definition may be, several core attributes of a party emerge from the case law. Courts repeatedly have focused on the following characteristics in determining that a person is a party plaintiff:⁶⁶

absence of a truly adversarial relationship between that party and its litigation opponents. *See, e.g.,* *Erie Bank v. United States Dist. Court*, 362 F.2d 539, 540 (10th Cir. 1966) (claimants in interpleader action not permitted to file counterclaims against disinterested stakeholders who asserted no claim against them; not opposing parties under rule 13); *First Nat'l Bank v. Johnson County Nat'l Bank & Trust Co.*, 331 F.2d 325, 327-28 (10th Cir. 1964) (same); *Lindquist v. Quinones*, 79 F.R.D. 158, 161-62 (D.V.I. 1978) (third-party defendant's claim against plaintiff not compulsory counterclaim because plaintiff asserted no claim against him; not opposing parties under rule 13); *Atlantic Coast Line R.R. v. United States Fidelity & Guar. Co.*, 52 F. Supp. 177, 186 (M.D. Ga. 1943) (when defendant's complaint against third party alleged third party's liability to plaintiff, third-party defendant and plaintiff became opposing parties under rule 13). In some cases the counterclaim did not meet the opposing party requirement because the plaintiff sued in one capacity and was countersued in another. *See Tryforos v. Icarian Dev. Co.*, 49 F.R.D. 1, 3 (N.D. Ill. 1970) (stockholder bringing derivative suit not subject to personal counterclaim because representative litigant not opposing party as individual); *Chambers v. Cameron*, 29 F. Supp. 742, 744 (N.D. Ill. 1939) (trustee, acting as such, may not be countersued in individual capacity because representative litigant not opposing party as individual). *But see* *Burg v. Horn*, 37 F.R.D. 562, 563-64 (E.D.N.Y. 1965) (stockholder bringing derivative suit against closely held corporation to determine stock ownership opposing party as individual because such action determines individual property rights). The absent class member, however, both sues and is countersued as an individual, and has no special role or function that would change his capacity as an individual litigant. Consequently, absent class members, because they assert claims against the defendant, oppose the defendant within the meaning of rule 13.

63. Outside the class action context, some courts have taken a similar approach in construing the concept of a party for purposes of rule 13. *See, e.g.,* *N.L.R.B. v. Mooney Aircraft, Inc.*, 366 F.2d 809, 811 (5th Cir. 1966) (in suit by United States on behalf of employees, employees not opposing parties subject to counterclaims because not named plaintiffs and action commenced and controlled by Government for benefit of United States); *Mitchell v. Richey*, 164 F. Supp. 419, 419-21 (W.D.S.C. 1958) (same); *United States ex rel. Rodriguez v. Weekly Publications, Inc.*, 74 F. Supp. 763, 768-70 (S.D.N.Y. 1947) (plaintiff-informer in qui tam action opposing party because he commenced, had direct interest in, and had right to control action; counterclaim against him denied, however, on public policy grounds).

64. *Winchell v. Lortscher*, 377 F.2d 247, 252 (8th Cir. 1967) (notice to attorney constitutes notice to "party" for purpose of rule 5 requiring service upon party).

65. *In re Four Seasons Sec. Laws Litigation*, 525 F.2d 500, 504 (10th Cir. 1975) (absentee who took no affirmative step to terminate relation to class representative not a party with independent right of appeal).

66. The characteristics in the text describe the typical party plaintiff in various contexts. As a result,

- (1) He is among the persons who have commenced a suit.⁶⁷ Ordinarily, he is named in the record as a party plaintiff;⁶⁸
- (2) He is directly interested in the subject matter in issue;⁶⁹ he personally will benefit from a judgment in plaintiffs' favor and will lose something should judgment be in defendants' favor.⁷⁰ He will be bound by the judgment rendered;⁷¹ and
- (3) He exercises control over the handling of plaintiffs' case.⁷²

they are sometimes used as tests or criteria to determine whether a person is a party to litigation, or should be treated as such. See *Litchfield v. Goodnow*, 123 U.S. 549, 550-51 (1887) (defendant not party because not named in suit, not bound by judgment, and had no right to control proceedings or appeal decree); *Watts v. Swiss Bank Corp.*, 27 N.Y.2d 270, 277, 265 N.E.2d 739, 743-44, 317 N.Y.S.2d 315, 320 (1970) (person bound as party by prior judgment because circumstances indicated participation amounting to sharing in control of litigation). In certain circumstances, a person meeting only some of the criteria is not a party. See RESTATEMENT (SECOND) OF JUDGMENTS § 83, Comment b (Tent. Draft No. 2, 1975) (nonparty who controls litigation not bound in subsequent action if certain conditions met); *id.* § 84 (nonparty who agrees to be bound by results of action must abide by agreement).

67. See *Motley, Green & Co. v. Detroit Steel & Spring Co.*, 161 F. 389, 393 (S.D.N.Y. 1908) (plaintiff is person who brings suit); *Chalpin v. Mobile Gardens, Inc.*, 18 Ariz. App. 231, 234, 501 P.2d 407, 410 (Ct. App. 1972) (ordinarily, plaintiff becomes party by filing complaint).

68. See *Litchfield v. Goodnow*, 123 U.S. 549, 550 (1887) (defendant not party, in part, because not named in suit); *In re Library Editions of Children's Books*, 299 F. Supp. 1139, 1142 (J.P.M.L. 1969) (parties are those named in record or properly served with process); *M & A Elec. Power Coop. v. True*, 480 S.W.2d 310, 314 (Mo. App. 1972) (party is person whose name designated on record as plaintiff or defendant); *Doe v. Roe*, 600 S.W.2d 378, 379 (Tex. Civ. App. 1980) (party is one by or against whom suit brought); RESTATEMENT (SECOND) OF JUDGMENTS § 78 (Tent. Draft No. 2, 1975) (only persons named in record and served with process are parties).

69. See *Harrington v. Bush*, 553 F.2d 190, 209 (D.C. Cir. 1977) (litigant must have stake in controversy to have standing); *Burrell v. United States*, 147 F. 44, 46 (9th Cir. 1906) (parties include all persons directly interested in subject matter in issue); *Golatte v. Matthews*, 394 F. Supp. 1203, 1207 (M.D. Ala. 1975) (mem.) (party is person concerned in proceeding); *Larcon Co. v. Wallingsford*, 136 F. Supp. 602, 617 (W.D. Ark. 1955) (defendant as creditor in prior bankruptcy action bound by former judgment because directly interested in subject matter of suit). See generally 59 AM. JUR. 2D *Parties* § 7, at 351 (1971) (parties are directly interested in whole or in part of suit).

70. See *Harrington v. Bush*, 553 F.2d 190, 206 (D.C. Cir. 1977) (to have standing, complaining party must have such strong connection to controversy that outcome will cause him to win or lose in some measure); *Thomas v. Consolidated Coal Co.*, 380 F.2d 69, 85-86 (4th Cir. 1967) (parties benefit by final judgment on merits); *Chessman v. Teets*, 239 F.2d 205, 214 (9th Cir. 1956) (party is one who seeks relief); *Mitchell v. Stewart Bros. Constr. Co.*, 184 F. Supp. 886, 898 (D. Neb. 1960) (person cannot be party plaintiff without right against defendant by virtue of favorable verdict); cf. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976) (plaintiff compensated according to harm caused by defendant's breach of duty).

71. See *Litchfield v. Goodnow*, 123 U.S. 549, 550 (1887) (defendant not party to prior litigation, in part, because not bound by prior judgment); *Thomas v. Consolidated Coal Co.*, 380 F.2d 69, 85-86 (4th Cir. 1967) (ordinarily, parties bound by judgment); *E.I. DuPont de Nemours & Co. v. Sylvania Indus. Corp.*, 122 F.2d 400, 405 (4th Cir. 1941) (participation in trial and control of litigation bind participant as fully as if he had been party); cf. *Montana v. United States*, 440 U.S. 147, 155 (1979) (although not party, government had sufficient interest in and control of litigation to be held to principles of estoppel). Although class members are bound by judgments, this is only one factor in determining whether they are parties. See RESTATEMENT (SECOND) OF JUDGMENTS §§ 83, 84, 85 (Tent. Draft No. 2, 1975) (persons other than parties may be bound by judgments if they participate substantially, agree to be bound, or are represented by party).

72. See *Litchfield v. Goodnow*, 123 U.S. 549, 551 (1887) (defendant not party to prior litigation, in part, because had no right to make defense or to control proceedings); *United States v. Federal Maritime Comm'n*, 636 F.2d 792, 798 & n.24 (D.C. Cir. 1980) (government participated in proceeding and was therefore a party); *Tidewater Patent Dev. Co. v. Kitchen*, 421 F.2d 680, 681 (4th Cir. 1970) (those with substantial interest in and absolute control of defense are parties); *Allen v. County School Bd.*, 28 F.R.D.

The purpose of distilling these characteristics⁷³ from judicial decisions is to help determine the proper judicial response when the issue whether an absent member of the plaintiff class is or should be treated as a party arises in various legal contexts. Having isolated these core characteristics, the analysis proposed by this article requires consideration of the extent to which absent class members share the characteristics implicated by the policies of the particular rule or doctrine in question. Thus, the article next examines whether absent plaintiffs are opposing parties subject to counterclaims in light of the policies underlying rule 13—the rule governing counterclaims.

B. THE POLICIES OF RULE 13

Rule 13, which provides for the assertion of compulsory and permissive counterclaims, has three major purposes: to provide the defendant with an opportunity to litigate all of his complaints against the plaintiff in a single action along with plaintiff's claims against him ("consolidation");⁷⁴ to implement the policy judgment that it is "only fair" for the defendant to be

358, 362 n.2 (E.D. Va. 1961) (dictum) (party plaintiff, as distinguished from *amicus curiae*, has right to control its side of case); *Larcon Co. v. Wallingsford*, 136 F. Supp. 602, 617 (W.D. Ark. 1955) (defendant, creditor in prior action, bound by former judgment partly because had right and opportunity to control proceedings); *Apostolos v. Estrada*, 163 Cal. App. 2d 8, 12, 328 P.2d 805, 807 (Dist. Ct. App. 1958) (claimant not party because no right to control proceedings); *People ex rel. R.D.S.*, 183 Colo. 89, 91, 514 P.2d 772, 773-74 (1973) (*en banc*) (true party must have right to control proceedings); *City of Chattanooga v. Swift*, 223 Tenn. 46, 49, 442 S.W.2d 257, 258 (1969) (party generally means one having right to control proceedings). See generally 59 AM. JUR. 2D *Parties* § 7, at 351 (1971) (parties have right to control proceedings).

73. Another core attribute of a party, related to the stakeholder attribute, is the right to appeal from the judgment or other orders of the trial court. Except in unusual circumstances not pertinent here, only a party of record, aggrieved by a judgment or order of a district court, may exercise the right to appeal therefrom. See *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980) (named plaintiffs in proposed class action may appeal denial of class certification despite satisfaction of their claim, because of continuing individual interest in certification question). The right of appeal is fundamentally dependent upon the appellant's personal stake in the action. *Id.* at 336. Absent plaintiff class members, because they are bound by the trial court's judgment and subject to its orders, have the necessary personal stake. Courts have determined that a member of a putative plaintiff class may appeal a denial of class certification by intervening after entry of judgment in favor of the named plaintiff. *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 387 (1977). The putative plaintiff may also appeal a denial of his motion to intervene. *McCarthy v. Kleindienst*, 562 F.2d 1269, 1275 (D.C. Cir. 1977). Moreover, objecting unnamed members of the plaintiff class may appeal from final judgments approving settlements, *Cotton v. Hinton*, 559 F.2d 1326, 1329 (5th Cir. 1977), and after final judgment, absent members may appeal miscellaneous other orders entered in response to their motions. See, e.g., *In re National Student Marketing Litigation v. Barnes Plaintiffs*, 530 F.2d 1012, 1014 n.5 (D.C. Cir. 1976) (post-judgment denial of absentees' motion for exclusion from class appealable); *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 829 (3d Cir. 1973) (denial of absentees' requests for adjournment of settlement hearing and extension of claim period appealable after final judgment); *Brennan v. Midwestern United Life Ins. Co.*, 450 F.2d 999, 1003 (7th Cir. 1971) (denial of absentees' motion to set aside dismissals of claims for failure to respond to discovery appealable), *cert. denied*, 405 U.S. 921 (1972).

Although being an appellant of right is not an attribute relevant to the analysis of rule 13 policies, this core characteristic may apply to analyses of other rules and judicial doctrines.

74. See *Montecatini Edison, S.P.A. v. Ziegler*, 486 F.2d 1279, 1282 (D.C. Cir. 1973) (purpose of counterclaim rule to provide complete relief to parties, to conserve judicial resources, and to avoid multiple lawsuits); 3 MOORE'S FEDERAL PRACTICE ¶ 13.12[1] (2d ed. 1980) (purpose of rule 13 to achieve just resolution in single action); 6 C. WRIGHT & A. MILLER, *supra* note 22, § 1403, at 13 (1971) (rule 13 eliminates circuitous action and multiple litigation).

able to strike back when he is sued ("reprisal");⁷⁵ and to conserve the resources of both the courts and the parties ("economies").⁷⁶

1. Consolidation

One purpose underlying rule 13 is to allow the resolution of all disputes between the parties when any of the disputes between them are being adjudicated.⁷⁷ This rule 13 policy of settling all disputes between the plaintiff and the defendant in a single action implicates all three major-core party characteristics but is inextricably tied to and predicated upon one core characteristic of a typical party plaintiff: he will be bound by the final judgment on his own claims. If a plaintiff were not so bound, this policy would not come into play; it is only when some dispute is being resolved that it makes sense to speak of resolving additional disputes between the parties.

The absent class plaintiff is bound by the judgment on the class claim. The plaintiff class member unquestionably has a direct interest in the subject matter at issue because of his personal stake in the substantive controversy.⁷⁸ The law is clear that he will be entitled to benefit personally from a judicial determination in favor of the plaintiff class; upon proof of his losses he will be able to share in the monetary recovery. If judgment should be in defendants' favor and the judicial procedures have satisfied the demands of due process, the absent class member's cause of action, vicariously asserted by the class representative, will be barred by the doctrine of res judicata.⁷⁹

There are at least two reasons that absent class members are bound by the judgment. First, it is fair to bind absent class members as long as the judgment

75. As one court has noted: "[T]hose who choose to join in a lawsuit and assert claims against a defendant must be prepared to accept the legal risks and consequences of their voluntary choice. In stark and simple terms, one who throws a punch ought to be ready to receive one in return." *Herrmann v. Atlantic Richfield Co.*, 72 F.R.D. 182, 186 (W.D. Pa. 1976); cf. *Brandtjen & Kluge, Inc. v. Joseph Freeman, Inc.*, 75 F.2d 472, 472-73 (2d Cir.) (dictum) (by selecting defendant for attack, plaintiff may be charged with risk of meeting reprisal), *aff'd on other grounds sub nom. Chandler & Price Co. v. Brandtjen & Kluge, Inc.*, 296 U.S. 53 (1935).

76. See note 74 *supra* (purposes of rule include judicial economy); cf. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1290 & n.43 (1976) (proponents of efficiency argue courts should not have to rehear same complex of events).

77. See note 74 *supra* (discussing policies of rule 13).

78. See *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1105 (5th Cir. 1977) (absent class members must be notified of proposed partial settlement because absentees have definite stake in controversy).

79. Rule 23(c)(3) provides in part:

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.

Id. The draftsmen of amended rule 23 recognized that the declaration called for by rule 23(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." Advisory Committee's Notes, *supra* note 6, at 106. They were hopeful, however, that by thus compelling the trial court expressly to determine the extent of its judgment, future questions of res judicata would be raised only infrequently, and when

is the culmination of a proceeding in which the requirements of due process were satisfied, including adequate representation by the class representative.⁸⁰ Second, subjecting absent class members to the judgment is, after all, one of the very purposes of having a class action suit.⁸¹

In order to further the consolidation policy, however, it is insufficient that a plaintiff be bound by the judgment on his own claim. He also must be bound by the judgment on a defendant's counterclaim. For a plaintiff to be so bound, the court must have subject matter jurisdiction over the counterclaim and the proceedings must comport with the requirements of due process. Federal district courts have ancillary subject matter jurisdiction over rule 13 counterclaims that are "compulsory," but must have an independent basis of jurisdiction over counterclaims that are "permissive." The determination of whether a judgment on a counterclaim comports with due process requirements requires closer investigation.

Due process mandates both personal jurisdiction over and adequate notice to all parties.⁸² If a court purports to assert personal jurisdiction beyond its authority, the suit is subject to dismissal upon timely objection.⁸³ Provided the sued party makes no disqualifying appearance, any judgment is invalid and subject to collateral attack.⁸⁴

In traditional litigation, when a plaintiff is countersued there is rarely any question whether the trial court properly may assert personal jurisdiction

raised, would be answered more satisfactorily.

Relatively few res judicata questions have been raised in 23(b)(3) class actions, and the courts have resolved them consistently with black-letter law: if due process was afforded, all members of the plaintiff class who have not opted out are bound by the judgment. *See, e.g.,* Cotton v. Hutto, 577 F.2d 453, 454-55 (8th Cir. 1978) (per curiam) (prisoner seeking relief for allegedly unconstitutional conduct by facility employees bound by prior class action judgment); Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 411-12 (2d Cir. 1975) (alternative holding) (plaintiffs not opting out of prior class action bound by stipulated settlement concluding prior action). If due process or notice requirements were not satisfied in the class action, then members who do not opt out are not bound by that judgment. *See* Gonzales v. Cassidy, 474 F.2d 67, 75-76 (5th Cir. 1973) (inadequate representation in class action; no res judicata effect as to absent class members); Pasquier v. Tarr, 318 F. Supp. 1350, 1352-54 (E.D. La. 1970) (failure to give any notice to absent class members violated due process; absent plaintiff not bound by class action), *aff'd per curiam*, 444 F.2d 116 (5th Cir. 1971). *See generally* Annot., 48 A.L.R. Fed. 675 (1980).

