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Comment

THE APPLICABILITY OF RULE 23(e) TO PRECERTIFICATION PROCEEDINGS: THE FUNCTIONAL APPROACH APPLIED

I. INTRODUCTION

Rule 23(e) of the Federal Rules of Civil Procedure was promulgated in 1966 to provide court supervision of settlements of class actions and to ensure that all members of the class would be notified of such settlements. It has been noted that the purpose of this subsection is to protect the nonparty members of a class from unfair settlements affecting their rights—i.e., to prevent abuse of the class action procedure by named or representative parties. Because rule 23(e) requires judicial approval of dismissals or settlements of "class actions," and because a suit is not officially a "class action" until certified as such by the trial court, the issue has arisen whether rule

1. FED. R. CIV. P. 23(c). The text of 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." Id.


3. See TA C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1797, at 226 (1972). Wright and Miller have stated that "[t]he purpose of subdivision (e) is to protect the nonparty members of the class from unjust or unfair settlements affecting their rights when the representatives become faint-hearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise." Id. (footnote omitted). The potential for abusing the class action procedure has been explained as follows:

Most class actions never reach trial. Defendants usually attempt, successfully, to accommodate the claims of a certified class through compromise and settlement. This familiar pattern (filing suit, class certification, settlement) manifests itself not only when a guilty defendant simply throws in the towel rather than postpone the inevitable, but also in those cases in which an innocent defendant, unable to bear the expense, embarrassment and disruption of class litigation, pays whatever is necessary to be rid of the affair once and for all. The failure in either case to resolve matters on the merits means that "[t]he distinctions between innocent and guilty defendants and between those whose violations have worked great injury and those who have done little if any harm become blurred, if not invisible. The only significant issue becomes the size of the ransom to be paid for total peace." The policy goals of rule 23 have been served in such cases only if the defendant is actually guilty, a fact known only to the parties who, as a typical condition of the settlement, are not talking.


4. See FED. R. CIV. P. 23(e); note 1 supra.

5. FED. R. CIV. P. 23(c)(1). The text of rule 23(c)(1) provides: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditioned, and may be altered before the decision on the merits." Id. See 1966 Advisory Notes, supra note 2, at 430. The Advisory Committee’s notes make clear that, prior to the trial court’s certification of the suit as a class action, the suit’s status is defeasible at best: "A negative determination [of certification] means that the action should be stripped of its character as a class action." Id. See also Shelton v. Fargo, 582 F.2d 1298, 1304 (4th Cir. 1978) (certification is the act which makes

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23(e) applies to cases where dismissal or settlement occurred prior to class certification.6

In Philadelphia Electric Co. v. Anaconda American Brass Co.,7 the first case to address this issue, the United States District Court for the Eastern District of Pennsylvania held that suits brought as class actions were to be presumed class actions for purposes of applying rule 23(e) during the interim period between the filing of the complaint and the trial court’s certification of the class.8 Since Philadelphia Electric, courts have split and followed one of four identifiable schools of thought in considering the applicability of rule 23(e) to dismissals and settlements of class actions not yet certified as such:9 1) rule 23(e) should be strictly applied to dismissals and settlements of uncertified class actions;10 2) rule 23(e) should be applied to such settlements and dismissals but notice of the suit’s termination need not be sent to all putative class members;11 3) rule 23(e) is not applicable at all to dismissals and settlements of uncertified class actions;12 and 4) rule 23(e) should be applied according to the so-called functional approach under which a flexible case-by-case analysis is utilized.13

After examining these various approaches, this comment will suggest that the functional approach best serves the purposes of rule 23(e)14 because 1) it does not mandate a per se rule;15 2) the flexibility of the approach best serves to balance the interests of all parties to the class action;16 and 3) a

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6. See, e.g., In re Beef Industry Antitrust Litigation, 607 F.2d 167 (5th Cir. 1979); Shelton v. Fargo, 582 F.2d 1298 (4th Cir. 1978); Weight Watchers Inc. v. Weight Watchers Int’l, 455 F.2d 770 (2d Cir. 1972); Magana v. Platzter Shipyard, Inc., 74 F.R.D. 61 (S.D. Texas 1977); Rothman v. Gould, 52 F.R.D. 494 (S.D.N.Y. 1971); notes 45-117 and accompanying text infra. In clarifying the issue, one commentator has observed:
The rule speaks to settlement of class actions. What, then, of settlements that are negotiated at the precertification stage but nevertheless affect the rights of the class as a whole? If the proposed settlement is directed at the claims of the class and if settlement is to be accompanied by a voluntary dismissal with prejudice to class rights, then the policy objectives of rule 23(e) can be only fulfilled by requiring notice to absentee class members, even though the class has not yet been certified.

See Almond, supra note 3, at 311 (emphasis in original) (footnotes omitted).


8. 42 F.R.D. at 326.


14. See notes 118-53 and accompanying text infra.

15. See notes 121-53 and accompanying text infra.

majority of the courts recently deciding the issue view the approach as best suited to reconcile the policies of rule 23 with the public policy favoring settlements of suits.

II. BACKGROUND

A. Rule 23

As originally promulgated, rule 23 of the Federal Rules of Civil Procedure grouped into three categories the potential situations in which the class action device might be utilized. The so-called "true" category involved "joint, common, or secondary" rights. The "hybrid" category involved "several" rights related to specific property. Finally, the "spurious" category involved "several" rights affected by a common question and related to common relief. Judgment in the first two categories would bind the class, while judgment in the "spurious" category would extend only to the named parties and the intervenors.

The Advisory Committee discovered that although such categorization was theoretically appealing, it was practically unworkable. Following the

17. See notes 58-117 and accompanying text infra.
18. See notes 133-39 and accompanying text infra. One court has phrased the policy of encouraging settlements as follows: "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." Von Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976) (footnotes omitted).

(a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

Id.

23. 1966 Advisory Notes, supra note 2, at 427. For a discussion of how the original rule was intended to be applied, see Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Geo. L.J. 551 (1937).
25. 1966 Advisory Notes, supra note 2, at 427. The major criticism of the old rule was that its description of the various categories was not clear enough to guide trial courts in deciding whether a class action could be properly maintained. Id. For a discussion of the specific prob-
recommendations of the Advisory Committee, the United States Supreme Court, in 1966, promulgated an amendment to rule 23 which deleted the aforementioned categories and replaced them with a system whereby class allegations are required to be in compliance with specific prerequisites enumerated in the rule. Whether or not a class complaint satisfies the prerequisites of the rule is a matter of preliminary decision by the trial judge, who is required by rule 23(c)(1) to determine "as soon as practicable after the commencement of an action brought as a class action . . . whether it is to be so maintained." Rule 23(e) was passed as part of the 1966 amendments and provides that "[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." 

Items that induced the amendment to the original rule, see Z. Chafee, Some Problems of Equity 245-46, 256-57 (1950); Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684 (1941); Developments in the Law—Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 931 (1958); Comment, Federal Class Actions: A Suggested Revision of Rule 23, 46 Colu. L. Rev. 818 (1946).


