
I. GENERAL PRINCIPLES

The class action … is the manifest fair and expeditious procedure for disposing of the mass tort litigants. It has been for years the recognized procedure for dealing with cases which have a marked similarity to those flowing from mass torts. The class action was judicially developed first in the equity courts and later accepted and applied by the law courts. Drawing on English and state procedural decisions, the Supreme Court over a century ago stated in *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 303, 14 L. Ed. 942 (1853) and restated later in *Hartford Life Ins. Co. v. IBS*, 237 U.S. 662, 672, 59 L. Ed. 1165, 35 S. Ct. 692 (1915) and *Hansberry v. Lee*, 311 U.S. 32, 41-42, 85 L. Ed. 22, 61 S. Ct. 115 (1940) the circumstances justifying the use of such procedure in federal court proceedings. In *Hansberry*, that court declared that the class action device was an 'invention [or innovation] of equity [designed] to enable . . . [the court] to proceed to a decree in suits [or judgment] where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable.' To the same effect, see *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 155, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982). In *Falcon*, the Supreme Court said:

> The class action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' *Califano v. Yamasaki*, 442 U.S. 682, 700-701, 61 L. Ed. 2d 176, 99 S. Ct. 2545. Class relief is 'peculiarly appropriate' when the 'issues involved are common to the class as a whole' and when they 'turn on questions of law applicable in the same manner to each member of the class.' Id. at 701.

The procedure to be followed by a federal court in such a case is now embodied in Rule 23 of the Federal Rules of Civil Procedure as adopted in 1938. The formulation of the practice in this Rule was intended to embody the standards and purposes substantially already established in the federal decisions beginning with Smith. 24 Rule 23 was revised in 1966 in its present form but without change in its purpose.

In re A.H. Robbins Co., Inc., 880 F.2d 709, 727 (4th Cir. 1989), cert. denied, 493 U.S. 959, 110 S.Ct 377 (1989).

Federal Rule of Civil Procedure 23:

> (a) Prerequisites.
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> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable,
>
> (2) there are questions of law or fact common to the class,
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Types of Class Actions.
>
> A class action may be maintained if Rule 23(a) is satisfied and if:
>
> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
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> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment.

Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues.

When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses.

When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General.

In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require — to protect class members and fairly conduct the action — giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders.

An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise.

The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals.

A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel.

Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel.

When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel.

The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel.

Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney’s Fees and Nontaxable Costs.

In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time

> the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
>
> (2) A class member, or a party from whom payment is sought, may object to the motion.
>
> (3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).
>
> (4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).The Due Process Clause of the 5th Amendment applies only to the Federal Government. The 14th Amendment applies only to the States and their subdivisions (counties, cities, and their agencies). Both the 5th and the 14th Amendments provide that the government shall not take a person's "life, liberty, or property" without due process of law.

In addition, Local Rules may be controlling on certain issues and should not be ignored. Local court requirements for commencing class actions and time limitations for filing certification motions may be governed by local rule.

Class representatives must stand for the entire class, and not prefer their own interests, which can lead to conflicts. "The interest of lawyer and class may diverge, as may the interests of different members of the class…." *Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2d Cir. 1982) (internal quotation marks omitted).

Courts must ensure that "the interests of the absent parties are fairly encompassed within the named plaintiff's claim." *Gen. Tel Co. of Southwest v Falcon*, 457 U.S. 147, 170, 102 S.Ct 2364, 72 L.Ed 2d 740 (1982).

Rule 23(a) provides in pertinent part: "One or more members of a class may sue or be sued as representative parties...."

"Defendant classes have been certified where there is a need for a procedural device that allows one who has a common grievance against a multitude of persons to resolve the … dispute by suing only a few members of the class." *In*

re Broadhollow Funding Corp., 66 B.R. 1005, 1007 (Bkrtcy EDNY 1986) (internal quotations omitted).

"Both rules 23 and 23.2 expressly contemplate the possibility of defendant class actions and require that the representative parties fairly and adequately protect the interest of the class members. In permitting a class action to proceed, a district court determines adequacy of representation as a threshold matter. Moreover, the court has the power and the duty to ensure that all defendants be given adequate notice of the action and an opportunity to present individual defenses if desired. Should the district court fail to afford any defendant due process, he would be entitled to have an adverse judgment set aside or reversed on appeal." *Kerney v. Fort Griffin Fandangle Ass'n, Inc.*, 624 F.2d 717, 721 (5th Cir. 1980).