The absent class members of plaintiff classes certified under rule 23(b)(1) and (b)(2) likewise are bound by prior judgments if due process has been satisfied. *See* FED. R. CIV. P. 23(c)(3) (court shall include and describe members of class in judgment in (b)(1) or (b)(2) action); Advisory Committee's Notes, *supra* note 6, at 105 (judgment will embrace class as described by court); 3B MOORE'S FEDERAL PRACTICE ¶ 23.60 (2d ed. 1980) ((b)(1) and (b)(2) judgments have res judicata effect on all whom court finds to be members of class).

80. *See* Hansberry v. Lee, 311 U.S. 32, 41-43 (1940) (absent class members may be bound when adequately represented by parties who are present). Whether absent class members must be given notice and an opportunity to be heard in order to satisfy the requirements of due process, or whether adequate representation alone is constitutionally sufficient, continues to be a subject of debate. *See Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1402-03, 1413-16 (1976) (notice obligation in plaintiff class suits ancillary to adequate representation requirement) [hereinafter *Class Actions*]; 3B MOORE'S FEDERAL PRACTICE ¶ 23.55 (2d ed. 1980) (adequate representation, not notice, essential requisite of due process). Rule 23(c)(2), however, mandates notice to class members regardless of any constitutional requirements.

81. *See* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 367 (1921) (if class decree is to be effective and conflicting judgments avoided, class must be bound).

82. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980).

83. *See* FED. R. CIV. P. 12(b)(2) (prescribing procedures for filing motions to dismiss for lack of personal jurisdiction).

84. RESTATEMENT (SECOND) OF JUDGMENTS § 4 (Tent. Draft No. 5, 1978).

over him for purposes of the counterclaim, or whether the venue is proper. A court will regard the countersued plaintiff as having waived his objections to jurisdiction and to venue because of the perceived fairness of the estoppel notion that, having chosen the particular forum and submitted to the jurisdiction of the court for his claim, he is in no position to raise objections based on any resulting personal inconvenience.⁸⁵ As the United States Supreme Court has explained, "[t]he setting up of a counterclaim against one already in a court of his own choosing is very different, in respect to venue, from haling him into that court."⁸⁶ The same is true of personal jurisdiction.⁸⁷ Thus, traditional plaintiffs are bound by counterclaim judgments, and allowing counterclaims against them is in harmony with the consolidation policy of rule 13. These waiver and estoppel arguments, however, do not apply to the absent class member who neither initiates the action nor chooses the forum.⁸⁸

The absent class member does not commence the lawsuit. It is not he who files the complaint and he is not regarded as having been joined as a party.⁸⁹ He often does not even learn that an action has been commenced until months later when notice is sent to all members of the certified class pursuant to rule 23(c)(2).⁹⁰ If the notice does not reach the absent member, he will not

85. See 3 MOORE'S FEDERAL PRACTICE ¶¶ 13.16, 13.22 (2d ed. 1980) (traditional plaintiff waives objections to improper venue and lack of jurisdiction in event of counterclaims); 6 C. WRIGHT & A. MILLER, *supra* note 22, § 1416, at 90 (same); *id.* § 1424, at 129-30 (same).

86. General Elec. Co. v. Marvel Rare Metals Co., 287 U.S. 430, 435 (1932).

87. See note 85 *supra*. The example of "haling" someone into a particular court is one the United States Supreme Court has used recently in cases concerning the constitutionality of assertions of personal jurisdiction. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (court's exercise of personal jurisdiction over defendant violated due process when defendant could not reasonably foresee being "haled" into plaintiff's chosen forum); *Kulko v. Superior Court*, 436 U.S. 84, 97-98 (1978) (same).

88. Under the *Second Restatement of Judgments* only "a person who is named as a party to an action and [is] subjected to the jurisdiction of the court is a party to the action." RESTATEMENT (SECOND) OF JUDGMENTS § 78 (Tent. Draft No. 2, 1975). Under this definition, an absent member of the plaintiff class is not a party because he is not designated as a party, *id.* § 78, Comment a, and is not subjected to the jurisdiction of the court. *Id.* § 85(2), Comment f.

89. Conversely, it could be argued that the class action has been brought expressly on behalf of each proposed class member by a representative, self-appointed though he is. Thus, the absent class member is among the persons who have commenced the litigation in the sense that the lawsuit is commenced on his behalf. Moreover, although the absentee is not referred to by name in the pleadings, he is referred to generically and described in the complaint. The existence of the absent class member and the fact that the lawsuit is brought on his behalf are manifest on the record from the commencement of the suit.

The thesis of this counter-argument, however, is fundamentally flawed. For a lawsuit to be commenced on one's behalf manifestly is not the same as one commencing the action himself and doing so as a matter of conscious choice. The circumstance that an action has been commenced on one's behalf points primarily to the consequence that one will be bound by or entitled to the benefits of the resulting judgment. Yet, being bound by the judgment clearly is not the equivalent of having initiated the litigation.

90. Rule 23(c)(2) provides:

In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. 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.

FED. R. CIV. P. 23(c)(2).

know of the action even then. Moreover, in determining federal diversity jurisdiction, the federal district court in which the action has been brought is not concerned with the absentee's state of citizenship.⁹¹ Similarly, a court does not consider the absentee's contacts with the forum state for determining personal jurisdiction,⁹² nor does the court include the absentee in the group of plaintiffs when it determines whether venue lies in the judicial district where

91. See 28 U.S.C. § 1332(a)(1) (1976) (granting original jurisdiction to district courts for all civil actions between citizens of different states where the matter in controversy exceeds \$10,000). Although this statute requires complete diversity between plaintiffs and defendants, *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806), diversity in an action brought by representatives, including class representatives, is determined by the citizenship of the representatives. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 363-65 (1921) (federal class action decree binds all members of class as long as diversity exists between named complainant and defendant); cf. *Amen v. Black*, 234 F.2d 12, 16 (10th Cir. 1956) (court's diversity jurisdiction over original claim not impaired by citizenship of subsequent intervenors), *dismissed as moot*, 355 U.S. 600 (1958). In effect, the persons being represented are not treated as parties for the purpose of determining whether the requisite diversity of citizenship exists.

The decision in *Supreme Tribe of Ben-Hur* rested on the perceived need to prevent class actions from being relegated to state courts for lack of federal subject matter jurisdiction, and to ensure that federal court judgments in class actions would effectively bind all members of the class. 255 U.S. at 366-67. The Court reasoned that when diversity of citizenship exists between the named parties to the lawsuit, a court acquires jurisdiction of the suit. Thus, a decree binding upon class members is within the court's ancillary jurisdiction. *Id.* at 365. Joinder or intervention of non-diverse class members does not defeat the court's jurisdiction once it has attached. *Id.* at 365-66.

92. The requirement of minimum contacts that are necessary in order to ensure that maintenance of the suit does not offend traditional notions of fair play and substantial justice derives from *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The United States Supreme Court had emphasized as early as *Hansberry v. Lee*, 311 U.S. 32, 40-42 (1940), that the judgment in a class action will bind members of a plaintiff class whether or not they are within the jurisdiction of the trial court. *Id.* State courts appear to have adopted conflicting rules. Compare *Spirek v. State Farm Mutual Auto Ins. Co.*, 65 Ill. App. 3d 440, 452-54, 382 N.E.2d 111, 121 (App. Ct. 1978) (Illinois court not empowered to exercise personal jurisdiction over potential nonresident plaintiff class members who had not appeared) with *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 547, 567 P.2d 1292, 1308 (1977) (Kansas courts can exercise personal jurisdiction over nonresident plaintiff if due process satisfied), *cert. denied*, 434 U.S. 1068 (1978). The *Restatement of Judgments* and the *Second Restatement of Judgments* also take the position that a class action judgment is binding upon absent class members who are not subject to service of process or to the personal jurisdiction of the court. RESTATEMENT (SECOND) OF JUDGMENTS § 85 (Tent. Draft No. 2, 1975); RESTATEMENT OF JUDGMENTS § 26 (1942). Because plaintiff class members in a 23(b)(3) action have the absolute right to opt out, FED. R. CIV. P. 23(c)(2), failure to do so can be construed fairly as consent to the court's assertion of jurisdiction over them. See *School Dist. of Philadelphia v. Harper & Row Publishers, Inc.*, 267 F. Supp. 1001, 1005 (E.D. Pa. 1967) (proposed class member over whom court has no jurisdiction and who ignores notice bound by judgment and waives objections to personal jurisdiction and venue). That consent is, however, a fiction in the case of class members who have no actual knowledge of the litigation.

all plaintiffs reside.⁹³ Members of the plaintiff class, therefore, do not benefit from many of the protections typically afforded full parties.⁹⁴

93. The venue statutes do not differentiate between class actions and other actions. Under 28 U.S.C. § 1391(a) (1976) if jurisdiction is based solely on diversity of citizenship, the action may be brought, among other places, in the judicial district where all plaintiffs reside. Although few cases actually so hold, it is accepted that in a class action the residence of only the named plaintiffs is relevant for determining whether venue is proper under this provision. See *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1129 (2d Cir. 1974) (named party to class action met venue requirements; residences of absent class members did not make venue improper), *cert. denied*, 421 U.S. 921 (1975); *In re The Gap Stores Sec. Litigation*, 79 F.R.D. 283, 292 n.6 (N.D. Cal. 1978) (nature of defendant class does not change general rule that court looks to residence of named parties only to determine if venue proper); 3B MOORE'S FEDERAL PRACTICE ¶ 23.96, 23-593, 23-594 & n.8 (2d ed. 1980) (action may be brought in district where named representatives reside, regardless of where other class members reside); 7 C. WRIGHT & A. MILLER, *supra* note 22, § 1757, at 568-69 (general rule that only residence of named parties relevant to venue; absent class members need not satisfy venue provisions). A requirement that venue be proper as to nonrepresentative class members would substantially impair plaintiffs' ability to bring a class action. Except for cases in which all class members or defendants happened to reside in one judicial district, see 28 U.S.C. § 1391 (1976), plaintiffs would be forced to sue in the judicial district in which the claim arose. In light of the assumed geographic dispersal of class members and defendants, however, determining such a single locus might be impossible. "The fact that a claim for some of the plaintiffs . . . arose in a district does not make that district a proper venue for other parties as to whom the claim arose somewhere else." 15 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 3807, at 39 & n.14 (1976). For similar reasons, most courts have not applied venue requirements to members of a defendant class. See *United States v. Trucking Employers, Inc.*, 72 F.R.D. 98, 100 (D.D.C. 1976) (defendant class members' objection to venue overruled because class actions do not require personal appearance by absentees); *cf. Dale Electronics, Inc. v. R.C.L. Electronics, Inc.*, 53 F.R.D. 531, 538 (D.N.H. 1971) (venue in defendant class suit on patent validity proper in district where only named defendant did business); *Research Corp. v. Pfister Associated Growers, Inc.*, 301 F. Supp. 497, 501, 504 (N.D. Ill. 1969) (venue in defendant class suit on patent infringement need not be established for absent class members; otherwise effectiveness of class action device defeated). *But see Sperberg v. Firestone Tire & Rubber Co.*, 61 F.R.D. 70, 72-74 (N.D. Ohio 1973) (class certification denied partly because eight of 21 members of proposed defendant class not amenable to suit for lack of proper venue under special venue statute for patent cases).

An alternative to viewing absent (b)(3) class members as not plaintiffs for purposes of the venue statutes is to view an absentee's failure to opt out as implying consent to venue. See *School Dist. of Philadelphia v. Harper & Row Publishers, Inc.*, 267 F. Supp. 1001, 1005 (E.D. Pa. 1967) (proposed class member over whom court has no jurisdiction and who ignores notice waives objections to venue); Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1222-23 (1966) (policy of rule 23 best served by construing failure to opt out as consent to venue). Again, consent is a fiction in the case of class members who have no actual knowledge of the litigation. Any participation in the lawsuit by an absent class member, however, would constitute a waiver of any objection he might have to venue with respect to the class claim. See FED. R. CIV. P. 12(h)(1).

94. In contrast to judicial disregard of the absentee for purposes of the jurisdiction and venue requirements, courts do require that the complaint allege in good faith that each member of the class is entitled to recover more than any statutory minimum amount in controversy. In a rule 23(b)(3) class action, for example, each member of the plaintiff class must satisfy the jurisdictional amount, if any, or be dismissed from the case. *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973); *Snyder v. Harris*, 394 U.S. 332, 336 (1969). Both *Zahn* and *Snyder*, however, appear to be decisions that the Court felt compelled to reach as a matter of consistency with other decisions relating to what claims can be aggregated to meet amount in controversy requirements. See *Zahn v. International Paper Co.*, 414 U.S. at 300 (Court followed "well-established" rule of *Snyder*); *Snyder v. Harris*, 394 U.S. at 336 ("settled doctrine" that separate claims of more than one plaintiff cannot be aggregated to satisfy jurisdictional amount). Thus, *Zahn* and *Snyder* are aberrational when viewed against the backdrop of decisions that do not count absent plaintiff class members as parties for the various other purposes relating to commencement of the action.

In addition, absent class members are treated as parties in that commencement of the class action tolls the applicable statute of limitations for all putative class members described in the complaint—at least for the purpose of timely intervention in the original action. See *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 552-53 (1974) (where class status denied because of failure to demonstrate that size of class precludes joinder of all members, commencement of suit tolls statute of limitations for members who move

Because the waiver and estoppel arguments noted above do not apply to the plaintiff class member, the personal jurisdiction necessary to valid adjudication of a counterclaim cannot be obtained over an absentee by the means that suffice in both traditional litigation and in counter-litigation against the named class representatives. Similarly, the reasoning that permits courts to dispense with personal jurisdiction over absent plaintiffs does not apply when counterclaims are filed against them. Although the absent class plaintiffs must have a representative over whom the court has personal jurisdiction for purposes of the principal claim,⁹⁵ when countersued as individuals, the absentees have no such representative for the defense of the counterclaim.⁹⁶

Some absent class members will be within the trial court's jurisdiction. If the court asserts jurisdiction over them and adequate notice is given, the court may enter valid judgments against them on counterclaims even if they lack actual knowledge of the proceedings.⁹⁷ In the case of countersued absent class members, however, the court often will lack authority to assert personal jurisdiction and venue may be improper. Moreover, the absentee generally will have no representative before the court because he has been countersued individually and not as a member of a class. In such circumstances, unless the absentee has consented to the jurisdiction of the court⁹⁸ or has waived his objections,⁹⁹ a court should uphold the due process challenges to lack of jurisdiction and venue. Moreover, if the absentee has made no disqualifying

to intervene). Nevertheless, this tolling doctrine is consistent with the decisions that do not consider absent plaintiffs as parties for purposes of the commencement of the action. The doctrine recognizes that an absentee's silent, even unknowing, presence in the litigation from its commencement must be acknowledged when a class action (as initially structured) does not reach judgment and the absentee would be prejudiced by disregard of the litigation having been brought in his behalf.

95. See note 184 *infra* (discussing right of adequate representation).

96. Because the absentee must somehow defend a counterclaim, the ordinary rule of dispensing with venue requirements also should be inapplicable. Some courts and commentators have construed the federal venue statute, 28 U.S.C. § 1391 (1976), to bar venue objections by traditional plaintiffs. See 3 MOORE'S FEDERAL PRACTICE ¶ 13.16 (2d ed. 1980) (no real prejudice to plaintiff by allowing counterclaim in forum of original action); 6 C. WRIGHT & A. MILLER, *supra* note 22, § 1424, at 129-30 (plaintiff waives venue objections to defendant's counterclaims by bringing original action). This construction has been extended to situations in which the plaintiff has not actually waived venue objections (such as third party counterclaims) because there is a close relation between these counterclaims and the original claim that prevents trial inconvenience and unfair surprise. See 3 MOORE'S FEDERAL PRACTICE, *supra*, ¶ 13.16, at 13-408, 13-409 & n.6 (intervenor's counterclaim closely related to original claim; plaintiff cannot object to improper venue); *id.* ¶ 13.22, at 13-558 (third-party defendant's claim against plaintiff closely related to original; plaintiff cannot object to improper venue). There is no similar guarantee, however, that a counterclaim against an absent plaintiff class member will be closely related to the original claim. Moreover, the rationale that absentees' convenience is not at stake, which underlies the disregard of plaintiff class members for venue purposes, does not apply when the absentee is individually countersued.

97. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950) (if notice reasonably conveys information in timely manner, constitutional requirements satisfied); RESTATEMENT (SECOND) OF JUDGMENTS §§ 4-5, 7-8 (Tent. Draft No. 5, 1978) (valid judgment requires that court have jurisdiction and that adequate notice afforded).

98. Consent is a traditional basis for jurisdiction. See *Pennoy v. Neff*, 95 U.S. 714, 733 (1877) (determination of personal liability requires proper service or voluntary appearance); RESTATEMENT (SECOND) OF JUDGMENTS § 4 (Tent. Draft No. 5, 1978) (judgment valid if party submits to court's jurisdiction).

99. Due process rights are subject to waiver. See *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-87 (1972) (installment purchaser's knowing waiver of rights to notice and hearing on default valid and binding).

appearance, any judgment entered on a counterclaim should fall upon collateral attack.