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

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

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

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

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

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

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Id. For the text of rule 23(e), see note 1 supra. For the text of rule 23(c)(1), see note 5 supra.

27. See Fed. R. Civ. P. 23(a). For the text of the rule, see note 26 supra.


29. Fed. R. Civ. P. 23(c)(1). For the text of rule 23(c)(1), see note 5 supra.

30. Fed. R. Civ. P. 23(e). Although the Advisory Committee Notes give no express rationale for the addition of subsection (e), it is submitted that the practical effect of the addition necessarily inhibited abuse of the class action procedure by named or representative parties. See note 3 and accompanying text supra. See also 1966 Advisory Notes, supra 2, at 431.
The addition of rule 23(e) limited the possibility of abuse of the class action device by preventing unsupervised settlements which had theretofore allowed named representatives to abandon the class after obtaining the higher settlement that a class suit would bring.\textsuperscript{31}

\section*{B. The Case Law}

\subsection*{1. The Philadelphia Electric Case}

In \textit{Philadelphia Electric},\textsuperscript{32} the plaintiffs filed class complaints alleging violations of the antitrust laws.\textsuperscript{33} After the question of class certification had been scheduled to be argued, the parties reached a tentative settlement.\textsuperscript{34} Although the court never conclusively resolved the question of the legal status to be accorded to the precertification stage of a class action,\textsuperscript{35} Judge Fullam presumed the existence of a class in this suit for the purpose of applying rule 23(e),\textsuperscript{36} and ordered that notice be given to members of the putative class.\textsuperscript{37} However, since the class had not as yet been defined, such notice could not, as a practical matter, be given.\textsuperscript{38} Hence, the court ordered that approval of the proposed settlement be held in abeyance until such time as the class was certified and proper notice of settlement given.\textsuperscript{39}

The court in \textit{Philadelphia Electric} implied that plaintiffs should not be allowed to enhance their bargaining power by alleging class considerations, only to abandon the class after settlement of their personal claims.\textsuperscript{40} The

\begin{itemize}
\item \textsuperscript{31} See note 3 and accompanying text supra.
\item \textsuperscript{32} 42 F.R.D. 324 (E.D. Pa. 1967).
\item \textsuperscript{33} 42 F.R.D. at 325.
\item \textsuperscript{34} Id.
\item \textsuperscript{35} Id. at 326. Judge Fullam posed the following rhetorical question: "If the action is held to be a class action, does it then become one as of the date of filing, or merely as of the date of determination?" \textit{Id.} In responding to this query, Judge Fullam merely opined that "[t]he use of the word 'maintained' in 23(c)(1) is some indication that the court is expected to determine what the lawsuit has always been, not what it is about to become." \textit{Id.}
\item \textsuperscript{36} \textit{Id.} In setting forth this presumption, Judge Fullam stated:
\begin{quote}
It is my opinion that whatever uncertainties exist as to the precise status of an action brought as a class action, during the interim between filing and the 23(c)(1) determination by the court, it must be assumed to be a class action for purposes of dismissal or compromise under 23(e) unless and until a contrary determination is made under 23(c)(1).
\end{quote}
\textit{Id.}
\item \textsuperscript{37} \textit{Id.} at 328.
\item \textsuperscript{38} \textit{Id.}
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{40} \textit{Id.} Two aspects of the court's opinion lead to this implication. First, the proposed settlement was to be with prejudice, thereby purportedly foreclosing the opportunity of absentee class members to bring their own individual suits. \textit{Id.} at 327. Second, the class at the time of settlement was not ascertainable. \textit{Id.} at 326.
\end{itemize}
Notwithstanding what the court perceived to be an otherwise reasonable settlement, it opted to preserve the absentee class members' right to be heard, thus preserving the ongoing fiduciary relationship between the named representative and the class. \textit{Id.} at 328 n.2. It is thus submitted that the court must have intended to establish a prophylactic rule to prevent abuse of class actions for otherwise there would have been no reason on the facts of this case not to approve settlement.

It should be noted that since the proposed dismissal was to be with prejudice as to absentee class members, \textit{Id.} at 327, due process principles may well have compelled that notice be
court also indicated that before it exercises its approval power under rule 23(e), it should be informed of the nature of the claims, class or individual, being presented.\(^{41}\) It should be noted, however, that in light of the actual disposition of the case in \textit{Philadelphia Electric}, the court's construction of rule 23(e) was largely by way of dicta,\(^{42}\) for once the class is certified as the court presumed it would be, rule 23(e) would expressly apply, thereby obviating the need to apply the rule to the precertification area.\(^{43}\) Numerous courts have nevertheless utilized the broad language of \textit{Philadelphia Electric} to justify the application of rule 23(e) to precertification cases.\(^{44}\)

2. \textit{The Early Post-Philadelphia Electric Cases}

In cases decided after \textit{Philadelphia Electric}, the courts divided in their approaches to the applicability of rule 23(e) to cases not yet certified as class actions.\(^{45}\) In \textit{Yaffe v. Detroit Steel Corp.}\(^{46}\) and in \textit{Rothman v. Gould},\(^{47}\) for example, the district courts simply applied rule 23(e), even though class action certification had not yet occurred, and ordered notice to be sent to all putative class members.\(^{48}\) These courts justified this per se approach in part by focusing on the possibility that the potential class members may have been induced not to bring their own suits by the filing of the class action.\(^{49}\)


\[^{42}\] Id. at 328.

\[^{43}\] Id. The actual disposition of the case was a stay of the motion for court approval of the settlement under rule 23(e). \textit{Id.}

\[^{44}\] See \textit{Sosna v. Iowa}, 419 U.S. 393 (1975). Concerning the effect of class certification, the \textit{Sosna} Court stated: "When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant." \textit{Id.} at 399. The Court further noted that "[i]n some cases, the class is certified as a class action, it may not be settled or dismissed without the approval of the court." \textit{Id.} n.8.

\[^{45}\] See, \textit{e.g.}, \textit{Muntz v. Ohio Screw Prods.}, 61 F.R.D. 396 (N.D. Ohio 1973); \textit{Elias v. National Car Rental Sys., Inc.}, 59 F.R.D. 276 (D. Minn. 1973); notes 51-54 and accompanying text \textit{infra}.\(^{46}\)

\[^{46}\] See notes 46-101 and accompanying text \textit{infra}.


\[^{48}\] Id. at 494 (S.D.N.Y. 1971).


\[^{43}\] See \textit{Rothman v. Gould}, 52 F.R.D. at 496; \textit{Yaffe v. Detroit Steel Corp.}, 50 F.R.D. at 483. In \textit{Yaffe}, the court declared:

In the first instance, permitting this amendment [to delete class action allegations] might well prejudice the rights of class members. This lawsuit, and the acquisition it challenges, have received publicity in the financial press and, at least one occasion, counsel for plaintiffs issued a press release which found its way into the Wall Street Journal. Moreover, counsel for plaintiffs participated in drawing up proxy materials sent to Detroit Steel shareholders which mentioned that this lawsuit was filed as a class action. It is altogether possible, therefore, that some class members, choosing to rely on this lawsuit as their means of redress, have decided not to file separate actions. Consequently, permitting this amendment without notice could result in an unwitting forfeiture of their rights.

