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Awarding Attorneys' Fees from Class Action Judgments [590 F.2d 433 (2nd Cir. 1978), *cert. granted*, 441 U.S. 942 (1979)]

Erratum

Page 187, asterisk footnote, line 2. Read "Second Circuit decision. The court's opinion focused on the propriety of attorneys' fees. *See*". Page 187, line 4 of footnotes. Add note 1: "See text accompanying notes 37-44 *infra*."

Case Note

AWARDING ATTORNEYS' FEES FROM CLASS ACTION JUDGMENTS

Van Gemert v. Boeing Co., 590 F.2d 433 (2d Cir. 1978),
aff'd, 48 U.S.L.W. 4127 (1980).*

In a recent decision, the United States Court of Appeals for the Second Circuit granted an award of attorneys' fees from the unclaimed portion of a class judgment. This Note examines the origins of a court's power to grant such awards and finds that although the doctrines in this area are not easily discernible, the ultimate result of this decision depends on a mixture of traditional quasi-contract concepts and practical implications of class action rules. In addition, the author discusses the conflicting policy issues that arise from such awards and that have significant impact on the future viability of class actions. Finally, he proposes alternative remedies for conflicts of interest which are inherent in such attorney fee awards.

INTRODUCTION

THE PROPRIETY OF AWARDING ATTORNEYS' FEES from unclaimed portions of a class action judgment is controversial. Such fee awards can be viewed as a significant extension of a federal court's equitable powers and may conflict with traditional rules in this area.¹ The United States Court of Appeals for the Second Circuit confronted this issue in *Van Gemert v. Boeing Co.*,² (*Van Gemert IV*), where fee awards from unclaimed funds were held to be proper when calculable legal benefits have been conferred upon the nonclaiming class members.³

Recovery of legal fees in class judgments may be justified through alternative analyses. Under one rationale, such awards are considered an outgrowth of the equitable powers of courts,⁴ with specific awards based on a theory of quasi-contract.⁵ Under

* In the final stages of publication of this issue, the Supreme Court affirmed the Second Circuit decision. The court's opinion focused on the propriety of attorneys'. See notes 37-129 *infra* and accompanying text.

2. 590 F.2d 433 (2d Cir. 1978), *aff'd*, 48 U.S.L.W. 4127 (1980).

3. *Id.* at 435.

4. *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 165 (3d Cir. 1973). "The award of fees under the equitable fund doctrine is analogous to an action in *quantum meruit*: the individual seeking compensation has, by his actions, benefited another and seeks payment for the value of the service performed." *Id.* at 165 (emphasis added).

5. The theory of quasi-contract permits one who has nongratuitously conferred a benefit on another to recover from that person the reasonable value of the benefit con-

another rationale, such awards are viewed as a possible violation of the "American Rule" which requires each party to pay its own litigation costs, including legal fees.⁶ Recognized exceptions to this rule exist. Specifically, a prevailing party may be awarded attorneys' fees by virtue of statutory provisions granting such authority to the court,⁷ or when an opposing party has acted in bad faith or is disobedient to the court.⁸ Another exception to the American Rule, called the "common fund" or "common benefit" doctrine,⁹ is germane to class actions and allows a party who has conferred a benefit on another through litigation to recover a proportionate share of attorneys' fees from those who benefit.¹⁰

Notably, both rationales are based on quasi-contractual principles and are designed to prevent unjust enrichment.¹¹ A fundamental issue under both of these rationales is whether attorneys for the named plaintiffs have indeed conferred a legal benefit on the nonclaiming class members.¹² If so, these attorneys should be entitled to the reasonable value of the benefit conferred¹³ and awards should be granted.

This Note will examine these rationales and the problems created in using them to justify awards for unclaimed portions of class judgments with particular emphasis on the treatment given to them by the Second Circuit in *Van Gemert IV*.¹⁴ The policy ramifications of such awards, including the potential effect that they may have on the viability of future class actions, will also be discussed.¹⁵ Finally, this Note concludes that awards in this situation should be used discriminately since abuse can lead to serious conflicts of interest and consequent inadequate representation of

ferred. 12 WILLISTON ON CONTRACTS § 1483 (rev. ed. 1970). See also F. WOODWARD, THE LAW OF QUASI-CONTRACTS § 4 (1913).

6. See notes 37-44 *infra* and accompanying text. For a recent discussion of the American Rule by the Supreme Court, see *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-49 (1975).

7. *Id.* at 257-59. One commentator noted that in 1977 there were 75 such statutory provisions. Berger, *Court Awarded Attorney's Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281, 303 (1977).

8. 421 U.S. at 257-59. *E.g.*, *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972).