The presence or absence of consent is critical. Just as defendants who choose to appear and defend an action consent to the court's exercise of jurisdiction, absent (b)(3) class plaintiffs who are countersued may consciously choose to remain in the plaintiff class *and* to appear and defend on the counterclaim. These absent plaintiffs thus consent to the court's jurisdiction over them for purposes of both the principal claim and the counterclaim. In theory, there is no problem with entering a valid judgment on a counterclaim against consenting absent class members. There is a problem, however, in identifying these absentees. Overt manifestations of a conscious choice to consent to the court's jurisdiction for purposes of the counterclaims must be selected as identifying characteristics. With respect to counterclaims, courts should not infer consent to the court's jurisdiction from an absentee's mere failure to opt out of the plaintiff class. Although that failure may reflect a conscious choice to submit to the court's jurisdiction for purposes of the counterclaim, it equally may be the product of simple ignorance or fear—and not a voluntary, knowing, or intelligent relinquishment of the absentee's right not to be sued in the forum court.¹⁰⁰ Some class members who do not opt out are simply unaware of the litigation.¹⁰¹ Others may receive notice but are unable to understand it, or fear to act in response to it, and therefore fail to opt out even if the notice contains information intended to communicate that a counterclaim has been filed or may be filed against them.¹⁰² Because the absentee's silence is ambiguous, consent to jurisdiction for purposes of the counterclaim should not be inferred. It is one thing to infer consent to personal jurisdiction from silence when the result is that someone may reap benefits from being included in a plaintiff class; it is quite another to infer from that silence consent to personal jurisdiction for purposes of a counterclaim that can only harm him.

Absent a change in present procedures, courts also should not treat an absentee's failure to make a timely objection to lack of personal jurisdiction or venue as an overt manifestation of a conscious choice to submit himself for purposes of counterclaims. Inferred consent of this kind would be defensible if each absentee had been served with a summons and a pleading asserting the counterclaim. Because of the nature and requisites of formal service,¹⁰³ it is

100. The Supreme Court has implied that a waiver of rights in a civil case must be voluntary, knowing, and intelligent. See *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-87 (1972) (if standard is that waiver be voluntary, knowing, and intelligent, debtor who signed cognovit clause met that standard).

101. See 42 *FORDHAM L. REV.* 791, 811 (1974) (dismissal of claims of absent class members for failure to respond to discovery unduly harsh because some may never have received notice); cf. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 *HARV. L. REV.* 356, 397-98 (1967) (class members should not be required to take affirmative step of opting into class because some may have had no notice of proceedings).

102. See *Cotchett v. Avis Rent A Car Sys., Inc.*, 56 F.R.D. 549, 553 (S.D.N.Y. 1972) (some plaintiff class members will not heed notice of counterclaims and thus unwittingly face net judgment against them); 42 *FORDHAM L. REV.* 791, 811 (1974) (although in receipt of discovery requests some absent class members may have misconstrued or been confused by them and thus declined to respond). A requirement that the initial notice of class action include appropriate mention of counterclaims "leaves open the possibility that absent members, including some individuals not even subject to the counterclaims, will be confused or frightened by the notice and will opt out of the class." 87 *HARV. L. REV.* 470, 476 & n.30 (1973).

103. See note 104 *infra*.

fair to treat an absentee as having waived objections to the court's jurisdiction on the counterclaim if he fails to answer a summons and pleading. Such service has not, however, been required heretofore. In order to render an absent plaintiff's failure to object a manifestation of consent sufficient to justify a court in adjudicating a counterclaim against him, the absentee should be served with a summons and a pleading stating the counterclaim.

A pleading asserting counterclaims against absent members of a plaintiff class should be served pursuant to rule 4 upon those who have not made an appearance, and pursuant to rule 5 upon any who have.¹⁰⁴ This proposal is consistent with not regarding absentees as parties for purposes relating to commencement of the action and with their lack of participation.¹⁰⁵ It also is consistent with courts' not treating absent members of the plaintiff class who have not filed an appearance as parties entitled to service under rule 5.¹⁰⁶ Moreover, the proposal is consistent with fairness; the procedures mandated by rule 4 will better assure that the absentee receive notice of all claims for relief under which judgment may be entered against him¹⁰⁷ than would notice either pursuant to the provisions of rule 23 or pursuant to rule 5.¹⁰⁸

104. Under rule 4 a summons and complaint must be served upon defendants in a manner prescribed by the rule and within certain territorial limits. FED. R. CIV. P. 4. Rule 4(c) requires that service must be made by a United States marshal or his deputy, by some person specially appointed by the court, or by a person authorized to serve process in an action brought in the courts of general jurisdiction of the state in which the district court is held or in which service is made. Under rule 4(d) the summons and complaint must be served together. A competent adult must be served by

delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.

FED. R. CIV. P. 4(d). Rule 4(f) provides territorial limitations on effective service and 4(g) requires the person serving the process to make prompt proof thereof to the court.

Rule 4 prescribes how, and under what circumstances, federal courts may assert jurisdiction over defendants. Counter-defendants, however, have been treated differently. In traditional litigation, once the counter-defendant has appeared in the action the pleading containing a counterclaim need not be served pursuant to rule 4. Service of the pleading pursuant to the lesser requirements of rule 5 is sufficient. 3 MOORE'S FEDERAL PRACTICE ¶ 13.10, at 13,225 (2d ed. 1980); see FED. R. CIV. P. 5(a) (pleadings subsequent to complaint, papers, and motions must be served on parties); FED. R. CIV. P. 5(b) (service may be made on party or attorney by hand, by leaving at place of business or abode, or by mail). The applicability of the less demanding standards of rule 5 to the service of a counterclaim presupposes that the court already has gained jurisdiction over the counter-defendant. See 2 MOORE'S FEDERAL PRACTICE, *supra*, ¶ 5.04[1], at 1327-28 nn.6-8 (subsequent pleading asserting claim against person not already party, such as third-party defendant, must be served on that person together with summons under rule 4).

105. See text accompanying notes 89-93 *supra* (absent class member does not commence suit).

106. See note 132 *infra* (absentees not regarded as parties under rule 5 unless they have filed an appearance).

107. Cf. 2 MOORE'S FEDERAL PRACTICE ¶ 5.05 (2d ed. 1980) (rule 5(a) requirement of rule 4 service for new claims against parties in default based on notions of fairness; notice necessary before judgment can be entered).

108. The differences between the requirements of rule 4 and rule 5 make evident the greater likelihood that an absent plaintiff class member will receive notice of a counterclaim against him if he is served pursuant to rule 4. Among other differences, service by mail suffices under rule 5, but not under rule 4. Furthermore, rule 5 places no territorial limitations upon service, whereas rule 4 limits service to the territorial limits of the state in which the district court sits—except when otherwise authorized by a statute of the United States or by the rules. See also FED. R. CIV. P. 4(f) (service may be made not more than 100

This analysis suggests that a valid judgment can be entered on counterclaims against certain absent members of a plaintiff class and therefore that certain class members may be opposing parties within the consolidation policy of rule 13. This group includes those absent class members over whom the court asserts personal jurisdiction through service of a summons and pleading stating the counterclaim and who have no valid objection to that assertion of personal jurisdiction.¹⁰⁹ Given present procedures, however, it is essential for a court not to construe absentees' silence as a waiver of objections to the court's exercise of personal jurisdiction for purposes of a counterclaim.

The consolidation policy of rule 13 indicates that those absentees who have waived valid objections by failing to make a timely motion upon service of a summons and pleading stating the counterclaim against them also may

miles from place action commenced, assigned, or transferred for trial).

The notice requirements of rule 23 are less specific and less adequate mechanisms for notification of counterclaims. Rule 23(c)(2), which applies only when a class suit has been brought under (b)(3), states in pertinent part: "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." FED. R. CIV. P. 23(c)(2). Rule 23(c)(2)'s requirements meet or exceed constitutional requirements for notice of the class suit. 2 NEWBERG ON CLASS ACTIONS §§ 2300, 2300a (1977) (rule 23 notice provision more stringent than due process requires); *Class Actions*, *supra* note 80, at 1402, 1416 n.140 (rule 23 notice provision more rigorous than constitutional standard); Note, *Consumer Class Actions in California: A Practical Approach to the Problem of Notice*, 7 PAC. L.J. 811, 818-26 (1976) (rule 23 notice provision not required by due process considerations). Nevertheless, rule 23 does not always require even the service by mail that satisfies rule 5. The Advisory Committee's Notes state that notice to members of the class need not comply with the formalities for service of process. Advisory Committee's Notes, *supra* note 6, at 107. Notice by publication suffices for some class members under rule 23. See *Johnson v. Robinson*, 296 F. Supp. 1165, 1169 (N.D. Ill.) (in class action involving unidentifiable plaintiffs, best practicable notice was news media coverage), *aff'd per curiam*, 394 U.S. 847 (1969). When counterclaims have been threatened or asserted, courts often have contemplated notifying class members of the counterclaims simply through the (c)(2) notice. See *National Super Spuds, Inc. v. New York Mercantile Exch.*, 75 F.R.D. 40, 43-44 (S.D.N.Y. 1977) (existence of counterclaims should be included in notice as factor for class member to consider); *In re Sugar Indus. Antitrust Litigation*, 74 F.R.D. 322, 349 (E.D. Pa. 1976) (same); *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 485, 490 (S.D.N.Y. 1973) (same). Yet in a few instances courts have recognized the need for more effective notice than that required by rule 23(c)(2). See *Carter v. Public Fin. Corp.*, 73 F.R.D. 488, 493 (N.D. Ala. 1977) (existence of counterclaims required individual notice to class members); *Cotchett v. Avis Rent A Car Sys., Inc.*, 56 F.R.D. 549, 553 (S.D.N.Y. 1972) (same).

Moreover, rule 23(c)(2) does not apply to class actions brought pursuant to rule 23(b)(1) or (b)(2). Notice in such class actions is issued pursuant to rule 23(d)(2), which authorizes the court to require "that notice be given in such manner as the court may direct." FED. R. CIV. P. 23(c)(2) (emphasis added). In order for a valid judgment to be entered on counterclaims asserted against individual absent members of plaintiff (b)(1) or (b)(2) classes, notice of the counterclaim, providing a meaningful opportunity to be heard, would have to be given. It is highly unlikely, however, that notice a court would require under rule 23(d)(2) would be as stringent as the requirements for service of process under rule 4.

In actions brought against a class of defendants certified under rule 23(b)(1) or (b)(2), several courts have ordered individual written notice to all identifiable members of the class as a matter of discretion under (d)(2). 1 NEWBERG ON CLASS ACTIONS § 1148 (1977); see *United States v. Trucking Employers, Inc.*, 75 F.R.D. 682, 685 (D.D.C. 1977) (in action against (b)(2) defendant class, court ordered written notice to all identified class members); *Hopson v. Schilling*, 418 F. Supp. 1223, 1241 (N.D. Ind. 1976) (same). It would seem to follow a fortiori that when absent members of (b)(1) or (b)(2) plaintiff classes are countersued individually they are entitled, at a minimum, to individual written notice.

109. Under this analysis, the individually countersued absent class member who is within the territorial jurisdiction of the court and is served with process is treated as a traditional defendant would be. That is, he can either default on the counterclaim or he can litigate it. He will have the opportunity to object to improper venue or to insufficient process or service under rule 12, with the usual consequences of failing to do so. Assuming he has not opted out of the plaintiff class, he will be bound by the judgment entered thereon. Beyond that, it makes no difference whether he participates in any way in the class action.

properly be regarded as rule 13 opposing parties. Consequently, judgments on the counterclaims may be entered against them. Under *res judicata* principles, however, countersued class members who do not answer or otherwise plead to the counterclaim, and who wholly fail to participate in the class action, should be able to make a collateral attack on a judgment entered against them on the counterclaims.

If the served absentee, however, voluntarily participates in the class action, for example by filing an appearance or a claim for damages with notice that he thereby risks liability on a counterclaim, it is fair to infer his consent to the assertion of jurisdiction over him for purposes of the counterclaim.¹¹⁰ Such activity is an unambiguous indication of an affirmative choice to remain in the action. One who so participates has chosen to come into the forum court, seeking benefits for himself at the defendant's cost. Justifications similar to those for treating an ordinary or named plaintiff as having waived his objections to personal jurisdiction and venue apply to such a claimant. No collateral attack upon the judgment on the counterclaim will be available to him. This part of the analysis, considered by itself, would permit counterclaims to lie against some absent members of the plaintiff class, even when that class loses on the principal claim.

The third and final group of class members who are parties under rule 13's consolidation policy consists of the individually countersued and served class members who successfully object to the assertion of jurisdiction over them for the counterclaim, but who then actively participate in the plaintiff class action. In the absence of such active participation—an exercise of control—¹¹¹ these absentees would not be rule 13 opposing parties because a judgment against them on a counterclaim would be invalid for lack of personal jurisdiction. Active participation with notice of the consequences, however, should constitute consent rendering them vulnerable to binding judgments on the counterclaims. Nonetheless, special care must be taken in dealing with this group of counter-defendants. Because they will not be subject to the personal jurisdiction of the trial court until they have voluntarily participated in the class action, no valid adjudication of the counterclaims against them can take place until they have so participated. "[T]he validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently."¹¹² For example, counterclaims against those who file a claim for damages after the trial would have to be adjudicated after that trial, not as a part of it.¹¹³

110. Voluntary participation by an absentee late in the class action proceedings arguably might make it unfair to permit a counterclaim to be asserted against him because of insufficient time to prepare a defense. Thus, the court might be faced with the need to make repeated decisions as to whether an absentee had participated early enough to warrant allowance of a counterclaim against him. If the late-participating absentee had, as here proposed, been served with a timely summons and a pleading stating the counterclaim against him and had been advised of the consequences of participating in the class action, it would not be unfair to litigate the claim against him.

111. See notes 123-86 *infra* and accompanying text (discussing the extent of absent class member's ability to control plaintiffs' case).

112. *Pennoyer v. Neff*, 95 U.S. 714, 728 (1877).

113. If matters relevant to the counterclaim had been in issue during the trial, either party might be collaterally estopped from relitigating them. See generally 1B MOORE'S FEDERAL PRACTICE ¶¶ 0.411[1], 0.441-0.448 (2d ed. 1980) (discussing application of collateral estoppel doctrine). When counterclaims raising common issues of law have been brought against absent members of the plaintiff class, some of

In applying these principles, a court must decide which absentees' objections to personal jurisdiction and to venue are valid. It will have to do so in advance of discovery, or at least well before the hearing on the pertinent counterclaims. The court may want to rule upon the absentees' objections to personal jurisdiction and venue before the class claims are adjudicated in order to conduct a simultaneous trial of certain counterclaims and the class claims. Nevertheless, the processing of absentees' objections should not substantially delay the disposition of plaintiffs' class action because the objections are likely to be few. Objections will be of little use if class members who come into the action thereby consent to the jurisdiction of the court. Those class members beyond the court's jurisdiction who want to avoid the counterclaims will have to forgo participation in the class suit and in any recovery because under the consolidation policy of rule 13 class members cannot both recover in the class action and avoid the counterclaims. At the same time, an objection by one who is beyond the court's reach and who does not participate will be unnecessary because a judgment against such a person is invalid and will be subject to collateral attack.¹¹⁴

This section of the article has identified the core party characteristic of being bound by the judgment on one's own claim as the quality most pertinent to rule 13's consolidation policy. Under the foregoing analysis, the only absent members of the plaintiff class against whom a valid judgment could not be entered on a counterclaim are those who are beyond the jurisdiction of the trial court, never voluntarily participate in the litigation of the class claims, and never file a claim for a share of the recovery.¹¹⁵ Because no valid judgment on a counterclaim could be rendered against them, they would not be opposing parties within rule 13's consolidation policy.¹¹⁶ It should be

whom are within the court's jurisdiction and some of whom are not, a court might decide to postpone all the hearings until it could determine which counterclaims it would have jurisdiction to adjudicate. Thus, the court would minimize the risk of reaching inconsistent decisions on common questions of law. Proceeding in this way might entail losses of judicial economy, depending upon the extent of factual and legal overlap between the counterclaims and the principal claims in the class action.

114. Despite these reasons not to file objections to the court's exercise of jurisdiction, some class members might file them in an effort to protect themselves, especially if they are unsure what their future course of action will be, and if they are more confident that they would win a reversal on appeal than that they would succeed in a collateral attack on the judgment.

115. The approach taken in *National Super Spuds, Inc. v. New York Mercantile Exch.*, 75 F.R.D. 40 (S.D.N.Y. 1977), is constitutionally questionable. The court seemed prepared to enter judgment on counterclaims against absent members of the plaintiff class without requiring that they be served with a summons and a pleading stating the counterclaim, without regard to whether they were within the court's jurisdiction, and without regard to whether the absentees took action in the proceedings fairly constituting either consent to the court's jurisdiction or a waiver of their objections thereto. See notes 43-60 *supra* and accompanying text (discussing *Super Spuds*).

116. These arguments and rationale apply equally to absent (b)(1) or (b)(2) class members, with certain qualifications. A member of such a class cannot opt out and thereby avoid a counterclaim. The nature of the relief sought in such actions often is such that the absent members need not do anything in order to benefit from a judgment in favor of the class. A (b)(1) or (b)(2) class member who is wholly passive throughout the proceedings never manifests consent to the action and ought not be regarded as consenting to the jurisdiction of the court for purposes of a counterclaim against him individually. Once served with a summons and a pleading stating a counterclaim, however, failure to act should have the usual consequences under rule 12. See FED. R. CIV. P. 12(h) (if not asserted promptly, objection to jurisdiction lost). Collateral attack on the judgment on the counterclaim would be open to such an absentee. Thus, only if the absentee intervenes, files an appearance, or takes other affirmative action in the lawsuit would justification exist for treating the absentee as having consented to the court's jurisdiction. If the absentee follows this course, it is fair and constitutional to bind him by a judgment on the counterclaim.

emphasized, however, that no ultimate prejudice to the defendant would flow from a rule precluding the assertion of counterclaims against absent members of a plaintiff class: the defendant still could sue and receive redress for his rightful grievances. He would simply have to initiate his own lawsuit to do so.¹¹⁷

2. Reprisal

The second policy underlying rule 13 is the notion that it is "only fair" that the defendant be able to strike back in kind when he is sued. This policy implicates all three major core party characteristics, but depends primarily on a party's having commenced or exercised control over the action.