\textit{Id.}
The courts reasoned that if such inducement occurred and no notice of the settlement was provided, putative class members could, depending upon the statute of limitations, be left without a cause of action.\textsuperscript{50} A second line of cases have followed the dicta in Philadelphia Electric which suggested that a court should presume that rule 23(e) applies "until and unless" the certification issue is decided negatively.\textsuperscript{51} These cases recognize, as a theoretical matter, that rule 23(e) applies to precertification cases; nevertheless, the impact of this approach is avoided by requiring an expedited preliminary ruling on the certification issue under rule 23(c)(1).\textsuperscript{52}

\textsuperscript{50} See Rothman v. Gould, 52 F.R.D. at 495; Yaffe v. Detroit Steel Corp., 50 F.R.D. at 483. See also Monarch Asphalt Sales Co. v. Wilshire Oil Co., 511 F.2d 1073, 1079 (10th Cir. 1975) (motion to intervene denied because original statute of limitations had run, notwithstanding plaintiffs' claim that they were misled by the filing of an action whose class status was subsequently denied).

\textsuperscript{51} In Rothman and Yaffe, the applicable statutes of limitations would have run out in precisely the same manner as the scenario in Philadelphia Electric had notice not been ordered prior to approval of settlement. See Rothman v. Gould, 52 F.R.D. at 496; Yaffe v. Detroit Steel Corp., 50 F.R.D. at 483, notes 33-44 and accompanying text supra. However, in light of the United States Supreme Court decision in American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1973), the running of statutes of limitations has become a far less prominent concern. That case held that the applicable statute of limitations is tolled, as to putative class members, upon the filing of the class action, and remains tolled until certification of the class is denied. Id. at 766. It is thus suggested that American Pipe has seriously undermined the persuasiveness of the reliance rationale of Yaffe and Rothman, because if the statute of limitations is tolled during the pendency of certification proceedings, absentee class members with no knowledge of the existence of such proceedings are in no worse position than they would have been had no class action been brought.

Moreover, use of this reliance rationale has been criticized recently by at least one commentator:

The policy goals stated by the district courts that have required notice hardly justify this judge-made extension of rule 23(e). The cases usually speak of reliance of absentee members upon the purported "class action" and stress that rule 23(e), if applied in the individual pre-certification settlement context, will somehow curtail abuse of rule 23 by plaintiffs and their attorneys. Little, if any, concern is expressed in any of the cases for the defendant's plight. The defendant, who is the party directly abused by the plaintiff's machinations, should not, having settled with the plaintiff, be required to endure additional manhandling.

Almond, supra note 3, at 315-16 (footnotes omitted). Cf. Duncan v. Goodyear Tire & Rubber Co., 66 F.R.D. 615, 616 (E.D. Wis. 1975) (precertification notice of settlement held mandatory under rule 23(e), although no rationale was provided to support this per se approach).

It should be noted, however, that even after the Supreme Court's decision in American Pipe there remained some confusion on the issue of when the statute started running again. The Court's decision has, however, been construed to mean that upon denial of certification and notice thereof, the original statute of limitations would begin to run once more. See United Airlines, Inc. v. McDonald, 432 U.S. 385, 391 (1977).

\textsuperscript{51} See, e.g., Muntz v. Ohio Screw Prods., 61 F.R.D. 396, 399 (N.D. Ohio 1973) (court denied class status on failure to satisfy numerosity requirement of rule 23(a)(1), and then approved individual settlement with named representative); Elias v. National Car Rental Sys., Inc., 59 F.R.D. 276, 277 (D. Minn. 1973) (court found inadequate representation as grounds for denying class status and then approved settlement with named representatives without notice to others). See generally Almond, supra note 3, at 321-27, note 5 and accompanying text supra.

\textsuperscript{52} Muntz v. Ohio Screw Prods., 61 F.R.D. 396 (N.D. Ohio 1973); Elias v. National Car Rental Sys., Inc., 59 F.R.D. 276 (D. Minn. 1973). The approach taken in these cases is distinct from that relied upon in Yaffe and Rothman. Cf. notes 46-50 and accompanying text supra. Under the Muntz and Elias approach, the courts assume that the class could not be certified,
If the certification is denied, the presumed applicability of rule 23(e) has been rebutted and no notice is ordered.\textsuperscript{53} If the preliminary finding is that the class is viable, rule 23(e) applies on its face.\textsuperscript{54}

Still, in a third line of cases, courts have refused to apply rule 23(e) to proposed settlements with individual members of a class when such settlements have no effect upon the rights of other class members.\textsuperscript{55} Such cases generally refer to attempts at settlement with individual class members other than the named representatives.\textsuperscript{56} According to the rationale of these cases, defendants can settle with individual members of putative classes encumbered by the notice and approval requirements of rule 23(e), even though the effect of this practice may be to destroy the numerosity requirement of rule 23(a)(1).\textsuperscript{57}

largely because named representatives make no attempt to adduce evidence of class viability. See, e.g., Muntz v. Ohio Screw Frods., 61 F.R.D. at 399; Elias v. National Car Rental Sys., Inc., 59 F.R.D. at 277. It is submitted that under these circumstances there is no possibility of prejudice to class members in terms of being bound to an unfair settlement because, in the absence of a viable class, each class member is free to litigate on his own. Nevertheless, the courts which use this approach tend to ignore their role as preventors of abuse of the class action device, since denial of class action status gives the named representative the benefit of an enhanced settlement value which exists by virtue of the mere allegation of entitlement to class-wide relief in the original complaint. See generally Almond, supra note 3, at 323, 324. Moreover, it is suggested that the expedited certification approach would force courts to expedite rule 23(c)(1) motions merely to approve settlements. One commentator has severely criticized this approach:

\textit{Philadelphia Electric} cannot be read to support the requirement of a 23(c)(1) hearing in every case. The court expressly limited its language so as to presume the validity of the class action only for restricted purposes. The only reason a 23(c)(1) determination occurred in this case was that considerations of due process required notice to be given members of the class under rule 23(e) because they would be bound by the consequences of the settlement. These due process considerations are absent where the dismissal of the action would not foreclose the class from seeking further relief. Therefore, a 23(c)(1) determination would not be an essential exercise in those situations.

Comment, supra note 6, at 595 (footnotes omitted).

53. See note 52 and accompanying text supra. See also note 1 and accompanying text supra.

54. See notes 51-52 and accompanying text supra.


56. See, e.g., Rodgers v. United States Steel Corp., 70 F.R.D. 639 (W.D. Pa. 1976). Nesenoff v. Muten, 67 F.R.D. 500 (E.D.N.Y. 1974). See also Almond, supra note 3, at 328. The Rodgers Court noted that the rationale underlying notice and approval requirements are inapposite to proposed settlements with individual class members:

By its terms, Rule 23(e) applies and is limited to the dismissal or compromise of a class action itself . . . where application of its strictures is necessary to protect the rights of absentee or nonparty class members who may be bound or affected by a settlement of their claims by their class representatives . . . . In contrast, the Rule does not attach to direct settlements with individual class members which have no effect upon the rights of others.