9. 421 U.S. at 257.

10. *Id.* at 257 n.30.

11. See generally Seavey & Scott, *Restitution*, 54 LAW Q. REV. 29 (1938); Winfield, *The American Restatement of the Law of Restitution*, 54 LAW Q. REV. 529 (1938) (regarding the first rationale); 421 U.S. at 257 n.30 (regarding the latter rationale).

12. See text accompanying notes 78-129 *infra*.

13. See note 11 *supra*.

14. See text accompanying notes 32-129 *infra*.

15. See text accompanying notes 130-50 *infra*.

nonclaiming class members.¹⁶

I. LITIGATION OF THE VAN GEMERT CLAIM

A. *The Facts and Early Litigation*

Van Gemert IV was the result of lengthy litigation.¹⁷ In February 1966, the Boeing Company called an issue of convertible debentures for redemption, and set March 29, 1966 as the conversion deadline.¹⁸ A considerable number of bondholders did not convert their debentures into the higher value Boeing common stock.¹⁹ William Van Gemert brought a class action against the Boeing Company on behalf of all nonconverting bondholders, alleging inadequate notice of the redemption deadline.²⁰ The District Court for the Southern District of New York dismissed the claim, holding that Boeing had complied with the debentures' indenture provisions.²¹ On appeal, the Second Circuit found no violation of federal securities law, but found a violation of New York contract law.²² Accordingly, it reversed and remanded the

16. See notes 151-68 *infra*. The dissent in *Van Gemert IV* raised the latter issue and concluded that the nonclaiming class members had been inadequately represented. 590 F.2d at 443.

17. The litigation started in 1966 and a final decision was not reached until 1978. The case was decided by the Supreme Court of the United States on February 19, 1980. 48 U.S.L.W. 4127 (1980).

18. 590 F.2d at 435. These debentures carried a 4½ percent coupon with a maturity date of July 1, 1980. *Id.*

19. *Id.*

20. *Van Gemert v. Boeing Co.*, 520 F.2d 1373 (2d Cir. 1975) [hereinafter cited as *Van Gemert I*]. Plaintiffs alleged inadequate notice of redemption despite Boeing's compliance with indenture provisions. Plaintiffs contended that Boeing was liable under three federal statutes: The Securities Exchange Act of 1934, 15 U.S.C. § 78f (1976); The Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1976); and The Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa-77bbbb (1976); and also alleged liability under a theory of implied contract under New York law. 520 F.2d at 1374.

21. *Id.* at 1373. The Boeing Company complied with the notice provisions of the indenture agreement by publishing notices of its intention to call the debentures in national newspapers and by sending notice to bondholders who had registered ownership of their securities. However, these debentures were bearer-bonds, and although numbered, there was no feasible way to ascertain the identity of nonregistered holders. Thus publication seemed to be the only practical mode of notification. *Id.* at 1383-86.

22. *Id.* at 1383. The Second Circuit held that New York contract law imposed an implied duty to provide reasonable notice of redemption proceedings, regardless of the indenture provisions. The court found that Boeing had breached this implied duty.

In order to maintain subject matter jurisdiction, the court invoked the doctrine of pendent jurisdiction. *Id.* at 1374. In *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), the Supreme Court established the propriety of invoking pendent jurisdiction to hear state claims which accompany properly entertained federal claims. Notably, the power of a federal court to continue to hear a state claim after all federal claims have been dismissed is

case.²³

On remand, the class damages were calculated to be \$3,289,359—the difference between the nonconverted debentures' stock and bond values.²⁴ The Court of Appeals, in *Van Gemert II*, affirmed this ruling²⁵ but rejected the contention that claiming class members were entitled to a *pro rata* distribution of the unclaimed portion of the judgment.²⁶ The class was, however, awarded prejudgment interest on its damages.²⁷

On second remand, plaintiffs' attorneys were granted their fees and expenses from the total amount of the judgment against Boeing.²⁸ A three-judge panel of the Second Circuit overturned this fee award in *Van Gemert III*²⁹ and held that the interests of

unclear under *Gibbs*. Although *Gibbs* did hold that the power to invoke pendent jurisdiction is subject to broad discretion, Justice Brennan, writing for the majority, did state, "Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *Id.* at 726.

Application of this dicta in the *Gibbs* majority opinion to *Van Gemert* suggests that when the Second Circuit affirmed the dismissal of the federal claims, it may have been improper to entertain the state claim under pendent jurisdiction. Justice Brennan's use of the word "certainly" would seem to indicate that contrary behavior would be an abuse of discretion. Under this view, the Second Circuit's subject matter competency in *Van Gemert* was questionable. A valid contrary argument may be made, however, that this dicta is inapplicable (or at least diminished in effect) since Justice Brennan was directing his comments at a pretrial dismissal of federal claims and since the *Van Gemert* litigation had progressed beyond that point.