The reprisal policy contemplates the defendant's striking back at the persons who initiated the lawsuit against him. As noted above, absent class members are usually not counted among those who have commenced the action. Thus, a defendant who files counterclaims against absent members of a plaintiff class thereby strikes at persons other than the class representatives who have commenced the litigation against him. Indeed, absentees usually could not have commenced an action, either individually or through a suit in which they were fully and formally joined.¹¹⁸ At most, they have acquiesced in the prosecution of a claim by others who act on their behalf.¹¹⁹ Thus, the absent members are not fair targets of counterclaims; they should not be regarded as having assumed the risk of reprisal merely by failing to opt out. They are not opposing parties within the reprisal policy of rule 13.¹²⁰

117. The foregoing discussion has related to counterclaims asserted against *individual* members of a plaintiff class certified under rule 23(b)(3). If a defendant asserted counterclaims against plaintiff class members as a defendant class, the same general tests for who would be an opposing party within rule 13 would apply. Members of the defendant class, however, would not be entitled to object to the counterclaims on the grounds that the court lacked personal jurisdiction over them or that the venue was improper as to them. See *United States v. Trucking Employers, Inc.*, 72 F.R.D. 101, 105 (D.D.C. 1976) (by implication) (absent defendant class members bound by judgment because representation adequate although not served with process); *Appleton Elec. Co. v. Advance-United Expressways*, 494 F.2d 126, 139-40 (7th Cir. 1974) (dictum) (venue need not be established over individual absent members of defendant class); Note, *Defendant Class Actions*, 91 HARV. L. REV. 630, 635-36, 638 (1978) (jurisdiction and venue need not be established for individual absent members of defendant class). Jurisdiction would be valid, however, only if the absent defendants were afforded due process of law. See *In re The Gap Stores Sec. Litigation*, 79 F.R.D. 283, 292, 308 (N.D. Cal. 1978) (fundamental fairness requires notice, relation to forum, and minimum contacts); Parsons & Starr, *Environmental Litigation and Defendant Class Actions: The Unrealized Viability of Rule 23*, 4 ECOLOGY L.Q. 893-97 (1975) (in defendant class actions, due process requires that jurisdiction be exercised only in circumstances fundamentally fair to absent members).

In a counter-class action brought against members of a (b)(3) plaintiff class or brought under (b)(3) against members of any plaintiff class, the inability to object to jurisdiction and venue would be relatively unimportant because the counter-defendants have the right to opt out. FED. R. CIV. P. 23(c)(2); see *Appleton Elec. Co. v. Advance-United Expressways*, 494 F.2d 126, 140 (7th Cir. 1974) ((b)(3) defendant class members' opportunity for exclusion from class adequate protection for due process rights); *In re The Gap Stores Sec. Litigation*, 79 F.R.D. 283, 308 (N.D. Cal. 1978) (same). Rule 23(c)(3) authorizes the court to enter a binding judgment against defendant class members who cannot or do not opt out.

118. See note 214 *infra* and accompanying text (discussing absentees' frequent inability to vindicate their rights).

119. See notes 100-02 *supra* (discussing lack of knowledge by absentees).

120. Concern has been expressed that if counterclaims against absent class members are not permitted, plaintiffs could bring "risk-free" actions. See 87 HARV. L. REV. 470, 475-76 & n.26 (1973) (while plaintiff

The *Donson* court, by implication, held that when absent class members file claims for damages, they become rule 13 opposing parties subject to counterclaims. From the perspective of this article, the *Donson* holding can be seen as the logical consequence of viewing the filing of a claim for damages by an absentee as the equivalent of commencing an action. Filing a damage claim is a conscious act against the defendant by the absentee sufficient to entitle the defendant to strike back by counterclaiming.¹²¹ From this view, *Donson's* approach fits reasonably well with the counterstrike rationale of rule 13, while the *Super Spuds* court's allowance of counterclaims against any and all class members, whether or not they file damage claims, does not.¹²²

The degree of control that absentees possess with respect to the handling of plaintiffs' case also has relevance to the rule 13 policy of permitting defendants to strike back at plaintiffs. The model controllers are the named plaintiffs who institute and prosecute the class litigation. It is fair that defendants be permitted to strike back at them by counterclaim.

Conversely, persons who lack control over the handling of a case ought not, in fairness, be subjected to counterclaims. As absent class members have few rights and opportunities to influence the proceedings and seldom exercise any control,¹²³ class members generally should not be treated as rule 13 opposing parties under the reprisal policy. Class members should be forewarned, however, that the assumption of some control, by coming into the action even without formally intervening, may render them vulnerable to counterclaims under the reprisal policy.

Absent class members typically exercise no control over the presentation of plaintiffs' case. In the 1930's, one court said that one who brings a class action "holds and retains absolute dominion over it unless the court orders otherwise upon findings made after hearing that it is not being prosecuted in good faith, with vigor and reasonable capacity. There can be but one master of

who contemplates bringing action on own behalf must weigh both risk of losing own claim and being liable on defendant's counterclaim, these risks would not enter equation when class action contemplated). Persons who commence the class action, however, still must weigh the risk that counterclaims will be filed against them individually. The class members who would be free of the risk of counterclaims are, by hypothesis, neither the ones bringing suit nor participants in the decision to bring suit.

121. Alternatively, *Donson's* implied holding might be based upon the judgment that it is appropriate under rule 13 to allow reprisal by counterclaim against those who exercise control of the class litigation, or seek personally to benefit from a judgment in favor of the class by filing a claim for damages against a defendant. See notes 24-38 *supra* (discussion of *Donson*).

122. The policy of permitting a defendant to strike back in kind at those who sue him may also implicate the core party characteristic of being bound by the judgment and entitled personally to benefit from a judgment in favor of the class. It implicates that characteristic if the policy is one of permitting reprisal against all those who may directly benefit from the litigation against the defendant. It is probably more accurate to say that rule 13 reflects the notion that one who seeks benefits for himself through litigation opens himself up to the burdens of litigating. By implication, one who seeks no benefits for himself should not be put to the risks and burdens of the typical party plaintiff. If so, only those absent class members who seek to benefit personally from a judgment in plaintiffs' favor by filing a claim for damages should pay the price of being subject to counterclaims. Absent class members who file no claims and who therefore seek no benefit from a judgment in plaintiffs' favor should not be vulnerable to counterclaims.

123. See *Class Actions*, *supra* note 80, at 1342 (one consideration in deciding whether to join class is loss of control of action); cf. RESTATEMENT (SECOND) OF JUDGMENTS § 83, Comment f (Tent. Draft No. 2, 1975) (one who surrenders control of litigation nonetheless bound by judgment); *id.* § 85 (same).

litigation for the plaintiffs.”¹²⁴ This remains true to a considerable extent. A class suit is permitted only if the class is so numerous that joinder of all members is impracticable.¹²⁵ In a rule 23(b)(3) class action class membership may number in the millions. Even if it numbers merely in the hundreds all members cannot practicably be joined. Moreover, all cannot control the handling of plaintiffs’ case either through attorneys for the class or through the members’ individual counsel. With inevitably divergent views among class members on virtually any matter as to which an attorney might consult his client, a single attorney or group of attorneys for the class would be unable to function if subject to the control of all class members.¹²⁶ The litigation would be unmanageable if absentees were entitled to have their individual counsel actively participate in the litigation by filing pleadings, motions, and briefs; taking discovery; examining witnesses at trial; and arguing to the jury.¹²⁷

The incompatibility of active participation by class members with the class action concept is manifest both in rule 23 and in the customary handling of class suits. Under rule 23(b)(3) a court must determine whether the questions of law or fact common to the class predominate over questions affecting only individual members, and whether a class action is superior to alternative methods for adjudication of the controversy.¹²⁸ In making this determination courts generally consider whether the members of the class have an interest in individually controlling the prosecution or defense of separate actions.¹²⁹ The draftsmen of the rule clearly perceived a difference between the ability of class members to control their own litigation as they saw fit,¹³⁰ and their relative inability to exercise such control in a class action brought on their behalf by others.

124. *Hallett v. Moore*, 282 Mass. 380, 388, 185 N.E. 474, 478 (1933).

125. See FED. R. CIV. P. 23(a) (one prerequisite to class action is that class so numerous as to preclude joinder of all members).

126. See *Class Actions*, *supra* note 80, at 1593, 1596 (class action lawyer will inevitably subordinate interests of some class members to those of others; otherwise advocacy of any interest impossible). It is unclear to what extent counsel for the class is responsible to absent members of the class. See *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1176 (5th Cir. 1978) (allocation of decision-making responsibility between attorney and class members unclear), *cert. denied*, 439 U.S. 1115 (1979). See generally *Class Actions*, *supra*, at 1592-97 (discussing attorney’s role when conflict of interest between class members). The class representatives, in practice, make the decisions as an initial matter. See *Pettway v. American Cast Iron Pipe Co.*, *supra*, 576 F.2d at 1177-78, 1180 (decision to appeal class action judgment should rest with class representatives). The absent members of the class, therefore, are not in control of plaintiffs’ case. Cf. Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589, 594 n.37 (1974) (class members have right to make collateral attack on judgment if their interests not adequately represented). Class members’ right to collateral attack reflects recognition that the attorney for the class is not under the control of the class.

127. A class member permitted such extensive participation would no longer be an absent class member; he would, in effect, have become an intervening party. See *Adams v. Morton*, 581 F.2d 1314, 1318 (9th Cir. 1978) (class member’s objection to summary judgment motion equivalent to formal entry, rendering him intervening party), *cert. denied*, 440 U.S. 958 (1979); Note, *The Litigant and the Absentee in Federal Multiparty Practice*, 116 U. PA. L. REV. 531, 544 (1968) (discussing when absent class member should be allowed to intervene and what intervenor’s rights of participation should be).

128. FED. R. CIV. P. 23(b)(3).

129. See FED. R. CIV. P. 23(b)(3)(A) (interest of class members in controlling defense or prosecution of actions one factor in court’s determination of existence of common questions and superiority of class action mechanism).

130. See Advisory Committee’s Notes, *supra* note 6, at 103-04 (court should consider interests of class members in controlling litigation).

With respect to the customary handling of class suits, the members of the class usually are not identified either when the suit is commenced or when the defendant files an answer or motions in response to the complaint.¹³¹ Even class members whose names and addresses are known to the named parties need not be served with pleadings and motions, orders of the court, or similar papers required to be served "upon each of the parties" under rule 5(a).¹³² Thus, absent class plaintiffs are not expected to file motions in response to the defendant's pleadings, and probably would not be permitted to do so despite rule 12(c)'s mandate that "any party may move for judgment on the pleadings."¹³³

Absent members of the class typically are not kept informed of the progress of the suit except at critical moments¹³⁴ such as when they must request exclusion from the class,¹³⁵ when they must take affirmative action to share in a recovery,¹³⁶ or when they must object to a proposed dismissal or settlement.¹³⁷ Without advance notice of decisions to be made by counsel for the

131. See Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123, 1141 (1974) (often class defined only generally at pleading stage).

132. Absentees are not regarded as parties within the meaning of rule 5 unless they have filed an appearance. See note 104 *supra*. It may be that when notices are directed to the members of the class pursuant to rule 23, the best notice practicable may be by service upon the class member's attorney in compliance with rule 5(b). See *Supermarkets General Corp. v. Grinnell Corp.*, 490 F.2d 1183, 1185-86 & n.1 (2d Cir. 1974) (although certain class members represented by attorney in known, related individual actions, service upon class members of notice and settlement proposal sufficient when court so ordered and class members not yet represented by attorney in class action).

133. See Newberg, *Orders in the Conduct of Class Actions: A Consideration of Subdivision (d)*, 10 B.C. INDUS. & COM. L. REV. 577, 588 (1969) (class members should not be permitted to disrupt proceedings by appearing; should yield to unified representation).

134. 3B MOORE'S FEDERAL PRACTICE ¶ 23.72 (2d ed. 1980). Although rule 23(d)(2) authorizes the court to require that notice be given to class members of any step in the action, this power is used sparingly and was intended to fulfill due process requirements. Advisory Committee's Notes, *supra* note 6, at 106-07. The significant costs of notice to the class militate against requiring frequent notices. Cf. *Souza v. Scalone*, 563 F.2d 385, 385-86 (9th Cir. 1977) (notice not required in (b)(2) actions except in determining adequacy of representation); *Larionoff v. United States*, 533 F.2d 1167, 1184-86 (D.C. Cir. 1976) (prejudgment notice in (b)(1) actions not required), *aff'd*, 431 U.S. 864 (1977); *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 254 (3d Cir.) (notice not required in every (b)(2) action), *cert. denied*, 421 U.S. 1011 (1975).

135. See FED. R. CIV. P. 23(c)(2) (court must require individual notice to identified class members of right to request exclusion from class).

136. Courts usually require class members to take some such action in order to share in the recovery. The *Manual for Complex Litigation* recommends that proofs of claim not be required until after liability has been established. See MANUAL FOR COMPLEX LITIGATION pt. 1, § 1.45, at 102-03 (Tent. Draft 1980) (proof of claim submitted after judgment surest way to avoid confusion and prejudice to absent class members) [hereinafter DRAFT MANUAL].

137. See FED. R. CIV. P. 23(e) (notice of proposed dismissal or compromise shall be given to all class members).

In addition, courts typically notify class members of a mandatory procedure they must follow to object to the fairness, reasonableness, or adequacy of a proposed dismissal or settlement. Failure to comply with the court's requirements may result in the court's refusal to hear a person's objections or consider any papers he seeks to file in support of his objections. 3 NEWBERG ON CLASS ACTIONS § 5660c (1977). In addition, failure to object may preclude a member of the class from appealing from the judgment entered upon approval of a settlement. See *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059, 1060-61 (7th Cir. 1970) (*per curiam*) (class member who failed to object to settlement could not appeal judgment thereon). At least one district court has ordered that its decisions against the class on the merits be communicated to class members, accompanied by a statement from the class representatives as to whether they would appeal, and if not, providing information as to how class members might seek leave to file an appeal and

plaintiff class and information pertinent thereto, absent members can neither contribute to those decisions nor exercise any control over the class counsel. Moreover, it is likely that courts would not allow an informed class member who is not a named party to present material pertinent to a motion for summary judgment under rule 56, despite rule 12(c)'s provision that "all parties shall be given reasonable opportunity" to present such materials;¹³⁸ to seek discovery of the defendant except in connection with a proposed settlement (although rule 26 and succeeding rules detail how and when parties may obtain discovery);¹³⁹ to participate in rule 16 pretrial conferences through counsel;¹⁴⁰ or to take an active role at trial in selecting and arguing to a jury, questioning witnesses, making objections, and generally exercising the participatory rights of full-fledged parties.¹⁴¹ The class action is designed to avoid multiplicitous activity including the filing of repetitious papers and motions.¹⁴²

Many courts have imposed strict limitations upon communication between class representatives, including their counsel, and absent class members; such limits generally apply from the time litigation on behalf of a class commences.¹⁴³ By local court rules and case-by-case orders issued in accordance

stating the applicable time limits. *Cranston v. Freeman*, 290 F. Supp. 785, 811-12 (N.D.N.Y. 1968), *rev'd on other grounds sub nom. Cranston v. Hardin*, 428 F.2d 822 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971).

138. See FED. R. CIV. P. 12(c) (all parties have reasonable opportunity to present material pertinent to rule 56 motion); *cf. Farber v. Riker-Maxson Corp.*, 442 F.2d 457, 458-59 (2d Cir. 1971) (*per curiam*) (upholding order denying nonlead counsel's motion for summary judgment in shareholder derivative suit and prohibiting such counsel from taking further action in violation of order appointing lead counsel). See generally 3B MOORE'S FEDERAL PRACTICE ¶ 23.71 (2d ed. 1980) (discussing options available to court in event of several attorneys and absent plaintiffs' intervention).

139. See Newberg, *supra* note 133, at 581 (except upon good cause shown, class should have one overall opportunity for discovery as if single plaintiff); *Class Actions*, *supra* note 80, at 1439 & n.239 (possibility of abuse of class discovery because absentees may be subjected to discovery without seeking it; absentees not ordinarily expected to make discovery).

When absent class members object to a proposed settlement they are more likely to be permitted to take discovery. Objectors, however, have no absolute right to discovery. In its discretion the court may limit discovery to what it believes will assist it in evaluating the fairness and adequacy of the settlement. Courts sometimes are willing to grant objectors' motions for discovery, particularly when reasonable bases for the discovery requests have been shown, and the number or interest of the objectors is substantial. See 3 NEWBERG ON CLASS ACTIONS § 5660d (1977) (objectors have no absolute right of discovery; depends on their number and interests); *cf. In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1123-33 (7th Cir. 1979) (trial court abused discretion by failing carefully to examine conduct of settlement negotiations and by preventing plaintiff-objectors from showing through discovery that negotiations had prejudiced best interests of class).

140. See Newberg, *supra* note 133, at 588 (court should restrict role of counsel for individual class members or for intervenors in pretrial conferences; those who enter appearance should not be permitted to disrupt proceedings or gain special rights not available to members who do not appear).

141. *Cf. id.* at 577, 582-83, 588 (class must act through lead counsel to avoid duplication of effort and contradictory positions).

142. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550-51 (1973) (dictum); see 42 FORDHAM L. REV. 791, 792 (1974) (class actions designed to ensure economies of time, effort, and expense).

143. See 2 NEWBERG ON CLASS ACTIONS § 2720 (1977) (ability of class representatives and counsel to communicate restricted once litigation commences); *Class Actions*, *supra* note 80, at 1597-98 & n.81 (current practice to restrict communications between attorney and class he represents). The *Manual for Complex Litigation* recommends forbidding the named parties and their counsel from communicating, directly or indirectly, orally or in writing, with class members without the court's consent to the proposed communication. The only express exceptions are for: (1) communications between the attorney and his

with the recommendations of the *Manual for Complex Litigation*,¹⁴⁴ courts have restricted such communications as a prophylactic measure against client solicitation, champerty, solicitation of funds and fees, misrepresentations, and other feared abuses.¹⁴⁵ Unless these restrictions are modified by court order, they can, among their other faults,¹⁴⁶ substantially impair the ability of class

clients or prospective clients upon contact initiated by them for consultation or in regard to proposed employment of the attorney and (2) communications in the regular course of business or in the performance of the duties of a public office or agency, as long as they do not have the effect of soliciting representation by counsel or misrepresenting the status, purpose, or effect of the action and orders therein. The *Manual* also provides that if a party or counsel asserts a constitutional right to communicate with a member of the class without prior restraint and does so communicate, the attorney must file with the court a written copy or summary of the communication. DRAFT MANUAL, *supra* note 136, pt. I, § 1.41, at 71.

144. See MANUAL FOR COMPLEX LITIGATION, pt. II, § 1.41 (1977) (parties and counsel to class actions forbidden from communicating with class members not formal parties to action without consent of court) [hereinafter MANUAL]; DRAFT MANUAL, *supra* note 136, pt. I, § 1.41, at 70-72 (same); *Class Actions*, *supra* note 80, at 1597-98 & n.81 (*Manual for Complex Litigation* encourages practice of restricting communication between class and attorney; "gag orders" may be inconsistent with rule 23). Several courts have entered orders pursuant to the recommendations of the *Manual*. See, e.g., *Byrnes v. IDS Realty Trust*, 70 F.R.D. 608, 615 (D. Minn. 1976) (court order restricting communication between absent class members and both class attorneys and opposing attorneys); *Brown v. Gillette Co.*, 21 Fed. R. Serv. 2d 372, 373-74 (D. Mass. 1975) (same); *Sayre v. Abraham Lincoln Fed. Savings & Loan Ass'n*, 65 F.R.D. 379, 382 (E.D. Pa. 1974) (same).

At least eleven federal district courts have adopted a rule forbidding or limiting communications between class members and class attorneys: S.D. FLA. R. 19B; N.D. GA. R. 221.2 & 221.3; N.D. ILL. (Civ.) R. 22 (vacated Dec. 2, 1980); E.D. LA. R. 2.12(e) (upheld in *Waldo v. Lakeshore Estates, Inc.*, 433 F. Supp. 782 (E.D. La. 1977), *appeal dismissed mem.*, 579 F.2d 642 (5th Cir. 1978)); Md. R. 20; M.D.N.C. R. 17(b)(6); S.D. OHIO R. 3.9.4; W.D. PA. R. 34 (invalidated as applied to pre-certification communications in *Rogers v. United States Steel Corp.*, 508 F.2d 152 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975)); N.D. TEX. (unpublished); S.D. TEX. R. 6; W.D. WASH. (Civ.) R. 23(g). *Class Actions*, *supra* note 80, at 1597 n.81.

145. See DRAFT MANUAL, *supra*, note 136, pt. I, § 1.41, at 67-70 (discussing potential abuse by solicitation and misrepresentation by counsel).

146. The restrictions recommended by the *Manual for Complex Litigation* have drawn much criticism, some of which is cited in the new Tentative Draft. See DRAFT MANUAL, *supra* note 136, pt. I, § 1.41 nn.33, 33a, 33b, 33c. Commentators have argued that the restrictions are overbroad and vague and may be an unconstitutional prior restraint violative of the first amendment. See *Class Actions*, *supra* note 80, at 1600-01 (prohibiting communications overbroad, dysfunctional, and possibly unconstitutional under first amendment); 88 HARV. L. REV. 1911, 1921-23 (1975) ("gag" rules unreasonable obstacles to class action device and may be unconstitutional). Increasingly, the courts also have questioned the constitutionality of these restrictions. See *Rodgers v. United States Steel Corp.*, 508 F.2d 152, 162-64 (3d Cir.) (judicial interest in administering justice authorizes no blanket exception to first amendment), *cert. denied*, 423 U.S. 832 (1975). One court of appeals held the restrictions to be an unconstitutional prior restraint on speech. See *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 467 (5th Cir. 1980) (en banc) (plenary prohibition of communication in racial discrimination action unconstitutional prior restraint), *aff'd*, 49 U.S.L.W. 4604 (U.S. June 1, 1981). A lower court has rejected constitutional challenges to the kind of restrictions that the *Manual* recommends. See *Waldo v. Lakeshore Estates, Inc.*, 433 F. Supp. 782, 791-94 (E.D. La. 1977) (rule identical to *Manual's* suggested local rule held not unconstitutionally overbroad or vague), *appeal dismissed mem.*, 579 F.2d 642 (5th Cir. 1978).

In addition, courts and commentators have criticized the restrictions as unduly interfering with wholly legitimate communications such as reporting on the status of the litigation, explaining court rulings or notices, consulting about litigation strategy, reporting settlement negotiations and offers, and seeking information for case preparation and responding to inquiries. See *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 477 (5th Cir. 1980) (en banc) (holding unconstitutional as prior restraint a district court order restricting communication by parties and counsel to actual and potential class members), *aff'd*, 49 U.S.L.W. 4604 (U.S. June 1, 1981); *Belcher v. Bassett Furniture Indus., Inc.*, 22 Fed. R. Serv. 2d 1171, 1171-72 (W.D. Va. 1976) (blanket prohibition on communication denied; communications permitted for purpose of develop-

members to influence the positions taken by class counsel both on issues related to certification and on issues arising in the litigation on the merits.¹⁴⁷ The *Manual's* restrictions may preclude even indirect influence on the conduct of the plaintiffs' case by absent class members who are already precluded from participating directly.

Even under the recommendations of the *Manual*, however, the absent class member is not utterly lacking in rights to exert influence on the handling of the case. Class members have limited rights to communicate with the class representative and class counsel. For example, the *Manual* indicates that the preventive orders it recommends are not meant to thwart the ethically proper handling of a case, and that courts should "freely permit proposed communications which will not constitute abuse of the class action."¹⁴⁸ The *Manual* regards as proper those communications needed to develop facts relevant to class action issues and to the merits, and purports to except from prohibited communications those that are constitutionally protected. It recommends that "promptly after the entry of the recommended order, the court should, upon request, schedule a hearing at which time application for relaxation of the order and proposed communications with class members may be presented to the court."¹⁴⁹ The *Manual* contemplates that courts will approve some communications in advance and that, generally, it should suffice that constitutionally protected communications be reported to the court after they have occurred.¹⁵⁰

Courts have begun to move away from the restrictive approach of the *Manual*, and have recognized the legitimacy of communications with absent class members. In the recent case of *Gulf Oil Co. v. Bernard*,¹⁵¹ the Supreme Court ruled that any district court order limiting communications between parties and potential class members must be based upon "a specific record showing by the moving party of the particular abuses by which it is threatened."¹⁵² Moreover, the trial court is required to make "specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties."¹⁵³ The Court noted that the mere possibility of abuses does not justify routine adoption of restrictive orders.¹⁵⁴ The Court did not decide the constitutional issue,¹⁵⁵ holding only that a district court had abused its discretion by adopting the order suggested in the *Manual* without weighing any of the particular circumstances of the case before it.¹⁵⁶

ing case and establishing discrimination claim), *rev'd on other grounds*, 588 F.2d 904 (4th Cir. 1978); 2 NEWBERG ON CLASS ACTIONS §§ 2730a, 2730b (1977) (discussing legitimate reasons for communication by class representatives and counsel).

147. The *Manual* appears to recognize this, as evidenced by its statement that "[t]he recommended preventive order is not intended to be either a permanent or an absolute prohibition of contact with actual or potential class members." DRAFT MANUAL, *supra* note 143, pt. I, § 1.41, at 72.

148. *Id.*

149. *Id.*

150. *Id.* at 71 & nn.33f, 33g.

151. 49 U.S.L.W. 4604 (U.S. June 1, 1981).

152. *Id.* at 4608 (quoting *Coles v. Marsh*, 560 F.2d 186, 189 (3d Cir.), *cert. denied*, 434 U.S. 985 (1977)).

153. *Id.*

154. *Id.*

155. *See id.* ("we do not decide what standards are mandated by the First Amendment in this kind of case").

156. *Id.*

Prior to the *Gulf Oil* decision, other courts had questioned the validity of limiting communications to potential class members. In the first court of appeals decision to rule on the constitutionality of orders modeled after the *Manual*'s suggestion, the United States Court of Appeals for the Fifth Circuit held one such order to be an unconstitutional prior restraint of speech.¹⁵⁷ Moreover, the Fifth Circuit regarded the order as vague and overbroad.¹⁵⁸ The court expressly refused to allow an exception to the constitutional principles limiting prior restraints in the general context of the administration of justice or in the particular context of rule 23, despite the supposed potential for abuses in class actions.¹⁵⁹ Another court of appeals also rejected the recommendations of the *Manual* and held the district courts to be without power to restrict communications with the class except where a specific record of abuses had been made.¹⁶⁰ Moreover, some district courts have chosen to enter far narrower prohibitions than the *Manual* recommends.¹⁶¹ Other decisions have given protection to communications in which absent class members were furnished information relevant to their decisions concerning acceptance of a back pay tender,¹⁶² and were consulted about litigation strategy.¹⁶³ Lowering these barriers to communication is important insofar as it permits class members, representatives, and attorneys to communicate relatively freely, and affords class members an opportunity to influence the handling of their case.¹⁶⁴

A second aspect of absent class members' right to influence the proceedings derives from rule 23(c)(2)(C), which provides each absent member of a class certified under (b)(3) the right to enter an appearance through counsel and requires notice of that right to be given to class members in the initial notice of the class action.¹⁶⁵ The amount of influence to be gained through entering

157. *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 467 (5th Cir. 1980) (en banc), *aff'd*, 49 U.S.L.W. 4604 (U.S. June 1, 1981).

158. *Id.* at 477 n.33.

159. *Id.* at 474-76.

160. See *Coles v. Marsh*, 560 F.2d 186, 189 (3d Cir.) (district court order based upon recommendations of *Manual* vacated; power to restrict communications may not be exercised without specific showing of particular abuses; relief should be consistent with rule 23 policies and narrowest possible to protect parties), *cert. denied*, 434 U.S. 985 (1977).

161. See *Belcher v. Bassett Furniture Indus., Inc.*, 22 Fed. R. Serv. 2d 1171, 1171-72 (W.D. Va. 1976) (blanket prohibition on communication denied; communications permitted for purpose of developing case and establishing discrimination claim), *rev'd on other grounds*, 588 F.2d 904 (4th Cir. 1978).

162. See *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1006-08 (3d Cir. 1976) (protective order prohibiting class counsel from disseminating information on how to calculate back pay vacated because no waiver of first amendment rights for information obtained independent of court process).

163. See *In re International House of Pancakes Franchise Litigation*, [1972] Trade Cases ¶ 73,797, at 91,372 (W.D. Mo. 1972) (defendant enjoined from terminating franchises for purpose of deterring class members from participating in class action), *aff'd*, 487 F.2d 303 (8th Cir. 1973).

164. Cf. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974) (each identifiable class member must be notified of right to remain in class and participate in management of action).

165. FED. R. CIV. P. 23(c)(2)(C).

Rule 23 does not grant this express right of appearance to members of (b)(1) and (b)(2) classes, apparently on the theory that the greater shared interests between the representatives and absent members of (b)(1) and (b)(2) classes will provide sufficient protection for the absent members of those classes. Section (d)(2) effectively gives the courts power to invite class members in (b)(1) and (b)(2) actions to appear and participate to the extent deemed appropriate by the court. It provides in pertinent part: "[T]he court may make appropriate orders . . . (2) requiring, for the protection of the members of the class or

such an appearance, however, is dependent upon what accompanying rights of participation the court permits.

Inasmuch as rule 23(b)(3) class members will be bound by the resulting judgment, their right to enter an appearance is one mechanism for assuring that they will be accorded due process of law.¹⁶⁶ This right enables class members to avoid relying entirely on the representative party¹⁶⁷ if they are dissatisfied with the adequacy of the representation.¹⁶⁸ By allowing absentees to enter an appearance, the rule allocates to class members some control over the proceedings. The Advisory Committee's Note indicates that the right to appear through counsel was intended to enable class members to maintain some control over the litigation.¹⁶⁹

Although the right of absentees to enter appearances has potentially significant effects on the management of plaintiffs' case, neither the rule nor the Advisory Committee's Note elaborates upon the specific rights and obligations of class members who elect to do so. Perhaps the draftsmen believed that the broad discretionary power under rule 23(d) enables a court to control the "appearing" class member.¹⁷⁰ Commentators interpret the appearance provision in different ways. Judge Kaplan explains the right to enter an appearance merely "as entitling counsel to receive the papers in the action to enable him to follow the case with a view to deciding, e.g., whether he should move to intervene."¹⁷¹ In his view, the appearance is not tantamount to intervention and therefore does not circumvent rule 24.¹⁷² Recognizing the rule's ambiguity, however, Judge Kaplan recommends that the (c)(2) notice of a right to appear should specify the extent to which appearing members may participate.¹⁷³ Professor Cohn, on the other hand, argues that the (b)(3) class member has a right to become a party for all purposes without having to meet the requirements for intervention under rule 24.¹⁷⁴ Recent

otherwise for the fair conduct of the action, that notice be given . . . to some or all of the members . . . of the opportunity . . . to intervene and present claims or defenses, or otherwise to come into the action." FED. R. CIV. P. 23(d)(2).

166. See C. WRIGHT & A. MILLER, *supra* note 22, § 1787, at 161 (appearance provision gives absentees ability to protect rights).

167. Kaplan, *supra* note 101, at 392.

168. See *Brennan v. Midwestern United Life Ins. Co.*, 259 F. Supp. 673, 683 (N.D. Ind. 1966) (class members dissatisfied with representation may appear through counsel), *aff'd*, 417 F.2d 147 (7th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970).

169. The Advisory Committee's Note explains that "[e]ven when a class action is maintained under subdivision (b)(3), this individual interest [in pursuing one's own litigation] is respected. . . . A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel." Advisory Committee's Notes, *supra* note 6, at 105. By "pursuing their own litigation," the draftsmen referred to the class members' interest in "controlling their own litigations and carrying them on as they see fit," one of the factors to be considered by the court in certifying a class under rule 23(b)(3). *Id.* at 104.

170. See FED. R. CIV. P. 23(d) (court may impose conditions to prevent repetition and provide for fair conduct of action).

171. Kaplan, *supra* note 101, at 392 n.137.

172. *Id.* Rule 24 governs intervention, and sets the criteria by which courts determine whether a petitioner may intervene either by right or in the court's discretion. Intervention of right requires an interest that otherwise will be impaired or impeded. FED. R. CIV. P. 24(a). Permissive intervention requires a question of law or fact in common with the main action. FED. R. CIV. P. 24(b).

173. Kaplan, *supra* note 101, at 392 n.137.

174. Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1223-24 (1966). *But see* Milne v. Berman, 384 F. Supp. 206, 213 (S.D.N.Y. 1974) (class members' motion to intervene denied given their

commentators and courts favor Judge Kaplan's approach.¹⁷⁵ Nevertheless, because of the court's wide discretionary powers to limit the participation of both appearing and intervening members¹⁷⁶ the difference between the two views has little practical effect.¹⁷⁷ The appearing class member has not been a frequent or aggressive participant in class actions,¹⁷⁸ and thus courts have not yet delineated the precise scope of appearing members' participation rights.

The rules provide other ways in which an absentee can expand his role in the litigation. An absent class member can move to intervene under rule 24.¹⁷⁹ In addition, the court may increase the absentee's role by means of notification orders.¹⁸⁰ In particular, courts have used such orders to invite absentees' objections to the adequacy of representation.¹⁸¹ Furthermore, all members of

ability to appear under rule 23(c)(2)(C)), *rev'd on other grounds*, 424 U.S. 577 (1976); Note, *The Litigant and the Absentee in Federal Multiparty Practice*, 116 U. PA. L. REV. 531, 533 (1968) (acknowledging that 23(c)(2)(C) confers right to become party, but recommending that requirement of showing reasons for intervention under rule 24 should apply to 23(c)(2)(C)).

175. See *Ramsey v. Arata*, 406 F. Supp. 435, 442 (N.D. Tex. 1975) (Kaplan approach favored); 7A C. WRIGHT & A. MILLER, *supra* note 22, § 1787, at 161 (Kaplan approach more sound because stricter standard of intervention prevents action from becoming unwieldy).

176. Rule 23(d) provides in part:

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; . . . (3) imposing conditions on the representative parties or on intervenors; . . . (5) dealing with similar procedural matters.

FED. R. CIV. P. 23(d).

177. See Kaplan, *supra* note 101, at 392 n.137 (court's discretion under 23(d) to limit or expand participation by appearance or intervention effectively eliminates distinction); *Class Actions*, *supra* note 80, at 1341 n.63 (same). See also 3B MOORE'S FEDERAL PRACTICE ¶ 23.90[2], at 23-542, 23-543 (2d ed. 1980) (same); 7A C. WRIGHT & A. MILLER, *supra* note 22, § 1799, at 255-57 (same).