70 F.R.D. at 642 (emphasis in original) (citations and footnote omitted).

57. See, e.g., Weight Watchers, Inc. v. Weight Watchers Int'l, 455 F.2d 770, 775 (2d Cir. 1972)(dicta). For the text of rule 23(a)(1), see note 26 supra. It should be noted that rule 23(e) has also been held to be inapplicable when the settlement or dismissal is involuntary or achieved by operation of law. See Burgen v. California Adult Auth., 407 F. Supp. 555, 560 (N.D. Cal. 1976) (dismissal of plaintiff's claims on the merits is an involuntary dismissal and not subject to rule 23(e)).
III. The Functional Approach

A. Notice Requirement

In what must be considered the modern trend,58 some courts have eschewed the application of the aforementioned categorical approaches and opted instead to order rule 23(e) notice only when warranted by the facts of an individual case.59 One of the first cases to recognize the utility of the so-called functional approach in precertification cases was Magana v. Platzer Shipyard, Inc.,60 where the named plaintiffs filed a class action in the United States District Court for the Southern District of Texas alleging discrimination in violation of Title VII of the Civil Rights Act of 1964.61 The suit had not yet been certified as a class action when a settlement was proposed between the defendant and the named plaintiffs.62 Relying upon two cases which did not utilize the functional approach,63 the court declared that

58. See notes 60-61, 67 & 70 and accompanying text infra.  
"The applicability of Rule 23(e) between the time the action is brought and the date of certification of the class has been raised in several cases. Courts have recognized that in order to effectuate the purpose of Rule 23(e), it must apply from the commencement of an action filed as a class action until such time as there is a ruling denying the class action.  
. . . .  
However, it is generally recognized that class notice may properly be waived in the court's discretion without first denying the class aspects. provided the court determines that no prejudice to the class will result. This is the preferable procedure because the court directly focuses on possible class prejudice in deciding whether class notice is required."

62. 74 F.R.D. at 64.  
63. Id. at 67, citing Berse v. Berman, 60 F.R.D. 414 (S.D.N.Y. 1973) and Elias v. National Car Rental Sys., Inc., 59 F.R.D. 276 (D. Minn. 1973). It is suggested that Berse and Elias can more properly be classified as cases which have espoused one of the three categorical approaches outlined above. See notes 46-54 and accompanying text supra.  
In adopting the "reliance approach," see notes 47-51 and accompanying text supra, the Berse court stated that if the putative class members could possibly have actual knowledge of the suit's class allegations, it would be presumed that the putative members relied upon this suit in not filing their own actions. 60 F.R.D. at 416. The court ruled that, in light of this presumed reliance, it would require notice to be given when the class action allegations are struck following a defendant's offer of settlement. Id. Noting that the class allegations in this suit were struck because plaintiffs could not meet the rule's prerequisites to class certification, the Berse court found that notice was not required. Id. at 417. Although the Berse court's consideration of several factors gave it the appearance of the functional approach, it is contended that the court was working within the framework of the "reliance approach." This conclusion is reached because under the theory of the functional approach, reliance by putative class members would not ordinarily be presumed; rather, it would have to be proven in some manner, possibly by the existence of a small percentage of motions to intervene, or by affidavits of putative class members, or by any other reasonable means of establishing reliance. See Almond, supra note 3, at 337.
a case-by-case analysis was necessary to protect "the possible reliance interest of putative class members." Finding that the reliance interest among the absent class members varied with the members' actual knowledge of the existence of the suit, the court concluded that notice is required only when it is shown that putative class members have actually relied upon the plaintiff's class action allegations.

Similarly, in Johnson v. Wentz Equipment Co., a federal district court in Kansas viewed the reliance interest to be the touchstone of the notice requirement of rule 23(e) and refused to order notice in the absence of a showing of actual reliance by putative class members. The Wentz court added, however, that rule 23(e) notice would also be ordered upon an alternative showing of abuse of the class action device by the named representatives.

The most explicit and authoritative exposition of the functional approach came in Shelton v. Pargo, where the United States Court of Appeals for the Fourth Circuit reversed a district court's ruling that rule 23(e) mandated notice of a stipulated dismissal of an uncertified class action. Although the Fourth Circuit rejected the presumption that rule 23(e) applies per se to any action in which there are class action allegations in the complaint, it did not abandon the concept that the judiciary must protect the integrity of the class action device. Rather, the court emphasized that a named representative of a class has a fiduciary obligation to putative class members to prosecute the suit vigorously. Thus, in order to guard against potential abuse of the class action device by named representatives, the Fourth Circuit took the view that district courts have the power to supervise and regulate class

It is also suggested that the Elias court did not follow the functional approach, but rather followed that line of cases using expedited preliminary decisions on class certification. See 59 F.R.D. at 277; notes 51-54 and accompanying text supra. In Elias, the court held that the named representative's desire to withdraw was a sufficient ground to deny class certification under rule 23(a)(4). 59 F.R.D. at 277.

64. 74 F.R.D. at 70.
65. id.
66. Id. The court noted that such a showing could be made, for example, where substantial publicity has been given to the filing of the class suit. id.
68. id. at 1503.
69. id. The Wentz court stated:
Additional to the goal of protecting the class is the Court's goal of preventing abuse of the class action device by judicial approval of pre-certified settlements.

The classic example of such abuse is the use by a plaintiff class's attorney of class action allegations as a bargaining chip to produce settlement offers which would be unwarranted by the individual claims of the representative plaintiffs.

Id. at 1502.
70. 582 F.2d 1298 (4th Cir. 1978).
71. id. at 1316.
72. id. at 1303.
73. id.
74. id. at 1305.
75. For a description of the manner in which the class action device may be abused by named representatives, see notes 3 & 31 and accompanying text supra.
action suits, including the power to order notice to putative class members, which is derived not only from rule 23(e) but from rule 23(d)76 as well.77

By grounding the power to order notice partly upon rule 23(d), the Shelton court implied that notice could be ordered to curb abuse at any stage of the proceedings, including before class certification, without having to rely upon rule 23(e).78 The court noted that under this approach, notice to putative class members prior to certification would not be mandatory, as rule 23(e) on its face purports to make it,79 but would instead be a discretionary power to be used to curb abuse and preserve the integrity of the class action device.80

76. 582 F.2d at 1306. See Fed. R. Civ. P. 23(d). The text of rule 23(d) provides:
   (d) Orders in conduct of actions.
       In the conduct of actions to which this rule applies, the court may make appropriate orders:
       (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

77. 582 F.2d at 1309.