II. CLASS ACTION BASICS

Individual standing is still a requirement for class actions.

> Plaintiffs in the federal courts must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction. There must be a personal stake in the outcome such as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions. Nor is the principle different where statutory issues are raised. Abstract injury is not enough. It must be alleged that the plaintiff has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged statute or official conduct. The injury or threat of injury must be both real and immediate, not conjectural or hypothetical. Moreover, if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.

O'Shea v. Littleton, 414 U.S. 488, 494 (1974)(internal quotations omitted).

"A court must assess standing to sue based upon the standing of the
and not upon the standing of unidentified class members." *Adair v.*

Sorenson, 134 F.R.D. 13, 16 (D Mass. 1991), *citing Warth v. Seldin*, 422 U.S. 490, 502, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

Therefore, the "constitutional threshold [of standing] must be met before any consideration of the typicality of claims or commonality of issues required for procedural reasons by Fed. R. Civ. P. 23." *Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. July 1981); "Only after the court determines the issues for which the named plaintiffs have standing should it address the question whether the named plaintiffs have representative capacity, as defined by Rule 23(a), to assert the rights of others." *Griffin v. Dugger*, 823 F.2d 1476, 1482 (11th Cir. 1987). "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i. e.*, with the manner and degree of eviden

Under Rule 23, a class is appropriate in part when "the class is so numerous that joinder of all members is impracticable." Rule 23 F.R.C.P. "The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *General Tel. Co. of Northwest, Inc. v. EEOC*, 446 U.S. 318, 329, 64 L. Ed. 2d 319, 100 S. Ct. 1698 (1980); see also *Gurmankin v. Costanzo*, 626 F.2d 1132, 1135 (3d Cir. 1980) ("We believe that the numerosity requirement must be evaluated in the context of the particular setting …").

factors include: (1) the judicial economy that will arise from avoiding multiple actions; (2) the geographic dispersion of members of the proposed class; (3) the financial resources of those members; (4) the ability of the members to file individual suits; and (5) requests for prospective relief that may have an effect on future class members." *Ansari v. New York University*, 179 F.R.D. 112, 114 - 15 (SDNY 1998).

A common question of law arises from a "common nucleus of operative facts regardless of whether the underlying facts fluctuate over the class period and vary as to individual claimants." *Haywood v Barnes*, 109 F.R.D. 568, 577 (EDNC 1986).

In the "commonality context … not every question of fact or law need be common to every member of the class. So long as there exist common questions of law or fact, the possibility of questions of fact relevant only to individual class members does not forbid class certification." *Molina v. Mallah Organization, Inc.*, 144 F.R.D. 37, 41 (SD NY 1992).

"Rule 23(a)(2) requires that there be questions of law or fact common to the class. This requirement is satisfied as long as the members of the class have been affected by a general policy of the defendant, and the general policy is the focus of the litigation." *Day v. NLO, Inc.*, 144 F.R.D. 330, 333 (SD Oh 1992) (internal citations and quotations omitted). "This subsection [23(a)(2)] does not require that all, or even most, issues be common, nor that common issues predominate, but only that common issues exist." *Central Wesleyan College v W.R. Grace & Co.*, 143 F.R.D. 628, 636 (D. SC 1992), affd, 6 F.3d 177 (4th Cir. 1993). The commonality test is met when there is "at least on issue whose resolution will affect all or a significant number of the putative class members." *Stewart v. Winter*, 669 F.2d 328, 335 (5th Cir. 1982).

Class Actions also require that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed.R.Civ.P., 23(a)(3). "A class representative's claims or defenses must be typical of the claims or defenses of the class. … In other words, there must be a between the class representative's claims or defenses and the common questions of fact or law which unite the class. A sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory. Typicality, however, does not require identical claims or defenses. A factual variation will not render a class representative's claim atypical unless the factual position of the representative markedly differs from that of other members of the class." *Kornberg v. Carnival Cruise Lines, Inc*. 741 F.2d 1332, 1337 (11th Cir. 1984), *citing in part* 3B J. Moore & J. Kennedy, Moore's Federal Practice para. 23.06-2 at 191-92 (2d ed. 1982); 7 C. Wright & A. Miller, Federal Practice and Procedure § 1764 (1972).

Class representatives "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Simon v Eastern Kentucky Welfare Rights Org*., 426 U.S. 26, 40 n 20, 96 S.Ct 1917, 48 L.Ed 2d (1976), quoting *Warth v Seldin*, 442 U.S. 490, 502, 95 S.Ct 2197, 2207, 45 L.Ed 2d 343 (1975).