178. See 2 NEWBERG ON CLASS ACTIONS § 2475 (1977) (absent class members have not tended to make appearances under rule 23(c)(2)(C)).

179. Rule 24 provides that a petitioner may intervene "of right" if he meets three requirements: he claims an interest in the subject of the action, he is so situated that disposition of the case may impair his ability to protect that interest, and he is inadequately represented by the existing parties. FED. R. CIV. P. 24(a)(2). An absent class member satisfies the first two requirements. *Class Actions*, *supra* note 80, at 1484 n.163. The absentee also may satisfy the third requirement. Although certification of the class under rule 23 depends on the adequacy of the representation, the court may still conclude under rule 24 that the absentee's interest is not adequately represented for purposes of intervention. See Advisory Committee's Notes, *supra* note 6, at 110-11 (class member may intervene upon establishing with sufficient probability that "representative" does not adequately represent him). Nonetheless, in practice, even if the requisite showing for intervention is made, the court has discretion to limit and condition intervention by absent class members. *Class Actions*, *supra*, at 1484 & n.163. Despite persuasive arguments for revising rule 24 so that all interventions are permissive, Professor Shapiro does not recommend this change when the applicant for intervention is a class member in a pending class action. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 758 (1968). Such a person should be able to intervene if representation of his interest is shown to be inadequate, regardless of other factors. *Id.*

Even if a court grants an absentee's motion to intervene, the court is empowered under rule 23(d) to impose conditions and otherwise limit the participation of intervenors. FED. R. CIV. P. 23(d); see Shapiro, *supra*, at 752-56 (limitations on intervenors' participation appropriate when necessary to maintain control over proceeding and to protect interests of other parties).

180. See FED. R. CIV. P. 23(d)(2) (court may order notice to class members of any step in action, of proposed judgment, of opportunity to criticize adequacy of representation, or of opportunity to enter action).

181. See *Harriss v. Pan Am. World Airways, Inc.*, 74 F.R.D. 24, 51-52 (N.D. Cal. 1977) (responses

the class have the right to notice of a proposed dismissal or compromise of the class action under rule 23(e)¹⁸² and, by implication, the right to object thereto.¹⁸³ Finally, absentees can police the representation they receive by seeking a declaration that they are not bound by the judgment if the proceedings did not comport with due process requirements.¹⁸⁴

Despite the various theoretical opportunities for participation and influence available to absent members of a plaintiff class, class members have little incentive to avail themselves of these rights¹⁸⁵ and as a result rarely participate voluntarily or exercise any control over the handling of plaintiffs' case.¹⁸⁶ Because rule 23 exists in part to furnish an effective procedure for those so lacking in means or whose claims are so small that they are unlikely to try to vindicate their rights,¹⁸⁷ significant involvement by means of appearance or intervention is improbable. Rights such as that to be heard when a settlement is proposed and to complain of inadequate representation either directly or through a collateral attack upon the judgment, while important, are not avenues for meaningful, continuing control over the litigation. Under these circumstances, absentees' rights to control or even to participate in the litigation are far more theoretical than real. Even in theory,

from notice to potential class members in sex discrimination suit would disclose whether plaintiff fairly and adequately could protect interests of absent members and therefore represent class); *Gates v. Dalton*, 67 F.R.D. 621, 633 (E.D.N.Y. 1975) (notice in labor union suit provided class members with opportunity to signify whether representation fair and adequate, and resolve whether record plaintiffs' interests conflicted with those of class).

182. Rule 23(e) provides: "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." FED. R. CIV. P. 23(e).

183. See, e.g., *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1116 (7th Cir.) (subclass members notified of and provided opportunity to object to proposed settlement), *cert. denied*, 444 U.S. 870 (1979); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) (class members who object to proposed settlement should be given opportunity to develop record of contentions before court); *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 832-33 (3d Cir. 1973) (same). See generally 3B MOORE'S FEDERAL PRACTICE ¶ 23.80[3], 23.80[4] (2d ed. 1980) (court properly may consider objections of class members in decision to approve settlement); 2 NEWBERG ON CLASS ACTIONS § 2800 (1977) (class members may appear with counsel or file response with court to give views on settlement); 3 NEWBERG ON CLASS ACTIONS §§ 5660a, 5660b (1977) (right to notice of settlement affords members ability to object to fairness and adequacy of settlement); see also note 139 *supra* (right of absent class members who object to proposed settlement to take discovery with respect thereto).

184. *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940). Lack of due process may result from inadequate representation by named plaintiffs. See *Gonzales v. Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973) (named representative's failure to appeal prospective judgment on behalf of class rendered representation inadequate; class not bound). Alternatively, inadequate notice can constitute denial of due process. See *McCubrey v. Boise Cascade Home & Land Corp.*, 71 F.R.D. 62, 67-68 (N.D. Cal. 1976) (class plaintiffs who had commenced individual suits against defendants prior to receipt of notice of class action inadequately notified as to consequences of proposed class settlements for individual suits; not bound by class adjudication).

185. See Advisory Committee's Notes, *supra* note 6, at 104 (amounts at stake for individuals usually small).

186. 2 NEWBERG ON CLASS ACTIONS § 2475v (1977); Pomerantz & Haudek, *Class Actions*, 2 REV. SEC. REG. 937, 940 (1969).

187. See Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684-86, 691 (1941) (rule 23 enables those with small claims to share expenses and prosecute claim vigorously); Kaplan, *supra* note 101, at 397-98 (class members not required to affirmatively request inclusion in class because those with small claims will not do so). See also 7 C. WRIGHT & A. MILLER, *supra* note 22, § 1754, at 543 (rule 23 objective to establish procedure for those not in economic position to sue).

absentees' ability to control the litigation differs significantly from the control that a traditional party plaintiff enjoys.

Thus, absent members of a plaintiff class generally exercise little, if any, control over the litigation and therefore lack the second core party characteristic most pertinent to rule 13's reprisal policy. Consequently, most class members are not opposing parties under rule 13's reprisal policy. Those few absent plaintiff class members who voluntarily assume some control over the litigation, however, may take on the attributes of an opposing party under an interpretation of the rule 13 reprisal policy that looks beyond who initiated the class action.¹⁸⁸ Wholly inactive class members, whether within or beyond the court's territorial jurisdiction, are not rule 13 opposing parties under either conception of the reprisal policy.

3. Economies

The final major policy underlying rule 13 is the conservation of judicial resources and the resources of the parties.¹⁸⁹ The core party characteristics to which this policy primarily relates are those of control over the proceedings and being bound by the judgment.

Economies to the Defendant. A prohibition of counterclaims against absent members of a plaintiff class would deprive defendants of the ability to have their claims against class members settled in a single action with the plaintiffs' complaint. Defendants would be forced to bring separate actions against individual class members in geographically scattered courts. This could impose a severe burden upon defendants if they had to establish the same legal positions and factual matters in many separate suits. Thus, allowing counterclaims may result in economies in some circumstances.

These economies, however, may be insignificant for three reasons. First, defendants in class actions often assert permissive counterclaims not sharing common questions with the main action.¹⁹⁰ The less the legal and factual overlap between the counterclaims and the class claims, the less will be lost in economies to the defendant if separate actions must be brought. Second, allowing counterclaims against inactive class members would involve participation by numerous attorneys who are unfamiliar with the main action,

188. For reprisal by counterclaim to be effective, class members must be bound by the judgment on the defendant's counterclaims. Therefore, it is consistent with rule 13's reprisal policy to allow counterclaims against only those absent class members over whom the court can and does validly assert personal jurisdiction. The same voluntary participation that can fairly be regarded as manifesting consent to the jurisdiction of the court and to venue may also constitute an assumption of control that entitles the defendant to a reprisal by counterclaim.

189. See 3 MOORE'S FEDERAL PRACTICE ¶ 13.12[1] (2d ed. 1980) (rule intended to prevent multiplicity of actions); 6 C. WRIGHT & A. MILLER, *supra* note 22, § 1403, at 13 (rule intended to prevent circuity of action, enables litigants to avoid costs of multiple litigation); *id.* § 1409, at 37 (same); *id.* § 1420, at 112 (same); cf. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1290 & n.43 (1976) (rules 13, 14, 15, 20 and 24 should facilitate consideration of all claims arising from single occurrence).

190. See, e.g., *Perry v. Beneficial Fin. Co.*, 81 F.R.D. 490, 493 (W.D.N.Y. 1979) (federal statutory claim and state contract counterclaim raised different issues of fact and law); *Fetta v. Sears, Roebuck & Co.*, 77 F.R.D. 411, 414 (D.R.I. 1977) (same); *Parr v. Thorp Credit, Inc.*, 73 F.R.D. 127, 129 (S.D. Iowa 1977) (same); *Herrmann v. Atlantic Richfield Co.*, 72 F.R.D. 182, 185 (W.D. Pa. 1976) (same).

causing confusion and duplicative proceedings. Furthermore, any counterclaim judgment rendered against an absent plaintiff who is beyond the jurisdiction of the court is subject to collateral attack on due process grounds, negating any conservation of defendant's resources. Thus, the economies to the defendant from the assertion of counterclaims may be illusory.

Economies to the Absentee.

Traditional plaintiffs and representatives of a plaintiff class are active parties—they communicate with their attorneys, respond to depositions and interrogatories, and testify at trial. Because absent class members do not participate in these activities, defense of a counterclaim would be no more efficient than the absentee's defending against the same claim in an independent action. Indeed, the class action forum may be far from both the absentee's home and the locus of the transaction in question. If the absentee must defend a counterclaim in this forum, the costs and other burdens imposed upon him may exceed those that would be incurred were the claim brought independently in a court of proper venue. Yet, if the counterclaim is allowed, the absentee must either defend against it or opt out of the class.

The (b)(3) class member's ability to opt out of the plaintiff class¹⁹¹ enables him not only to avoid being bound by the judgment in the main action, but also to avoid being sued on a counterclaim.¹⁹² Many class members who are cognizant of a counterclaim against them—or even of the possibility or threat of one—will choose to opt out.¹⁹³ Thus, a primary consequence of permitting counterclaims will be a reduction in the size of the plaintiff class. Every countersued class member who leaves the litigation eliminates potential savings to the defendant that adjudication of the counterclaim as such would have produced.

191. See FED. R. CIV. P. 23(c)(2)(C) ((b)(3) class member may request exclusion). Members of plaintiff classes certified under rule 23(b)(1) or (b)(2) have no such right.

192. Although the right is analogous to the right to voluntary dismissal in a nonclass action suit, FED. R. CIV. P. 41(a), it is in fact a broader right because a plaintiff who drops his claim in a nonclass suit may find that the counterclaim will be litigated nonetheless. See *Wong v. Bacon*, 445 F. Supp. 1177, 1184 (N.D. Cal. 1977) (compulsory counterclaim with independent jurisdictional basis can be litigated notwithstanding voluntary dismissal of plaintiff's complaint). It is unclear, however, whether upon voluntary dismissal of the suit by plaintiff the defendant can continue to litigate a counterclaim lacking an independent jurisdictional basis. Compare *Kirby v. American Soda Fountain Co.*, 194 U.S. 141, 145 (1904) (defendant's counterclaim failing to satisfy jurisdictional amount may be maintained after plaintiff requested dismissal of complaint) with *United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966) (dictum) (if federal claims dismissed before trial, pendent state claims lacking jurisdictional basis should be dismissed as well). See generally 6 C. WRIGHT & A. MILLER, *supra* note 22, § 1414, at 79-80 (interpreting *Gibbs* possibly to indicate that when courts' jurisdiction over original suit based on federal question, ancillary counterclaim should be dismissed once original claim dismissed).

Moreover, although a plaintiff ordinarily has the right to dismiss the action without prejudice at any time before the defendant serves his answer, FED. R. CIV. P. 41(a), there are limited circumstances when the court might deny plaintiff this opportunity. See *D.C. Electronics, Inc. v. Nortram Corp.*, 511 F.2d 294, 297-98 (6th Cir. 1975) (dictum) (when full merits of case brought out at pretrial hearing, court may prevent plaintiff's voluntary dismissal prior to defendant's service of answer). In contrast, courts have not so restricted the absentee's right to terminate his connection to the class action.

Thus, the opt-out provision grants absentees greater flexibility than traditional plaintiffs have. This ability to avoid the counterclaim probably reflects a recognition that the absentee did not commence and does not acquiesce in the litigation and, therefore, is not an appropriate target for reprisal.

193. See *Alpert v. U.S. Indus., Inc.*, 59 F.R.D. 491, 499 (C.D. Cal. 1973) (action generating counterclaims that force significant portion of class to opt out inappropriate for class certification); *Cotchett v. Avis Rent A Car Sys., Inc.* 56 F.R.D. 549, 553 (S.D.N.Y. 1972) (same).

Economies to the Court. Similarly, economies to the court are nullified if the countersued class members exercise their right to opt out. Even assuming, however, that no class members would opt out, it is not clear that significant judicial economies would result from allowing counterclaims against absent class members.¹⁹⁴

If the defendant's counterclaims are permissive, they will not have arisen out of the transaction that is the subject matter of the class claim.¹⁹⁵ Little saving of time and effort will accrue to the court system through the litigation of such counterclaims as part of the class action proceeding.¹⁹⁶ Indeed, the added complications of having counterclaims joined with a class action may increase the time and effort that the main action will require.¹⁹⁷ Courts have discretion to refuse to entertain counterclaims that will unduly complicate the litigation.¹⁹⁸ Permissive counterclaims asserted against absent members of the plaintiff class often should be dismissed under this doctrine and for reasons of inconsistency with the rule 23 policies discussed below.¹⁹⁹

Even a compulsory counterclaim does not necessarily further the objective of judicial economy in the class action setting. A counterclaim is compulsory under rule 13 if it arises out of the transaction or occurrence that is the subject matter of the main claim.²⁰⁰ A claim may properly be regarded as compulsory in the absence of a substantial identity in the evidence necessary to support or to refute the plaintiffs' claim and the defendant's counterclaim. The most common, and most liberal, test for determining whether a claim is compulsory under rule 13 is whether there exists a logical relationship between the

194. Most of the following discussion is equally applicable to counterclaims brought against absent members of (b)(1) or (b)(2) plaintiff classes who are sued individually or as a defendant class certified under rule 23(b)(1) or (b)(2) and who therefore cannot opt out.

195. See FED. R. CIV. P. 13(b) (permissive counterclaim does not arise out of transaction or occurrence that is subject matter of opposing party's claim).

196. As an alternative to counterclaims, if the claims include common questions of law or fact, the defendant may promote economy by joining the class members against whom he has claims and suing them together in one independent action. See FED. R. CIV. P. 20 (allowing joinder of parties for claims arising out of same transaction).

Overlap among the proposed counterclaims provides no justification in terms of economy for allowing them to be asserted in the main action. Only overlap between the counterclaims and the main class claims would justify assertion on grounds of economy; that overlap does not exist as to counterclaims that are merely permissive under rule 13(b).

197. Cf. *Turoff v. Union Oil Co.*, 61 F.R.D. 51, 58-59 (N.D. Ohio 1973) (adjudication of compulsory counterclaims unlikely to have been brought in absence of class action would create burden on court); *Cotchett v. Avis Rent A Car Sys., Inc.*, 56 F.R.D. 549, 552 (S.D.N.Y. 1972) (administrative difficulties created by compulsory counterclaims is factor weighing against class certification).

198. 6 C. WRIGHT & A. MILLER, *supra* note 22, § 1420, at 115; see *Rosemont Enterprise, Inc. v. Random House, Inc.*, 261 F. Supp. 691, 696-98 (S.D.N.Y. 1966) (additional issues interposed by permissive counterclaim would further complicate already complex litigation; counterclaim dismissed without prejudice); *Kaye v. Pantone, Inc.*, 395 A.2d 369, 372, 375 (Del. Ch. 1978) (permissive counterclaim against plaintiff shareholder who sought stock appraisal after merger would complicate valuation issue and deter similar actions; counterclaim dismissed without prejudice).

199. See notes 209, 214 & 216 *infra* (major purposes of rule 23 include avoiding multiple joinder, providing redress for small claimants, and deterring wrongful conduct).

200. FED. R. CIV. P. 13(a). Even if a counterclaim arises out of the transaction or occurrence that is the subject matter of the opposing party's claim, there are several circumstances under which it is not compulsory. The claim is not compulsory if it requires for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction, if at the time the action was commenced the claim was the subject of another pending action, or if the court does not otherwise acquire personal jurisdiction over the defendant and he is not stating any counterclaims. *Id.*

claim and the counterclaim.²⁰¹ In a class action, so many proposed counterclaims may meet this broad test that the sheer volume of counterclaim litigation could render the class action unmanageable. This impediment to judicial economy has led some courts to deny class certification because of the multitude of compulsory counterclaims against class members.²⁰² Other courts, placing more importance on the economies derived from the class action itself, have certified the class but dismissed the counterclaims as permissive despite some relationship to the main action.²⁰³

The court in *Super Spuds*²⁰⁴ apparently chose a compromise approach. The court characterized the counterclaims as compulsory, but in the interest of preserving the class action, severed the counterclaims from the main claim.²⁰⁵ An alternative, and in some respects less desirable, approach is for the court to exclude the counter-defendants from the plaintiff class.²⁰⁶ Such exclusion promotes judicial economy by preserving the class action, although it effectively may preclude relief for those parties excluded. Both of these methods of handling compulsory counterclaims may negate any saving of judicial resources because the severed claims share common questions with the main action, but nevertheless must be litigated separately.