78. Id. at 1306. The court stated:
   [T]he District Court should have both the power and the duty, in view of its supervisory power over and its special responsibility in actions brought as class actions, as set forth in 23(d), to see that the representative party does nothing, . . . in derogation of the fiduciary responsibility he has assumed, which will prejudice unfairly the members of the class he seeks to represent. Apart, then, from the question whether 23(e) provides authority for judicial control over settlements and compromises by representative parties or not, the District Court would appear to have an ample arsenal to checkmate any abuse of the class action procedure, if unreasonable prejudice to absentee class members would result, irrespective of the time when the abuse arises.

79. Id. (footnotes omitted).

80. 582 F.2d at 1310. For a discussion of how some courts have interpreted rule 23(e) to require mandatory precertification notice, see notes 46-54 and accompanying text supra.

81. 582 F.2d at 1310-11. The functional approach adopted by the Shelton court vindicates the prophecy of one notable commentator:
   Within the confines of the existing rule . . . the limited problems involving individual settlements of alleged class actions can be dealt with effectively. Any solution to the problems [of precertification settlements] must take several factors into account: (1) Class action "strike suits," prefilling abuse, class "sell-outs" and other abuses of rule 23 must be avoided and effectively deterred; (2) the interests of the putative class must be protected against settlement, dismissals or compromises that are binding upon them or otherwise prejudice their rights; (3) reliance by nonparty class members upon alleged class actions at the precertification stage must be prevented; and (4) the courts must be fair to parties who wish to settle individual claims at the precertification stage. This means rejection of procedures and proceedings that inject unzelled-for delays, expense and obstructions into the settlement process when the rights of others cannot reasonably be regarded as at stake.
Turning to the other approaches to this issue, the Shelton court rejected the view that Philadelphia Electric\(^{81}\) mandated a determination of certification and the ordering of notice as a precondition to settlement.\(^{82}\) The court distinguished Philadelphia Electric by noting that due process considerations controlled that case since absent class members were thought to be bound by the settlement.\(^{83}\)

Absent the countervailing due process considerations present in Philadelphia Electric, the Shelton court found that the necessity of conducting a precertification hearing to determine the merits of sending notice to putative class members is a matter of discretion for the trial judge.\(^{84}\) The court also rejected both the view that rule 23(e) mandates notice in precertification dismissals and the view that such precertification dismissals cannot be approved without notice unless a negative determination has been made on the certification issue.\(^{85}\) Such approaches, according to the court, would be too mechanical and would unreasonably inhibit voluntary settlements.\(^{86}\)

It should be noted that as a result of its reliance upon rule 23(d), the Shelton court’s decision is tantamount to a holding that rule 23(e), at least with respect to notice, does not apply in the precertification context.\(^{87}\) The Fourth Circuit would not, however, preclude a district court from certifying a class expeditiously and then applying rule 23(e),\(^{88}\) nor would it preclude notice from being ordered under the court’s general authority to regulate the conduct of class actions under rule 23(d).\(^{89}\) Thus, while the Shelton court...
dispelled the notion that application of rule 23(e) is mandatory in precertification cases,90 it simultaneously reserved the power of the trial court to order notice or to take other appropriate measures to safeguard the potential class members against abuse by the named representatives.91

Such a flexible approach has been vindicated by recent court decisions dealing with the precertification issue and, although the precedent is sparse, a trend favoring application of the functional approach is clear.92 For example, in Jaen v. New York Telephone Co.,93 the United States District Court for the Southern District of New York held that Shelton controlled the issue of whether precertification notice must be given, and cited Shelton with approval for the proposition that "a District Court is not automatically obligated to order notice to all putative class members under the terms of [rule] 23(e)."94

The most recent and most liberal exposition of the functional approach to date was set forth in In re Beef Industry Antitrust Litigation,95 where the United States Court of Appeals for the Fifth Circuit endorsed the so-called "temporary settlement class" technique96 as a means to achieve prompt approval of settlements.97 While at first blush it appears that this technique merely represents a modified form of the expedited rule 23(c)(1) procedure which pre-Shelton courts had used to circumvent rule 23(e),98 the Fifth Circuit's opinion indicates that this is not the case. Rather, the court found that the authority to use this technique is implicit in the functional approach which not only permits the exercise of discretion in determining whether

90. Id. at 1315.
91. See id.
94. Id. at 697, quoting Shelton v. Pargo, 582 F.2d at 1315.
95. 607 F.2d 167 (5th Cir. 1979).
96. Id. at 173. A temporary settlement class is an innovative technique designed to alleviate the practical problems of ordering notice in a precertification context to a class that has not as yet been ascertained. Id. at 177. Under this approach, a class, presumably smaller than the class might have been if actual certification had been accomplished, is created solely for the purpose of sending rule 23(e) notice. Id. The use of this technique has not been universally approved. See, e.g., MANUAL FOR COMPLEX LITIGATION § 1.46, at 88 (1978); Miller, An Overview of Federal Class Actions: Past, Present, and Future, 4 JUST. Sys. J. 197 (1979). Indeed, one commentator has stated:

I have become convinced in recent years that there really is a serious problem: prior to certification, the judge does not have enough information to do a completely effective job under Rule 23(e).

What is clear is that a judge is well advised to demand a full presentation on all of those aspects of certification bearing on adequacy of representation and class homogeneity if the court is going to consider a proposed settlement prior to formal certification. Ironically, if he does, he might as well complete the Rule 23(c)(1) process. Id. at 216 (emphasis added). Nevertheless, the following cases have utilized a temporary settlement class: Girsch v. Jeepson, 521 F.2d 153 (3d Cir. 1975); Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir.), cert. denied, 423 U.S. 864 (1975); Greenfield v. Villager Indus. Inc., 483 F.2d 824 (3d Cir. 1973).
97. 607 F.2d at 177.
98. See notes 51-54 and accompanying text supra.
rule 23(e) notice should be ordered, but also allows all methods of dealing with precertification settlement cases, including expedited certification procedure where it is called for. Thus, the Fifth Circuit in In re Beef Antitrust Litigation held that in the absence of abuse of the class action device—and where the settlement is otherwise fair and reasonable—creation of a temporary settlement class is within the discretion of the trial judge.

B. Approval Requirements

Thus far, discussion of the functional approach has emphasized the notice requirements of rule 23(e) in class actions not yet certified as such. The language of rule 23(e), however, not only mandates notice; it also requires court approval of settlements. As was true when the rule’s notice requirements were being considered, an analysis of the judicial approval aspect of rule 23(e) must begin with a discussion of Philadelphia Electric.

The Philadelphia Electric court required approval of the settlement of the alleged class action to be held in abeyance until 1) the trial court made a certification decision under rule 23(c)(1); and 2) if a class was certified, notice was given to class members. Thus, notwithstanding its dicta which indicated that rule 23(e) is to be applied in the precertification context, the court’s holding can only be construed as applying to the notice aspect of the rule since, after certification, rule 23(e) applies facially, whereas prior to such certification, the decision on approval of the settlement is delayed pursuant to the abeyance procedure.