In addition, "even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories." *Baby Neal v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994).

"While it is settled that the mere existence of individualized factual questions with respect to the class representative's claim will not bar class certification, class certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation." *Baffa v. Donaldson*, Lufkin & Jenrette Securities Corp., 2000 U.S. App. LEXIS 22162 at *18 - 19 (2d Cir. 2000) *quoting Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 903 F.2d 176, 180 (2d Cir. 1990) (internal citation omitted).

Under Rule 23, it is essential that "the representative parties will fairly and adequately protect the interests of the class." FRCP 23. "Determining whether representative parties will adequately represent those on whose behalf they are

suing involves consideration of two separate issues: first, the adequacy of the representative, and second, the adequacy of his counsel." *Kuper v. Quantum Chemical Corp*., 145 F.R.D. 80, 82 (SD Oh 1992), *quoting* 3B Moore's Federal Practice P 23.07[1] (2d ed. 1991).

Courts can evaluate the quality of the firms. "To determine if the representation is adequate, we must ask: (1) whether there exists any antagonism between the representatives and other class members; and (2) whether the named plaintiffs' counsel will adequately protect the interests of the class. In the present case, the representatives suffered the same injury as the class members and no conflict is present. Again, the fact that the Defendants have produced telephone statements from two purported members of the class, the credibility of which we may not reach at the point, to the effect that they witnessed none of the alleged conduct at the meeting does not raise a conflict.

As to the adequacy of representation, the named Plaintiffs are represented by a national law firm and by the Roger Baldwin Foundation of the American Civil Liberties Union, an organization with an excellent reputation in this area of the law." *Johns v. DeLeonardis*, 145 F.R.D. 480, 484 (ND IL 1992).

"[In class actions], it is counsel for the class who has the laboring oar. The class representatives furnish the factual basis to invoke jurisdiction of the court and provide the outline of the controversy, but the lawyers shape the claims by the compilation of factual and expert testimony and the presentation of evidence. The class representatives are not expected to have detailed knowledge or participate integrally in complex settlement negotiations. … Nor does replacement of class representatives destroy adequate representation of the class." *Brown v. Am. Home Prods. Corp. (In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.),* 2000 U.S. Dist. LEXIS 12275 at *156-*157 (E.D. Pa. Aug. 28, 2000).

Rule 23(b) provides three alternative grounds which support certification of a class:

> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

Rule 23(b)(2) provides that certification may be appropriate if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." FRCP 23(b)(2). Subsection (b)(2) class actions are "limited to those class actions seeking primarily injunctive or corresponding declaratory relief." *Barnes v. The American Tobacco Company*, 161 F.3d 127, 142 (3rd Cir. 1998), *citing* Conte, 1 Newberg on Class Actions 3d § 4.11. Monetary relief is available "at least where the monetary relief does not predominate." *Eubanks v. Billington*, 110 F.3d 87, 92 (D.C. Cir. 1997); *see also* Advisory Comm. Note to Fed. R. Civ. P. 23(b)(2) (noting that 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.").

The (b)(2) class "serves most frequently as the vehicle for civil rights actions an other institutional reform cases that receive class action treatment." *Baby Neal v. Casey*, 43 F.3d 48, 58 - 59 (3rd Cir. 1994). Indeed, (b)(2) was "designed for civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons." *Barnes v. The American Tobacco Company*, 161 F.3d 127 (3rd Cir. 1998) citing Conte, 1 Newberg on Class Actions 3d § 4.11. *See also*, *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998)("As the Advisory Committee Notes explain, 23(b)(2) was adopted in order to permit the prosecution of civil rights actions.") But "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 118 S. Ct. 1257, 1259, 140 L. Ed. 2d 406 (1998) (internal quotation omitted)).

"[B]y its very nature, a (b)(2) class must be cohesive as to those claims tried in the

III. JURISDICTION AND VENUE

Title 28 U.S.C. § 1332(a) states:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between--
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

"In a 'federal question' case within the scope of § 1331, there is by definition some substantive federal law to govern the case from the outset." *A.I. Trade Finance, Inc. v Petra Int'l. Banking Corp.*, 62 F3d 1454, 1459 (DC Cir. 1995)..

28 U.S.C. § 1391, provides, as follows:

> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.
>
> (e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of the legal authority, or any agency of the United States, or the United States, may except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of he events or omissions giving rise to the claim occurred, …, or (3) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if he United States or one of its officers, employees, or agencies were not a party.