Another practical factor undercutting the reality of judicial economies is that in those (b)(3) class actions that do go to trial,²⁰⁷ the first and only voluntary participation by absent class members often comes late in the proceedings when proofs of claim must be made. Insofar as voluntary participation is essential for the court to exercise personal jurisdiction over absent class members for purposes of counterclaims against them, the time during which judicial economies could have been reaped through simultaneous trial of the class claim and the counterclaims will have passed before jurisdiction over the counter-defendants has been established.

Finally, counterclaims can serve as a litigation tactic to deter the institution of a class action. The likely effect of prohibiting these tactical counterclaims would be the ultimate judicial economy—the claims probably would never be litigated at all. If, on the other hand, the counterclaims are valid and worth pursuing, their preclusion from the class action would not prevent defendants from litigating them independently. Class members would then defend

201. 6 C. WRIGHT & A. MILLER, *supra* note 22, § 1410, at 48.

202. See, e.g., *George v. Beneficial Fin. Co.*, 81 F.R.D. 4, 6 (N.D. Tex. 1977) (federal Truth-in-Lending-Act defendant's state contract counterclaims against class members compulsory; class certification denied because inefficient to litigate counterclaims); *Carter v. Public Fin. Co.*, 73 F.R.D. 488, 493 (N.D. Ala. 1977) (same); *Rollins v. Sears, Roebuck & Co.*, 71 F.R.D. 540, 542-43 (E.D. La. 1976) (same).

203. See, e.g., *Perry v. Beneficial Fin. Co.*, 81 F.R.D. 490, 492 (W.D.N.Y. 1979) (federal Truth-in-Lending-Act defendant's state contract counterclaims against class members permissive and not within federal jurisdiction; class certification granted); *Fetta v. Sears, Roebuck & Co.*, 77 F.R.D. 411, 414 (D.R.I. 1977) (same); *Parr v. Thorp Credit, Inc.*, 77 F.R.D. 127, 129 (S.D. Iowa 1977) (same).

204. *National Super Spuds, Inc. v. New York Mercantile Exch.*, 75 F.R.D. 40 (S.D.N.Y. 1977); see notes 39-47 *supra* (discussing *Super Spuds*).

205. 75 F.R.D. at 43-44; cf. *AAMCO Automatic Transmissions, Inc. v. Tayloe*, 67 F.R.D. 440, 450 (E.D. Pa. 1975) (court may sever permissive counterclaims from class action under rule 42(b)).

206. See *Rollins v. Sears, Roebuck & Co.*, 71 F.R.D. 540, 542 (E.D. La. 1976) (court excluded 36 plaintiffs from potential class because of time required to adjudicate counterclaims against them).

207. One court has noted that only a few class actions for damages have actually gone through a trial on the merits to judgment. *Van Gemert v. Boeing Co.*, 573 F.2d 733, 736 (2d Cir. 1978), *vacated on other grounds on rehearing en banc*, 590 F.2d 433 (2d Cir. 1978), *aff'd*, 444 U.S. 472 (1980).

against the claims in a forum in which they would be subject to personal jurisdiction and in which venue would be proper.

C. THE THRESHOLD CONCLUSION

The foregoing analysis of rule 13 has identified the basic purposes and policies of rule 13: (1) to provide the defendant with the opportunity to have any and all of his complaints against the plaintiffs litigated in a unified action with their claims against him; (2) to furnish the defendant an opportunity to strike back, in kind, when sued; and (3) to conserve judicial resources and avoid the proliferation of lawsuits.

The article's analysis of the extent to which absent class members share the core attributes of parties most relevant to the policies of rule 13 indicates that the allowance of counterclaims against all absent members of a (b)(3) plaintiff class exceeds the demands of these policies. At most, the class members who should be regarded as rule 13 opposing parties include those within the court's jurisdiction who have been served with a summons and a pleading stating the counterclaim, those who have waived their objections to lack of personal jurisdiction by failing to register timely objections after service upon them, and those who have consented to the court's assertion of jurisdiction over them by voluntarily participating in the class action. This conclusion is suggested by the first and third policies enumerated above, consolidation and economy, because it embraces all class members against whom a valid judgment could be entered on a counterclaim. Those beyond the court's jurisdiction who neither file objections nor otherwise participate in the class action can be regarded as opposing parties, although they will be entitled to bring a collateral attack against any adverse judgments on the counterclaims.

A more limited group of class members to whom the status of rule 13 opposing parties might apply would include only those who exercise some control in the class action or who individually seek benefits from it. This selection of absentees is suggested by the broader conception of the reprisal policy discussed above. Class members who remain entirely inactive through the class litigation and make no claim for damages would be immune from counterclaims under this policy, regardless of whether they are within or beyond the court's territorial jurisdiction. Finally, under the narrow conception of the reprisal policy as permitting a counterstrike against only those who have commenced an action against a defendant, no absent class members would be rule 13 opposing parties.

For reasons detailed above, the rule 13 policy of conserving judicial resources and avoiding the proliferation of lawsuits seldom will allow counterclaims against absent class members. When the counterclaims arise out of matters different from the complaint or are brought as a litigation tactic to reduce the plaintiff class, there is little potential for judicial economy. In other instances, the goal of economy can be frustrated by opt-outs, late participation that confers personal jurisdiction over absentees, and collateral attacks. Nonetheless, permitting counterclaims occasionally results in economies both to the courts and the parties. The remaining question is to what extent rule 23 requires a modification of the obligations normally imposed upon opposing parties.

III. RULE 23 POLICIES

Rule 23 directly governs class actions. Consequently, any conclusion on the question whether absent class members should be treated as full parties must depend, in part, upon a consideration of rule 23. The rule does not characterize class members as parties or nonparties.²⁰⁸ Courts must look, therefore, to the policies underlying rule 23 for guidance in evaluating whether absent class members should be subject to counterclaims.

One major purpose of rule 23 is to enable litigants to avoid multiple joinder in cases of multitudinous litigation, thereby promoting judicial efficiency in the resolution of disputes affecting numerous people.²⁰⁹ Subdivision (b)(3), in particular, provides an efficient procedure for the adjudication of claims asserted by a large number of persons and involving common issues.²¹⁰ Allowing counterclaims against absent (b)(3) class members conflicts with this policy, because it discourages participation in class action suits.²¹¹ Even the anticipation of responding to a discovery request may cause class members to exclude themselves from plaintiff classes.²¹² The far more burdensome prospect of having to finance and participate in the defense of a counterclaim, and the attendant risk of liability, would cause many proposed class members to opt out in order to avoid the counterclaim.²¹³ For each

208. At least two courts have inferred from the text of rule 23 that absent class members are not parties. See *Lamb v. United Security Life Co.*, 59 F.R.D. 44, 48-49 (S.D. Iowa 1973) (by authorizing court to order notification of class members of *option* to appear as parties, rule 23(d)(2) suggests class members not parties; otherwise class actions would be converted into massive joinders, emasculating rule 23); *Wainwright v. Kraftco Corp.*, 54 F.R.D. 532, 534 (N.D. Ga. 1972) (same). These arguments are inconclusive; other provisions of rule 23 appear to treat absent class members as parties. The right to appear through counsel, FED. R. CIV. P. 23(c)(2); mandatory inclusion or description of class members in the judgment, FED. R. CIV. P. 23(c)(3); and mandatory notice before settlement, FED. R. CIV. P. 23(e), all may be construed as providing absent class members with the rights and obligations of full parties. 87 HARV. L. REV. 470, 473 (1973).

209. See *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402-03 (1980) (convenience and economy among justifications for class action); *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974) (efficiency and economy of litigation a principal purpose of class action); Advisory Committee's Notes, *supra* note 6, at 102-03 (economies of time, effort, and expense among purposes of class action); 3B MOORE'S FEDERAL PRACTICE ¶ 23.02[1] (2d ed. 1980) (elimination or reduction of multiplicity of suits one function of class action); 7 C. WRIGHT & A. MILLER, *supra* note 22, § 1751, at 503 (necessity of providing device to enable large groups conveniently to enforce rights in single proceeding among purposes of class action).

210. Advisory Committee's Notes, *supra* note 6, at 102-03. Judge Kaplan, the reporter to the Advisory Committee on Civil Rules at the time of the amendment, stated that "[t]he object [of rule 23(b)(3)] is to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party." Kaplan, *supra* note 101, at 390. Effectuation of the policy requires that absent members of rule 23 classes share the core characteristic of parties that they be bound by the judgment, if the proceedings satisfied due process.

211. It could be argued that allowing counterclaims against named representatives of a (b)(3) class is also at odds with this policy, in that it may deter the institution of some class actions. Other arguments, however, favor allowing counterclaims against the class representatives: class members are sufficiently numerous so that if a meritorious claim exists, some members—whether or not subject to counterclaims—will not be deterred from starting an action; and the class representatives are full parties and consequently the policies of rule 13 fully support allowing counterclaims against them. A thorough exploration of this issue is beyond the scope of this article.

212. See *Wainwright v. Kraftco Corp.*, 54 F.R.D. 532, 534 (N.D. Ga. 1972) (absent class member withdrew from action because intimidated by defendant's extensive interrogatories).

213. See 87 HARV. L. REV. 470, 474 (1973) (absent members may exclude selves from class to avoid

person who does opt out, the class action will fail to provide a judicial resolution of his claim against the defendant. The class member intimidated by the possibility of counterclaims will be unlikely to initiate an independent lawsuit because of the same apprehension. Thus, the threat of counterclaims will defeat the stated policy of rule 23 to provide a forum for the redress of common injuries.

A second major policy underlying rule 23(b)(3) is to furnish an effective procedure for those persons so lacking in means or whose claims are so small that it is unrealistic to expect them to vindicate their rights in separate lawsuits.²¹⁴ The United States Supreme Court has recognized the importance of this purpose:

The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.²¹⁵

Allowing counterclaims against absent class members contravenes this policy. When each member's claim is small, the incentive to opt out of the plaintiff class will be especially great. The cost of presenting a defense to a counterclaim and the risk of being held liable will outweigh any possible gains that might inure to the absentee through membership in the class.

A third objective of rule 23(b)(3) is to deter wrongful conduct that causes minor injuries to a large number of persons; the rule enables injured persons to prevent the unjust enrichment of wrongdoers.²¹⁶ Those who bring class actions can act as "private attorneys general" to enforce statutes by means of civil litigation.²¹⁷ The deterrence policy, however, depends upon plaintiffs' willingness to maintain their claims. If they opt out of the class because of threats of counterclaims, defendants will retain some benefit from their

burden of defending against counterclaims).

214. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 186 n.8 (1974) (Douglas, J., dissenting in part) (class action one of few legal remedies available to small claimant); *Rutherford v. United States*, 429 F. Supp. 506, 508 (W.D. Okla. 1977) (basic objective of rule 23 to establish effective procedure for those whose economic position prevents them from vindicating rights in separate lawsuits); *duPont Glove Forgan, Inc. v. American Tel. & Tel. Co.*, 69 F.R.D. 481, 487-88 (S.D.N.Y. 1975) (essential purpose of rule 23 to encourage suits to redress rights when claims otherwise too small to warrant individual litigation). See generally 7 C. WRIGHT & A. MILLER, *supra* note 22, § 1754, at 543-47 (explaining construction and applicability of rule).

215. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

216. See Moore, *The Potential Function of the Modern Class Suit*, 2 CLASS ACTION REP. 47, 47 (1973) (overriding societal purpose of class actions to deter violations of rules governing conduct of corporations and others for benefit of public); Note, *The Cost-Internalization Case for Class Actions*, 21 STAN. L. REV. 383, 415 (1969) (class actions serve to internalize costs of corporate wrongdoing); Note, *Requests for Information in Class Actions*, 83 YALE L.J. 602, 610 (1974) (class actions deter and deprive large concerns of unjust enrichment).

217. See *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980) (noting increasing reliance on class actions by private attorneys general for vindication of legal rights); 3B MOORE'S FEDERAL PRACTICE ¶ 23.02[1] (2d ed. 1980) (rule 23 allows class actions by private attorneys general to vindicate substantive policies).

wrongdoing. Thus, the allowance of counterclaims against class members would impair the deterrent effect of class actions.

Counterclaims against absent class plaintiffs are effective devices for reducing the size of the plaintiff class because they typically make the litigation uneconomical for proposed class members, causing them to opt out.²¹⁸ The threat of counterclaims may cause a court to decline certification of the proposed class.²¹⁹ Counterclaims against absent class members thus threaten the objectives of the class action procedure.

Moreover, permitting counterclaims to be asserted against those who ultimately file claims for recovery and who otherwise voluntarily participate in the action, although consistent with rule 13 and due process analysis, would devastate class actions. It would deter participation, thus detrimentally affecting the representation provided to the class and, by deterring class members from claiming a portion of any recovery, would make the class action useless to many.

For the foregoing reasons, allowing counterclaims against *any* absent members of a (b)(3) plaintiff class is fundamentally inconsistent with the basic policies underlying rule 23.²²⁰ Such claims can only frustrate the rule's goal of promoting judicial efficiency and weaken the class action as a device to vindicate the rights of small claimants and to enforce substantive policies.²²¹

218. See note 212 *supra* (for example of opt-out).

219. See note 17 *supra* (giving examples of failure to certify class because of counterclaims).

220. See 87 HARV. L. REV. 470, 474 (1973) (threat of counterclaims can undermine basic purposes of class action device). The allowance of counterclaims is equally inconsistent if they are asserted against members of the plaintiff class as a counter-defendant class.

221. Similarly, allowance of counterclaims against absent members of plaintiff classes certified under (b)(1) or (b)(2) is fundamentally inconsistent with the policies of rule 23. Members of (b)(1) and (b)(2) classes have no right to opt out. Consequently, the devastation of the class action likely to result in (b)(3) actions because of opt-outs cannot occur in (b)(1) and (b)(2) actions. Nonetheless, the allowance of counterclaims against absent members of plaintiff classes certified under (b)(1) or (b)(2) is fundamentally inconsistent with rule 23. The counterclaims could cause courts to deny certification or to exclude the countersued. The result would be adjudication of individual actions that might establish inconsistent standards for the opposing party or, as a practical matter, impair the ability of other potential class members to protect their interests. Advisory Committee's Notes, *supra* note 6, at 100. The fragmentation sought to be avoided by the (b)(1) and (b)(2) class action thus would emerge. In addition, judicial economies and economies to the affected persons would be lost.

It is unclear to what extent counterclaims would have these feared effects: it is not a prerequisite to certification under (b)(1) or (b)(2) that the court find a class action to be superior to other available methods for the adjudication of the controversy. Moreover, rule 23 does not instruct courts to consider the difficulties likely to be encountered in the management of a (b)(1) or (b)(2) class action. A few cases suggest that the presence of counterclaims is properly a factor to be considered in determining whether to certify a class under (b)(1) or (b)(2). See *Jones v. Goodyear Tire & Rubber Co.*, 73 F.R.D. 577, 580 (E.D. La. 1976) (acknowledging that if class certified under rule 23(b)(3), or even under (b)(2), court would be required to hear myriad counterclaims and that, alternatively, presence of multiple counterclaims might require abandonment of the class action); *Malby v. General Elec. Credit Corp.*, 61 F.R.D. 59, 61 (N.D. Ohio 1973) (in suit with characteristics of both (b)(2) and (b)(3) class, presence of counterclaims alone not sufficient to preclude certification of class when injunctive relief required).

Allowing counterclaims could also deter plaintiffs from instituting (b)(1) and (b)(2) actions and increase the defendants' leverage in settlement negotiations, thus frustrating the substantive policies that the plaintiffs seek to vindicate. In view of the importance of much (b)(1) and (b)(2) litigation, particularly civil rights and public law litigation, deterrence of (b)(1) and (b)(2) actions would be very costly to society.

If not completely precluded, counterclaims against absent members of plaintiff classes certified under (b)(1) or (b)(2) should, therefore, be subject to a procedure like that proposed in this article for (b)(3) actions. See text accompanying note 237 *infra*.

At a minimum, substantial modifications should be made to the vulnerability that certain absent class members would otherwise have as opposing parties under rule 13.²²²

The modification of party obligations for absent class members so as to accommodate the policies of rule 23 is not without precedent: courts have accomplished an analogous result with respect to discovery compliance, when discovery demands normally imposed only on parties have been made of class members.²²³ Repeatedly, class representatives and absentees have contended that absent plaintiffs are not parties within the meaning of the discovery rules,²²⁴ and some courts have agreed.²²⁵ Other courts have stopped short of this conclusion, but have required defendants to make a strong showing of necessity before subjecting an absent plaintiff to discovery.²²⁶ Occasionally, courts have authorized discovery without discussing whether absent plaintiffs were parties for purposes of the rule at issue.²²⁷ Most courts that have allowed discovery against absent plaintiffs have recognized the need to police it closely; they have limited the scope of discovery and sometimes have refused to enforce compliance by the ultimate sanction, the threat of dismissal.²²⁸

222. The palpable unfairness of treating as rule 13 opposing parties those absentees who receive only constructive notice by publication and who fail to opt out from ignorance or passivity reinforces the need to use rule 23 to limit absent class members' vulnerability to counterclaims.

223. See FED. R. CIV. P. 33, 34, 36 (interrogatories under rule 33, requests for production of documents and other items under rule 34, and requests for admission under rule 36 may be served only upon parties to litigation). Nonparties are not vulnerable to demands under those rules, although discovery by different means is available against them. See FED. R. CIV. P. 30 (deposition upon oral examination); FED. R. CIV. P. 31 (depositions upon written questions).