Nevertheless, in Magana v. Platzer Shipyard, Inc., the district court apparently relied upon the broad language of Philadelphia Electric in presuming the validity of a class prior to actual certification so as to require

99. 607 F.2d at 177, quoting 3 H. Newberg, supra note 59, § 5570c, at 476. See notes 79-80 and accompanying text supra.
100. 607 F.2d at 177. See note 98 and accompanying text supra. It is submitted that such a procedure might be authorized under the broad authority granted trial judges under rule 23(d)(2). The use of this authority, however, would be discretionary as contradistinct from the mandatory language of rule 23(c)(1). It is suggested that the major innovation in the Fifth Circuit’s view is its perception that the functional approach neither mandates the imposition of an expedited certification procedure nor precludes such a procedure from being implemented in proper cases.
101. 607 F.2d at 180.
102. See notes 58-101 and accompanying text supra.
103. See Fed. R. Civ. P. 23(e). For the text of rule 23(e), see note 1 supra.
104. For a discussion of Philadelphia Electric, see notes 32-43 and accompanying text supra.
105. For the text of rule 23(e)(1), see note 5 and accompanying text supra.
106. 42 F.R.D. at 328.
107. Id. at 327. The court stated in dicta that "[u]nder any view of the matter, ... the proposed settlements must be regarded as attempting to compromise the claims of the class, not just the named plaintiffs. Rule 23(e) clearly applies to this situation ... ."
108. Id. at 328. See notes 42-43 and accompanying text supra.
110. See note 105 and accompanying text supra.
court approval of a settlement. Unlike *Philadelphia Electric*, however, the *Magana* court did not require mandatory notice under rule 23(e). The *Magana* court thus found that approval of a precertification settlement could be obtained in certain cases without first notifying all putative class members.

Similarly, in *Shelton v. Pargo*, the Fourth Circuit supported a bifurcated interpretation of the applicability of rule 23(e) in the precertification context. Notwithstanding the fact that the language of the rule is mandatory with respect to both elements, the *Shelton* court relied upon the following alternative theories to justify its finding that the rule's notice requirements were discretionary while its approval requirements were mandatory: 1) that rule 23(e) is "flexible" and should not be interpreted literally; and 2) that although rule 23(d) gives the court the power to order notice where necessary to protect abuse of the class action device, unless the court retains power under rule 23(e) to approve or disapprove settlements, the effectiveness of a court's exercise of its rule 23(d) powers would be seriously undermined.

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111. 74 F.R.D. at 66. It should be noted that *Magana* was decided by the same court which opted to apply the functional approach to the notice requirement of rule 23(e) in the precertification context. *Id.* at 70. Finding, however, that a prophylactic rule should apply with respect to the approval requirement of rule 23(e), the court stated:

"Because the abuses which rule 23(e) is designed to combat can occur prior to class certification, this Court holds that rule 23(e) approval must be obtained for the proposed settlement of a named plaintiff's claim when the plaintiff has purported to represent a class that he now seeks to dismiss."

*Id.* at 66. (emphasis added). Although this bifurcated approach to the inapplicability of rule 23(e) in the precertification context is seemingly inconsistent, it is submitted that such treatment can be justified on the grounds that 1) the language of rule 23(e) expressly supports this view; and 2) the policy goal of flexibility in applying the rule requires such an approach. See notes 115-17 & 120 and accompanying text infra.


113. 74 F.R.D. at 66.

114. 582 F.2d 1298 (4th Cir. 1978). For a discussion of *Shelton*, see notes 70-91 and accompanying text supra.

115. 582 F.2d at 1310. The *Shelton* court quoted with approval the following passage from Professor Newberg's work, *Class Actions*:

The language of rule 23(e) suggests that both court approval and notice are mandatory on dismissal or compromise of a class suit [with respect to precertification situations], and some courts have so held. However, on closer analysis, notice is not mandatory in all instances, but "shall be given to all members of the class in such manner as the court directs." Broadly interpreted, this language is sufficiently flexible to permit the court to approve a dismissal, but to determine that no notice at all is required, where the dismissal will not result in any prejudice to the class.

*Id.* (emphasis added), quoting H. NEWBERG, * supra* note 58, §4950, at 405-06 quoting FED. R. CIV. F. 23(e).  
116. 582 F.2d at 1310-11.

117. *Id.* at 1306, 1311. See also *Developments in the Law-Class Actions*, 89 HARV. L. REV. 1518, 1542 n.32 [hereinafter cited as *Developments*].
IV. A Case for the Functional Approach

It is submitted that the functional approach is best suited for attaining the general goals of amended rule 23\textsuperscript{118} and for reconciling the need to protect putative class members with the public policy of encouraging settlements.\textsuperscript{119} Amended rule 23 is designed to provide and encourage flexibility in dealing with the unique problems generated by the use of the class action device.\textsuperscript{120} The functional approach to precertification settlements obviates the necessity for a strict, mechanical reading of rule 23(c) because the purposes underlying rule 23 can be effectuated by other sources, including rule 23(d), which do not contain language that appears to be mandatory.\textsuperscript{121} It is therefore submitted that rule 23(e) ought not to be read literally, but liberally, with an eye towards the "mischief" it is designed to prevent.\textsuperscript{122}

Under the other approaches courts have utilized in construing the applicability of rule 23(e) in the precertification context,\textsuperscript{123} it is submitted that at least one of the two competing policy goals—protection of the class action device\textsuperscript{124} or settlement of complex litigation\textsuperscript{125}—must be sacrificed. If notice is deemed mandatory under rule 23(e) irrespective of either the actual need to inform putative class members who may have relied upon the filing of the suit or the absence of abuse by named representatives,\textsuperscript{126} then it is suggested that the unnecessary notice requirement can only have the effect of inhibiting the settlement of suits.\textsuperscript{127}

Similarly, if an expedited decision on the class certification issue is required,\textsuperscript{128} protection of the integrity of the class action device may be diminished because once a negative determination is made, the court loses all power to supervise the suit under rule 23.\textsuperscript{129} If such a determination is