IV. PLEADING AND STANDARD OF REVIEW

A complaint should be followed quickly by a motion for class certification. "Although the Court agrees plaintiffs should have filed their motion to certify seasonably, the motion's tardiness does not supply sufficient ground for the Court to refuse to certify the class." *United Brotherhood of Carpenters and Joiners of America Local 899 v Phoenix Associates, Inc.*, 152 F.R.D. 518, 521 n.3 (SD W Va 1994).

"[T]he proponent of class certification has the burden of establishing the right to such certification under Rule 23." *Windham v American Brands, Inc.*, 565 F.2d 59, 64 fn. 6 (4th Cir. 1977).

"The district court retains broad discretion in determining whether an action should be certified as a class action, and its decision, based upon the particular facts of the case, should not be overturned absent a showing of abuse of discretion." *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988).

Fed.R.Civ.P. 23(e) requires that notice of any proposed settlement of a class action be given to "all members of the class in such manner as the court directs." "The plain language of Rule 23(e) clearly contemplates allowing only class members to object to settlement proposals." *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989). Notice must be "the best notice practicable under the circumstances, including individual notice to all members who can be ident

or otherwise for the fair conduct of the action, that notice be given in such a manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action." FRCP Rule 23(d)(2).

Rule 23(c)(2) requires the "best notice practicable under the circumstances." *Eisen*, 417 U.S. at 173-77, 94 S.Ct. at 2150-52, often via publication. "[C]ombination of mailed notice to all class members who can be identified by reasonable effort and published notice to all others is the long-accepted norm in large class actions." *Gordon v. Huret*, 117 F.R.D. 58, 63 (S.D.N.Y. 1987).

"It is beyond dispute that notice by first class mail ordinarily satisfies rule 23(c)(2)'s requirement that class members receive the best notice practicable under the circumstances." *Peters v Nat'l. R.R. Passenger Corp.*, 966 F.2d 1483, 1486 (DC Cir. 1992).

"The decision to exercise the right of exclusion in a Rule 23(b)(3) action is an individual decision of each class member and may not be usurped by the class representative or class counsel." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (1998) citing Newberg & Conte, Newberg on Class Actions § 16.16 (3d Ed. 1992).

Intervention is guided by F.R.C.P. 24:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
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> (1) is given an unconditional right to intervene by a federal statute; or
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the

> action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.
>
> (b) Permissive Intervention.
>
> (1) In General. On timely motion, the court may permit anyone to intervene who:
> (A) is given a conditional right to intervene by a federal statute; or
> (B) has a claim or defense that shares with the main action a common question of law or fact.
>
> (3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

V. DISCOVERY

Discovery in federal class actions is governed by Rules 26-37, FRCP.

"The court may, and often does, permit discovery relating to the issues involved in maintainability, [of the action as a class action] and a preliminary evidentiary hearing may be appropriate or essential as a part of the vital management role which the trial judge must exercise in class actions to assure that they are both meaningful and manageable." *Windham v American Brands, Inc.*, 565 F.2d 59, 64 n5 (4th Cir. 1977).

"It is also important to bear in mind the nature of class action discovery. Discovery relating to class certification is closely enmeshed with merits discovery, and in fact cannot be meaningfully developed without inquiry into basic issues of the litigation. An order staying discovery pending class certification would be unworkable, since plaintiffs must be able to develop facts in support of their class certification motion. An order restricting discovery to class issues would be impracticable because of the closely linked issues, and inefficient because it would be certain to require ongoing supervision of discovery." *Gray v First Winthrop Corp.*, 133 F.R.D. 39, 41 (ND Cal 1990).

VI. SETTLEMENT

"It hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits

which are now an ever increasing burden to so many federal courts and which frequently present serious problems of management and expense." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976), citing *Williams v. First Nat'l Bank*, 216 U.S. 582, 595, 54 L. Ed. 625, 30 S. Ct. 441 (1910); *Clarion Corp. v. American Home Products Corp.*, 494 F.2d 860, 863 (7th Cir. 1974); *Cities Service Oil v. Coleman Oil Co.*, 470 F.2d 925, 927 (1st Cir.), cert. denied, 411 U.S. 967, 36 L. Ed. 2d 688, 93 S. Ct. 2150 (1972); *Autera v. Robinson*, 136 U.S. App. D.C. 216, 419 F.2d 1197, 1199 (1969); *Richards Construction Co. v. Air Conditioning Co. of Hawaii*, 318 F.2d 410 (9th Cir. 1963).