224. See note 225 *infra* (cases in which absentees not considered parties).

225. See, e.g., *Hawkins v. Holiday Inns, Inc.*, [1977-1] Trade Cases ¶ 61,310, at 71,028 (W.D. Tenn. 1977) (absentees not parties within federal discovery rules); *Wainwright v. Kraftco Corp.*, 54 F.R.D. 532, 534 (N.D. Ga. 1972) (motion to dismiss absent plaintiffs for failure to answer interrogatories under rule 33 denied; absentees not parties); *Fischer v. Wolfenbarger*, 55 F.R.D. 129, 132 (W.D. Ky. 1971) (motion to order absent plaintiffs to answer interrogatories denied; absentees not parties). See also *In re Arizona Bakery Prods. Litigation*, [1975-2] Trade Cases ¶ 60,556, at 67,443 (D. Ariz. 1975) (defendant's request that class action notice include provision that class members might be subject to discovery denied); *Bucalo v. General Leisure Prods. Corp.*, 54 F.R.D. 483, 485 (S.D.N.Y. 1971) (named plaintiff's request to be replaced by new named plaintiff denied; change would prejudice defendants because plaintiff would no longer be subject to discovery rules applicable to parties).

226. See, e.g., *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 340-41 (7th Cir. 1973) (trial court's dismissal of absent plaintiffs for failure to answer interrogatories reversed; party seeking discovery bears burden of showing necessity), *cert. denied*, 419 U.S. 1070 (1974); *Brennan v. Midwestern United Life Ins. Co.*, 450 F.2d 999, 1006 (7th Cir. 1971) (discovery of absent plaintiffs appropriate only after trial court satisfied of its necessity), *cert. denied*, 405 U.S. 921 (1972); *Bisgeier v. Fotomat Corp.*, 62 F.R.D. 113, 119-21 (N.D. Ill. 1972) (defendant's request to serve interrogatories on entire plaintiff class denied for failure to meet necessity standard); *Gardner v. Awards Marketing Corp.*, 55 F.R.D. 460, 462-66 (D. Utah 1972) (mem.) (same).

227. See, e.g., *Bishop v. Jelleff Assocs.*, 398 F. Supp. 579, 586 (D.D.C. 1974) (dismissal of absent plaintiffs' claims for failure to answer interrogatories affirmed); *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559, 582 (D. Minn. 1968) (defendants permitted to pose "transaction" interrogatories to all members of class); cf. *Grogan v. American Brands, Inc.*, 70 F.R.D. 579, 584 (M.D.N.C. 1976) (mem. order) (defendant permitted to depose any class member).

228. See *Bachman v. Collier*, 23 Fed. R. Serv. 2d 1461, 1463 (D.D.C. 1977) (court must review proposed interrogatories; defendant must explain why "directly" related to issues in case) (emphasis in original); *Robertson v. National Basketball Ass'n*, 67 F.R.D. 691, 700 (S.D.N.Y. 1975) (discovery allowed only against sample of (b)(1) absentees). The United States Court of Appeals for the Seventh Circuit strengthened the limitations on discovery of absent class members in *Clark v. Universal Builders, Inc.*, 501

In the leading case adopting the necessity standard, *Brennan v. Midwestern United Life Insurance Co.*,²²⁹ the court approved discovery of absent plaintiffs only in limited circumstances. Under *Brennan*, the trial court must be satisfied that the requested information is actually needed in preparation for trial; that justice to all parties requires that the absentees furnish the information; that discovery is not being used as a stratagem to reduce the number of claimants; and that adequate notice is given so that absentees are fully informed of the discovery order and of the possible consequences of noncompliance.²³⁰

All of the cases protecting absent class members from discovery, either absolutely or through required showings, do so on the basis of rule 23 policies.²³¹ These decisions reflect a deep concern that because obligatory participation through discovery might force class members to opt out, it is susceptible to abuse as a defense tactic to reduce the number of claimants, and thus imperils the usefulness of the class action device.²³²

The participation necessary to defend a counterclaim is both different in nature from and greater in degree than that involved in responding to discovery.²³³ The burden of responding to discovery, while in some circum-

F.2d 324 (7th Cir. 1973), *cert. denied*, 419 U.S. 1070 (1974). It held that when a defendant seeks the oral deposition of an absent class member, he must show that the discovery is necessary to trial preparation and that he does not intend to take undue advantage of the class member. *Id.* at 341. The court explained that because

the passive litigants are required to appear for questioning and are subject to often stiff interrogation by opposing counsel with the concomitant need for counsel of their own . . . the burden confronting the party seeking deposition testimony should be more severe than that imposed on the party requesting permission to use interrogatories.

Id. The Seventh Circuit imposed this burden even though the oral deposition is a discovery device available against "any person." FED. R. CIV. P. 30.

229. 450 F.2d 999 (7th Cir. 1971).

230. *Id.* at 1005-06.

231. See notes 225-26 *supra* (cases discussing discovery obligations of absent class members). The cases have not focused on the policies of the discovery rules, but rather on the spirit of the rule governing class actions, rule 23. Thus courts have not found it necessary to distinguish between discovery methods available only against parties and those available against anyone. See note 223 *supra* (explaining two kinds of discovery methods).

232. See, e.g., *Brennan v. Midwestern United Life Ins. Co.*, 450 F.2d 999, 1005-06 (7th Cir. 1971) (party seeking discovery must show no attempt to take undue advantage of absentee); *Wainwright v. Kraftco Corp.*, 54 F.R.D. 532, 534 (N.D. Ga. 1972) (dismissal of absent plaintiffs for failure to answer interrogatories would frustrate rule 23 policies); *Fischer v. Wolfenbarger*, 55 F.R.D. 129, 132-33 (W.D. Ky. 1971) (requiring absent plaintiffs to respond to interrogatories would frustrate rule 23 policies). See also Note, *Civil Procedure: Absentee Class Members Subjected to Discovery and Claims Dismissed for Failure to Respond*, 1971 DUKE L.J. 1007, 1014-15 (1971) (discussing danger that imposition of discovery on absent class members might undermine rule 23 policies); Note, *Party Discovery Techniques: A Threat to Underlying Federal Policies*, 68 NW. U.L. REV. 1063, 1092 (1974) (same); Note, *Requests for Information in Class Actions*, 83 YALE L.J. 602, 610 (1974) (same); 40 FORDHAM L. REV. 969, 977 (1972) (same).

233. An additional manner in which courts have recognized that obligations of participation imposed upon absent members of the plaintiff class should be kept to a minimum is judicial use of absentees' statements of intention to assert a claim. Initially, after rule 23 was amended in 1966, some courts appended claim forms to the mandatory (c)(2) class notice, and required class members to complete and submit them or be excluded from the class. See, e.g., *Lamb v. United Sec. Life Co.*, 59 F.R.D. 25, 43 (S.D. Iowa 1972) (stating that absent class members who did not complete proof of claim forms would be dismissed); *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 459 (E.D. Pa. 1968) (same);

stances necessary to enable the court to dispose of the primary claim before it in accordance with due process of law, has been imposed only minimally. It is all the more appropriate to reduce absentees' vulnerability to counterclaims, which need not be adjudicated as part of the class action.

IV. RECOMMENDED CHANGES IN THE LAW REGARDING COUNTERCLAIMS

A determination whether absent members of a plaintiff (b)(3) class should be vulnerable to counterclaims should begin with a balancing of the policies underlying rule 23 against those underlying rule 13. It is possible to conclude that the dangers to the class action device are sufficiently great, the policies of rule 23(b)(3) sufficiently important, and the costs of disallowing counterclaims against absent class members sufficiently small, that counterclaims ought to be precluded absolutely. For all of the reasons stated above, that is the author's view. In addition, absolute preclusion would bring certainty to the law, a virtue lacking if the determination whether to allow such counterclaims is left to depend upon the circumstances of particular cases.

Absolute preclusion is already within the powers of the judiciary. Even courts that consider certain absent members of a plaintiff class to be opposing parties²³⁴ within the meaning of rule 13 can reject counterclaims against them under the general grant of discretion in rule 23(d).²³⁵ In order to eliminate any doubt, rules 13 or 23 could be revised to prohibit counterclaims against absent members of the plaintiff class. If these counterclaims are precluded, defendants will have no duty to raise them even if they otherwise would have been compulsory. Thus, a plea of *res judicata* to bar a subsequent action by defendants on those claims should not succeed.²³⁶

In unusual cases, counterclaims might be permissible either against absent plaintiff class members who consent or against others over whom the court validly can assert personal jurisdiction. The article, therefore, proposes a change in the law more specifically tailored to the exigencies of each situation than is an absolute preclusion of counterclaims. Such a qualified approach, however, will entail costs. Litigating the issue of whether the court should allow particular counterclaims will impose burdens on defendants seeking to

Harris v. Jones, 41 F.R.D. 70, 74-75 (D. Utah 1966) (same). According to the *Manual for Complex Litigation*, however, requiring proof of a claim prior to adjudication or settlement under pain of exclusion or dismissal constitutes a clear abuse of the discretionary powers conferred by rule 23(d)(2), and is in violation of rule 23's opt-out procedure. DRAFT MANUAL, *supra* note 136, pt. I, § 1.45, at 102; cf. Bauman v. United States Dist. Court, 557 F.2d 650, 658-59 (9th Cir. 1977) (use of notice to (b)(2) class members permitted to determine size of class, but court may not dismiss for failure to respond).

234. If a court held absent class members not to be rule 23 opposing parties, it would automatically preclude all counterclaims against them.

235. See FED. R. CIV. P. 23(d) (court has wide discretion to enter orders to provide for fair and efficient conduct and to secure just, speedy and inexpensive determination of action). One of the "particularly useful" applications of rule 23(d) is to provide the court with means of protecting the interests of absent class members. Advisory Committee's Notes, *supra* note 6, at 106-07. This subdivision is sufficiently broad to authorize an order precluding or conditioning the allowance of counterclaims against absent plaintiff class members. See FED. R. CIV. P. 23(d)(1) (orders determining course of proceedings or prescribing measures to prevent undue repetition or complication of evidence or argument); FED. R. CIV. P. 23(d)(5) (orders dealing with "similar procedural matters").

236. RESTATEMENT (SECOND) OF JUDGMENTS § 56.1 (Tent. Draft No. 1, 1973).

demonstrate that the counterclaims are permissible, on plaintiffs combatting that attempt, and on courts resolving the issue. In addition, the individual nature of each dispute creates a new device for accomplishing unnecessary delay.

The added costs to future class members and indirectly to society of allowing such counterclaims warrant at least the imposition of a very high burden of persuasion upon defendants under the discretionary powers of rule 23(d). Under the proposed procedure, a defendant would have to seek leave to file particular counterclaims against named members of the proposed plaintiff class.²³⁷ To obtain leave under the proposed procedure the defendant would have to establish several facts. First, the defendant must show that the court has subject matter jurisdiction over the proposed counterclaims. This is already required. The court must determine either that there is an independent jurisdictional basis to support the counterclaims, or that the counterclaims fall within the court's ancillary jurisdiction. Because counterclaims tend to undercut the utility of the class action device, the court ought to construe the scope of compulsory counterclaims narrowly when they are asserted against absent plaintiff class members. This narrow construction would render some counterclaims permissive, eliminating those for which the defendant is unable to establish an independent basis of subject matter jurisdiction. Even if the defendant can establish independent jurisdiction, the court should refuse to entertain any permissive counterclaims that would unduly complicate the litigation.²³⁸

Second, the defendant must demonstrate that specific and substantial judicial economies will result from allowing the proposed counterclaims. This showing should include a specification of a significant overlap in both the pertinent evidence and the issues of law between the class litigation and the proposed counterclaims. Because counterclaims may be compulsory even when substantial overlap is lacking and because a defendant need not always establish that his proposed counterclaim is compulsory to establish subject matter jurisdiction over it, the demonstration of economies is necessary so that the court can assess the value of permitting the counterclaims.

Next, a defendant must show substantial prospective economies to the defendant from adjudicating the proposed counterclaims with the class litigation, as well as substantial prejudice to defendants if not permitted to assert their claims as counterclaims. In addition, the court should require proof that the counterclaims are not asserted as a tactic to take undue advantage of absent class members, as a stratagem to reduce the number of claimants or to defeat certification, or for other purposes at odds with the policies of rule 23. This showing could be made, in part, by evidence of the defendant's policies regarding litigation, and of the existence of actions initiated by the defendant against persons similarly situated with the proposed counter-defendants. A requirement of detailed and specific affidavits by high-ranking officials of the defendant to establish its proper purposes also could serve as a deterrent to the assertion of frivolous counterclaims.

237. Defendant would also have to seek leave if countersuing members of the plaintiff class as a class of counter-defendants.

238. Some of the dangers that have evoked such exercises of discretion in other contexts—the delaying and disruptive effects upon proceedings whose purpose is to vindicate substantive policies and the “chilling effect” on participation in group litigation—apply with full force in the class action context.

The defendant also must demonstrate that allowance of the counterclaims will not render the plaintiffs' class action unmanageable or otherwise provide a ground not to certify the plaintiff class. In the alternative, the defendant could demonstrate that his need justifies this extreme loss. Similarly, he must show that the number of counter-defendants is not so great as to endanger the usefulness of the class action device by causing a large number of proposed class members to opt out or to be severed by the court. Finally, the defendant must demonstrate that allowing the counterclaims would not seriously threaten the vindication of substantive policies or the deterrence of wrongful conduct.

Plaintiffs should be permitted discovery of defendant's contentions regarding the counterclaims and of the bases for those contentions. Moreover, plaintiffs should be afforded the opportunity to rebut defendant's proof and argue against defendant's motion. If defendant's showing of economies, advantages to be gained, and prejudice to be avoided does not overwhelmingly outweigh the diseconomies, dangers, burdens, and disadvantages of allowing the counterclaims, defendant's motion for leave to file should be denied.

The notice of class action required by rule 23(c)(2) should be given after the court's ruling on a motion for leave to file counterclaims against absent class members so as to avoid any unnecessary mention of the possibility of counterclaims. Consequently, the ruling on defendant's motion will have to be made promptly. Should the court grant defendant's motion in whole or in part, notice that discusses the counterclaims should be sent only to absent members of the plaintiff class who are countersued in order to avoid confusing, misleading, or frightening other class members.

The content of the notice sent to countersued absentees should, of course, make clear the fact of the counterclaim and the subject matter of the suit. It should also make clear that counterclaims will be allowed to go to judgment only against those class members who remain in the class, are properly served with a summons and pleading stating the counterclaims, and who either are within the jurisdiction of the trial court, consent to the assertion of jurisdiction over them by voluntarily participating in the class action, or waive their objections by failing to raise them as and when required by rule 12.²³⁹ Under the more restrictive view of which absentees are opposing parties, the notice should make clear that counterclaims will be allowed to go to judgment against only those class members who participate voluntarily, because only they will be proper targets of a reprisal in kind. The notice should explain the rights and obligations of the counter-defendants, including their right to opt out of the plaintiff class or the (b)(3) class of counter-defendants, if any; the consequences of alternative courses of action open to them; and all other information material to the decisions the counter-defendants will have to make in response to the notice.

CONCLUSION

This article is a response to the confused array of decisions on the issue of whether absent members of a rule 23(b)(3) plaintiff class should be treated as

239. See FED. R. CIV. P. 12(h) (defense of lack of jurisdiction or improper venue waived if not asserted in answer or by timely motion).

"parties" for various purposes. It proposes a mode of analysis with which to answer that question when it arises in new contexts, and with which traditional answers can be evaluated. Specifically, the article recommends that courts should approach the question by taking a series of steps. First, courts should analyze the policies underlying the particular rule or judicial doctrine in question, and determine to which of the party core characteristics these policies most directly pertain. The core characteristics of a party plaintiff were shown to be that he is among the persons who have commenced the litigation, is directly interested in the subject matter in issue, and exercises control over the handling of plaintiff's case. Second, a court should consider to what extent an absent class plaintiff shares those particular core characteristics. It was shown that for purposes of establishing subject matter jurisdiction, personal jurisdiction, and venue, an absent plaintiff class member is treated as a non-party, not as one who commenced the litigation; that the absent class member is directly interested in the lawsuit and is bound by the judgment essentially as a full party would be; and that the absentee's control over the presentation of plaintiffs' case is minimal. If an absent class member shares the qualities of a party relevant to the purposes at hand and if the policies of the rule or judicial doctrine in controversy would be furthered by so doing, a court should consider the absentee to be a party for purposes of that rule or doctrine. If that threshold is passed, the court then should analyze the purposes of rule 23 to determine what adjustments should be made to the normal rights granted to or obligations imposed upon such a party.

The article has illustrated this methodology with an analysis of the particular issue whether and when absent class members of a plaintiff class certified under rule 23(b)(3) should be vulnerable to counterclaims asserted under rule 13. The counterclaim illustration emphasizes the significance of rule 23 to the ultimate resolution of these issues. Significant as rule 23 policies are, however, they must enter into the analysis only after an initial analysis of the rule or doctrine in question to focus the arena within which class action policies should operate. Here, for example, the analysis of rule 13 narrowed the universe of potential counter-defendants to those who properly could be bound by the judgment on the counterclaims or, even further, to the subgroup whose activities in the proceedings made them proper targets of a reprisal in kind. Taking the narrowest view of the reprisal policy, the rule 13 analysis excluded all absent plaintiff class members from the universe of opposing parties. The article has recommended that the law be changed either to preclude counterclaims against absent members of a plaintiff class, or to condition them on a showing of overwhelming need and value to the judicial system.

The counterclaim illustration used here suggests that the proposed analytical method can assist courts to reach uniformly reasoned decisions, both correct in themselves and consistent with a coherent portrait of the absent class plaintiff. The analysis is complex, however, and its application is sometimes speculative: the purposes and policies of particular rules and doctrines, their relative weight, and their relationship to the core characteristics of parties are not always clear. These uncertainties could result in some inconsistency even among courts employing the same analytical method. Nevertheless, only a clear understanding of why rules and doctrines apply to parties and of the basic nature of the class member will permit consistent and informed adjudication of the question whether absent class members

should be regarded as parties as the issue continues to arise in manifold contexts.