\textsuperscript{118} See notes 3 & 31 and accompanying text supra.
\textsuperscript{119} See note 18 and accompanying text supra.
\textsuperscript{120} See generally MANUAL FOR COMPLEX LITIGATION \S 1.46 (1978). The Manual notes that courts are expected to develop new methods of employing amended rule 23. Id. \S 1.46, at 88.
\textsuperscript{121} See Shelton v. Pargo, 582 F.2d 1298 (4th Cir. 1978); notes 70-91 and accompanying text supra; notes 133-39 and accompanying text infra.
\textsuperscript{122} See notes 115-16 and accompanying text supra; notes 135-36 and accompanying text infra.
\textsuperscript{123} See notes 45-57 and accompanying text supra.
\textsuperscript{124} For a discussion of this policy, see H. NEWBERG, supra note 59 \S 4950, at 405; notes 3 & 31 and accompanying text supra.
\textsuperscript{125} For judicial recognition of this policy goal, see Shelton v. Pargo, 582 F.2d at 1311; Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1972); note 18 and accompanying text supra.
\textsuperscript{126} See notes 46-50 and accompanying text supra.
\textsuperscript{127} See, e.g., Rothman v. Gould, 52 F.R.D. 494 (S.D.N.Y. 1971). In Rothman, the named representative and the defendants reached a settlement after the certification issue had been dormant for more than two years. Id. at 495. Upon plaintiff's motion to strike the class allegations from the complaint, the judge ordered notice to be sent to the putative class members pursuant to rule 23(e). Id. at 496. When informed of the court's ruling, the defendants promptly withdrew their settlement offer rather than risk the possibility of facing innumerable separate suits and motions to intervene. Id. at 497. Thus, as these facts indicate, if settlement with named representatives cannot end the litigation, a defendant's incentive to settle will be effectively destroyed. See also notes 47-50 and accompanying text supra.
\textsuperscript{128} See notes 51-54 and accompanying text supra.
\textsuperscript{129} See note 5 and accompanying text supra; note 132 infra.
made solely to avoid imposing the notice requirement of rule 23(e), the courts will have effectively handcuffed themselves since any time a named representative desires to settle, he can contend that class certification should be denied due to a lack of adequate representation under rule 23(a)(4).\textsuperscript{130} While a notice order may or may not be desirable in a given case,\textsuperscript{131} courts avoiding such orders by expeditiously denying class certification have, it is submitted, deprived themselves of the means to insure fairness of the settlement to the class through the approval requirement of rule 23(e).\textsuperscript{132}

In contrast to these approaches, it is suggested that the functional approach avoids these pitfalls. The use of this analysis obviates the necessity of grounding a notice order solely upon rule 23(e) because it recognizes that even if a precertification dismissal or settlement is outside the scope of rule 23(e), it is governed by rule 23(d).\textsuperscript{133} Thus, it is suggested that the evils sought to be prevented by rule 23(e)—i.e., abuse of the class action device or the harm caused to potential class members relying upon the class complaint\textsuperscript{134}—can be prevented by discretionary notice orders\textsuperscript{135} without unduly burdening voluntary settlements with an overinclusive per se rule.\textsuperscript{136}

\textsuperscript{130} See, e.g., Elias v. National Car Rental Sys., Inc., 59 F.R.D. 276 (D. Minn. 1973). The court in Elias stated:

First it is clear that plaintiff desires to withdraw as a plaintiff individually and personally. Were it not designated as a class action, this would end the matter. In view of the requirements of rule 23(a)(4) it is clear that a plaintiff who desires to withdraw personally as an individual is not one who will fairly represent and adequately protect the interests of the class. One who wishes to cease his connection with the case cannot be a true class representative. There is no one sought to be substituted for him and so the action must fail for this reason alone.

\textit{Id.} at 277. See also notes 50-53 and accompanying text supra. See generally Almond, \textit{supra} note 3, at 321-23.

\textsuperscript{131} See notes 79-80 and accompanying text supra.

\textsuperscript{132} See H. Newberg, \textit{supra} note 59, at 407. Professor Newberg states that "Rule 23(e) requiring court approval of dismissals applies before any class ruling has been made as well as after there has been a class certification. By its terms, Rule 23(e) would not apply to non-class actions or to actions which have been denied certification." \textit{Id.}

\textsuperscript{133} See Shelton v. Fargo, 582 F.2d at 1309.

\textsuperscript{134} See notes 3 & 33 and accompanying text supra.

\textsuperscript{135} See Shelton v. Fargo, 582 F.2d at 1309. As the Shelton court pointed out, it is not necessary to find that rule 23(e) applies in order for the trial court to have the "power" to issue notice to putative class members. \textit{Id.} The court observed that such power can be found in rule 23(d). \textit{Id.} Moreover, even if rule 23(e) does apply in the precertification context, it is suggested that the rule's language does not create an obstacle for implementation of the functional approach because the language of rule 23 has been found to be directory in other contexts. See, e.g., Grand Rapids Furniture Co. v. Grand Rapids Furniture Co., 127 F.2d 245 (7th Cir. 1942) (language of rule 23 is directory, not mandatory, and rule impliedly recognizes the right of all members of class to join as plaintiffs if they so desire). Thus, it is submitted that insofar as rule 23(e) may be deemed to apply to precertification settlements or dismissals, its language should be construed as directory, applicable only where the mischief that the rule seeks to prevent exists under the particular circumstances of the case. \textit{But see} 2A C.D. Sands, \textsc{Statutes and Statutory Construction} §§ 47.23, 57.10, at 423, 428 (4th ed. 1973) (suggesting that where a statute grants authority to perform an act and prescribes the manner of performance, such performance is mandatory, even though the decision whether to perform the act in the first place was discretionary).

\textsuperscript{136} It is suggested that mandatory notice requirements are necessarily overinclusive if the purpose of rule 23(e) notice is merely to prevent abuse of the class action device or to protect
Moreover, use of the functional approach assumes continuation of the court's approval power over settlements.\textsuperscript{137} Accordingly, if abuse of the class action device is found to exist prior to certification, the court can remedy such abuse either by ordering notice or by simply denying approval of the settlement.\textsuperscript{138} Thus, it is submitted that the integrity of the class action device is continually protected under the functional approach.\textsuperscript{139}

It could be argued, however, that by construing rule 23(e)'s notice requirement to be discretionary while construing its approval requirement to be mandatory, the functional approach artificially bifurcates the rule.\textsuperscript{140} Nevertheless, it is contended that such bifurcation is defensible in light of the balancing of conflicting policy interests necessitated by a proper construction of the rule.\textsuperscript{141} Since rule 23(e) is designed to prevent abuses of the class action device, as well as to protect the interests of absent class members,\textsuperscript{142} it is suggested that the mischief sought to be prevented can only be excised if the settlement is subject to the approval of court.\textsuperscript{143} If the mis-

the reliance interest of putative class members. See notes 3, 31 & 46-50 and accompanying text supra. As one study has noted:

[W]hile pre-certification dismissal does not legally bind absent class members, notice may be appropriate under some circumstances to afford absentees an opportunity to intervene and take over the class suit, or to file individual claims. The judge's authority to order notice in the precertification situation is clear, the only question is when he should do so.

Developments, supra note 117, at 1541-42 (footnotes omitted) (emphasis added). The negative implication of this statement is, it is suggested, that mandatory notice would be counterproductive in that it would unnecessarily delay litigation in the absence of a showing of abuse or reliance, and it would dramatically increase litigation costs.

\textsuperscript{137} See Shelton v. Fargo, 582 F.2d at 1310.
\textsuperscript{139} 582 F.2d at 1310.
\textsuperscript{140} One commentator has noted that where mandatory language, as evidenced by the use of the verb "shall," is used in different sections of the same statute, courts usually construe the meanings of these sections consistently:

Similarly, an inference can be drawn from the use of the same verb in different but related provisions of the same statute. Where a city charter provided that tax assessments shall be made as of a certain date, and fully completed on or before a later date, the court, having found the first provision mandatory, decided that it was not to be presumed that the legislature used the mandatory verb in different senses in the same sentence.