"Under Rule 23(e) the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members. . . . The court cannot accept a settlement that the proponents have not shown to be fair, reasonable and adequate. Before sending notice of the settlement to the class, the court will usually approve the settlement preliminarily when the court finds that: (1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re General Motors Corp. Pick-up Truck Fuel Tank Prod. Liab. Litig.*, 55 F3d 768, 785-87 (3d Cir. 1968), overruled in part on other grounds by *Amchem Products, Inc. v Windsor*, 117 S.Ct 2231, 138 L.Ed 2d 689 (1997).

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The Notice should "fairly apprise the ... members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings." *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982) (internal quotation marks omitted)

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information … and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.

Rule 23(e) states that a "class action shall not be dismissed or compromised without the approval of the court …." Fed. R. Civ. P. 23(e). "[A] settlement should stand or fall on the adequacy of its terms." *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 211 (5th Cir. 1981).

> The settlement terms should be compared with the likely rewards the class would have received following a successful trial. And [] the strength of the case for plaintiffs (must be) balanced against the amount offered in settlement. We think this requires a three-step process. First, the district court must evaluate the likelihood that plaintiffs would prevail at trial. Second, the district court must establish a range of possible recovery that plaintiffs would realize if they prevailed at trial. And third, guided by its findings on plaintiffs' likelihood of prevailing on the merits and such other factors as may be relevant, the district court must establish, in effect, the point on, or if appropriate, below, the range of possible recovery at which a settlement is fair and adequate.

In re Corrugated Container Antitrust Litigation, 643 F.2d at 212 (internal quotations and citations omitted).

> Rule 23(e) requires judicial approval of any class action settlement, but does not provide any standards for such approval. It is now abundantly clear, however, that in order to approve a settlement, the district court must find that it is fair, adequate and reasonable and is not the product of collusion between the parties. Determining the fairness of the settlement is left to the sound discretion of the trial court and we will not overturn the court's decision absent a clear showing of abuse of that discretion. In addition, our judgment is informed by the strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement.
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> Our review of the district court's order reveals that in approving the subject settlement, the court carefully identified the guidelines established by this court governing approval of class action settlements. Specifically, the court made findings of fact that there was no fraud or collusion in arriving at the settlement and that the settlement was fair, adequate and reasonable, considering (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity,

> expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved.

Bennett v. Behring Corp., 737 F.2d 982, 986 (11th Cir. 1984).

VII. APPEAL

> Generally, only parties to an action have standing to appeal. *Marino v. Ortiz*, 484 U.S. 301, 304, 108 S. Ct. 586, 587, 98 L. Ed. 2d 629 (1988) (per curiam). A non-party may properly become a party for purposes of appealing an adverse final judgment by intervening in the action. *Id*. at 304, 108 S. Ct. at 588*; Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375, 107 S. Ct. 1177, 1182, 94 L. Ed. 2d 389 (1987). *See also Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F.2d 303, 305-06 (6th Cir. 1990) (intervention to appeal granting of injunction). In a class action, unnamed members of the class bear some resemblance to non-parties in other suits in that they do not actively prosecute the case, and indeed need not appear or even hire counsel. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810, 105 S. Ct. 2965, 2973-74, 86 L. Ed. 2d 628 (1985). However, such class members are bound by the settlement decree if the named members of the class adequately represent the absent class and the prosecution of the litigation is within the common interest. *Id*. at 808, 105 S. Ct. at 2973.

Shults v Champion Intern. Corp., 35 F3d 1056, 1058 (6th Cir. 1994).

VIII. FEES

The Supreme Court has held that a ''litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole . . . Jurisdiction over the fund

involved in the litigation allows a Court to prevent . . . inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 62 L. Ed. 2d 676, 100 S. Ct. 745 (1980).

> A strong presumption that the lodestar figure -- the product of reasonable hours times a reasonable rate -- represents a "reasonable" fee is wholly consistent with the rationale behind the usual fee-shifting statute, including the one in the present case.

Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 561-566, 92 L. Ed. 2d 439, 106 S. Ct. 3088 (1986).

"The party seeking attorney fees has the burden to prove their request for attorney's fees is reasonable." *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990). Counsel "must 'submit evidence supporting the hours worked and rates claimed'" to meet this burden. *Id.* (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983)). The Supreme Court has held that "the most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433.

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