2A C.D. Sands, supra note 135, § 57.11, at 430, citing Sanford Realty Co. v. City of Knoxville, 172 Tenn. 125, 110 S.W.2d 325 (1937). Since rule 23(e) contains the same mandatory verb with respect to both notice and approval, it appears that such bifurcation is in violation of the normal canons of statutory construction.

\textsuperscript{141} See, e.g., Magana v. Platzer Shipyard, Inc., 74 F.R.D. 66-69. In Magana, the court found that strict adherence to the rule's approval requirement does not deter settlements since, at the point in time when court approval is required, settlement has already occurred. Id. All that remains to be decided is whether the class action device has been abused and whether the settlement is fair to putative class members. Id. Thus, it is suggested that a bifurcated construction of rule 23(e) reconciles the rule's policy goals, rather than putting them in conflict as do the other approaches to the rule. See notes 123-32 and accompanying text supra.

\textsuperscript{142} See notes 3 & 31 and accompanying text supra.

\textsuperscript{143} See H. Newberg, supra note 59, § 4960, at 408. Professor Newberg has insisted that court approval should be deemed mandatory:

Otherwise, the risk may exist that a court may deny class certification on the grounds that an unwilling plaintiff cannot adequately represent the class, and then permit a dismissal of the suit which may unwillingly result in prejudice to class members because of the running of the statute of limitations or other factors.
chief exists, the court can deny approval or exercise any of the powers given pursuant to rules 23(d) or 23(e). If the mischief does not exist, approval of the settlement or dismissal can be granted. Absent such judicial supervision in the precertification context, it is contended that the safeguards of rule 23 would be illusory.

With respect to the notice requirement, however, it is suggested that the balance between the policy of encouraging voluntary settlements on the one hand, versus protection of class interests and preserving the integrity of the class action device on the other, tilts in favor of discretionary notice rather than a per se requirement. It is therefore submitted that the bifurcated reading of rule 23(e) necessitated by application of the functional approach is most consistent with the intent of the drafters of the 1966 amendments to rule 23—i.e., to create mechanisms flexible enough to be utilized in complex litigation.

In sum, it is suggested that use of the functional approach will square with several important policy considerations. First, it will allow maximum protection of absentee class members since a prerequisite of the approach is strict judicial supervision over the individual facts and circumstances of each case with an eye towards prevention of collusion and protection of the reliance interest of absentee class members. Second, by not mandating litigation-generating requirements, such as notice, it will encourage the voluntary settlement of complex litigation. Third, it will allow efficient use of the class action device without creating collateral interlocutory litigation over the meaning or construction of the federal class action rules. Finally, it puts the onus of administration of these suits within the discretion of the trial judge, thereby allowing the flexibility needed to effectuate the spirit of rule 23.

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Id. (footnote omitted). This risk is especially present when the original class action was filed just prior to the running of the statute of limitations. Id. § 4960, at 408 n.32. Moreover, it is submitted that in the absence of a mandatory approval requirement, the sending of notice becomes an ineffective act since those class members who fail to intervene or to file new actions may be prejudiced by the unfairness or inadequacy of the relief available to the class. The United States Supreme Court has held that absent class members are not to be deprived of the protections of rule 23, nor are they required to actively participate in the suit in order to receive such protections. See American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 543 (1973).

144. See Fed. R. Civ. P. 23(d), (e); note 1 supra; notes 75-77 and accompanying text supra. It is submitted that preventing the abuse of the class action device and protecting the interests of absentee class members is precisely the type of criteria judges usually use when determining whether to approve a settlement or dismissal. See Magana v. Plutzer Shipyard, Inc., 74 F.R.D. at 66-67.

145. See Fed. R. Civ. P. 23(d), (e); notes 1 & 76 supra.

146. See notes 133-36 and accompanying text supra. See also Developments, supra note 117, at 1542 n.32 (such a "flexible interpretation of rule 23(e) avoids . . . a formalistic approach . . . [and] seems more compatible with the functional orientation of the 1966 amendments").

147. See note 146 and accompanying text supra. See also Developments, supra note 117, at 1628.

148. See notes 59-77 and accompanying text supra.


150. Id. at 70.

151. See notes 81-86 and accompanying text supra.

152. See Shelton v. Fargo, 582 F.2d at 1311.

153. See notes 72-86 & 114-17 and accompanying text supra.
V. CONCLUSION

This comment has demonstrated that the issue of whether rule 23(e) should be applied in a precertification context has been approached by federal courts using a myriad of techniques but has not yet been unequivocally resolved.154 Early cases opted for per se rules 155 running the gamut from mandatory notice under rule 23(e)156 to expedited certification under rule 23(c)(1).157 This comment has noted that a more flexible approach, the so-called functional approach,158 has commanded the majority of recent federal court decisions on the precertification settlement issue.159 It has been suggested that the functional approach is necessary to vindicate the goals sought to be achieved by the amendments to rule 23. While the 1966 amendments have been criticized,160 and while proposals for further amendment have been set forth,161 it is submitted that use of the functional approach would obviate the necessity for reform. This comment has further suggested that the functional approach in its most liberal form162 has the incidental effect of encouraging voluntary settlement of complex litigation,163 thereby decreasing a major source of docket crowding.164 In the absence of a major overhaul of rule 23, and in the absence of a definitive ruling by the United States Supreme Court on the proper construction of rule 23,165 it is contended that the functional approach best allows the procedural safeguards of rule 23 to function in the spirit contemplated by the amendments of 1966.166

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154. See notes 45-117 and accompanying text supra.
155. See notes 46-54 and accompanying text supra.
156. See notes 46-50 and accompanying text supra.
157. See notes 51-54 and accompanying text supra.
158. See notes 58-153 and accompanying text supra.
159. See notes 58-117 and accompanying text supra.
161. See, e.g., Kennedy, Federal Class Actions: A Need for Legislative Reform, 32 S.W.L.J. 1209 (1979); Note, Class Actions and the Need for Legislative Reappraisal, 50 NOTRE DAME LAW. 285 (1974).
162. See notes 114-22 and accompanying text supra.
163. See notes 133-39 and accompanying text supra.
164. One commentator has stated that "[m]ost class actions never reach trial" because defendants will usually offer to settle, at least once the class has been certified. Almond, supra note 3, at 305. It is suggested that approaches to the applicability of rule 23(e) in the precertification context which do not inhibit such settlements must necessarily decrease the docket pressure in federal courts.
165. The United States Supreme Court has never ruled on the precertification settlement issue. To date, the Second, Fourth, and Fifth Circuit are the only courts of appeals which have specifically decided the question. See In re Beef Industry Antitrust Litigation, 607 F.2d 167 (5th Cir. 1979); Shelton v. Pargo, 582 F.2d 1298 (4th Cir. 1978); Weight Watchers, Inc. v. Weight Watchers Int'l, 455 F.2d 770 (2d Cir. 1972).
166. See Shelton v. Pargo, 582 F.2d at 1311; notes 30-31 & 114-17 and accompanying text supra.