23. 520 F.2d at 1387.

24. Each debenture had a face value of \$1,000 and was convertible, at the holder's election, into twenty shares of Boeing common stock. 590 F.2d at 435. On the date set as the deadline for conversion by Boeing (March 29, 1966), the stock was being traded at \$158.12 per share. *Id.* Those bondholders who did not convert would otherwise have been entitled to the call price of \$1,032.50 per \$1,000 debenture. *Id.* The stock value of the debentures was more than three times the bond value. *Id.* The difference per debenture amounted to approximately \$2,130. *Id.*

For a complete explanation of valuation techniques for the stock and bond values of convertible securities, see J. COHEN, E. ZINBARG, & A. ZEIKEL, *INVESTMENT ANALYSIS AND PORTFOLIO MANAGEMENT* 447-60 (3d ed. 1977).

25. *Van Gemert v. Boeing Co.*, 553 F.2d 812 (2d Cir. 1977) (*Van Gemert II*).

26. *Id.* at 815. Plaintiffs' motion for a *pro rata* distribution of the unclaimed funds to class members who had filed claims was denied because the court found it to constitute a form of fluid class recovery which was previously rejected in *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974) (*Eisen III*). The *Eisen* court specifically rejected any form of class recovery that would distribute unclaimed damages to a "next best" subclass. *Id.* at 1018.

27. 553 F.2d at 812.

28. *Van Gemert v. Boeing Co.*, 573 F.2d 733 (2d Cir. 1978) (*Van Gemert III*). The district court ordered that the legal fees assessed for each class member bear the same ratio to the total expense for legal fees as the member's recovery bears to the class' recovery. *Id.* at 733-34.

29. *Id.* at 736.

claiming and nonclaiming class members should not be treated collectively for the purposes of assessing legal fees.³⁰ Sitting *en banc*, the Court of Appeals reheard the case and, in *Van Gemert IV*, affirmed the district court's fee award.³¹

B. *The Van Gemert IV Decision*

In its fourth decision in the *Van Gemert* litigation, the Second Circuit reasoned that it was equitable for all class members (*i.e.*, claiming and nonclaiming) to share in the cost of obtaining the judgment.³² The court noted four consequences that would follow from imposing the entire cost of attorneys' fees on claiming class members. First, with the adoption of such a policy, courts would allow nonclaiming class members to be unjustly enriched by receiving a legal benefit—the right to a share of damages—at the expense of claiming class members, who would bear the legal costs of the entire class.³³ Second, by having claiming class members pay all the legal expenses, it is conceivable that the named plaintiffs' share of a favorable judgment would be substantially depleted by offsetting legal expenses.³⁴ Third, if the number of the parties claiming a share of the class judgment were small enough, the amount of attorneys' fees would be diminished signif-

30. *Id.* The court intimated that such treatment would constitute a fluid recovery. See note 26 *supra*.

31. 590 F.2d 433 at 435. In order to review the panel decision, the court *en banc* first decided whether the law of the case doctrine precluded such a review. Generally, if an appellate court has passed on a legal question and has remanded the case for further proceedings, the legal question thus determined will not be determined differently on a subsequent appeal. See, *e.g.*, *United States v. United States Smelting, Ref., and Mining Co.*, 339 U.S. 186 (1950).

The court *en banc* overcame this threshold issue by taking a flexible approach to the law of the case doctrine. It decided that a Court of Appeals, sitting *en banc*, could review any panel decision that a majority of the active judges found to have been decided incorrectly. 590 F.2d at 436 n.9. The court relied on case law which suggests that the law of the case doctrine is not binding, but rather an appeal to the good sense of the court. *First Nat'l Bank of Hollywood v. American Foam Rubber Corp.*, 530 F.2d 450, 453 n.3 (2d Cir. 1976); *Zdanok v. Glidden Corp.*, 327 F.2d 944, 952 (2d Cir. 1964).

This flexible approach taken by the *Van Gemert IV* court, which views the law of the case doctrine as discretionary and consequently nonbinding in the presence of reversible error, has merit when examined in the context of the appellate process. See *Higgins v. California Prune & Apricot Growers, Inc.*, 3 F.2d 896, 898 (2d Cir. 1924). Strict adherence to prior disposition of issues in a case would seem to impede effective appeal. For a contrary discussion which examines the negative impact of such a discretionary stance, see B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1st ed. 1921).

32. 590 F.2d at 439.

33. *Id.* at 440-41. The majority concluded that the fee award did not injure a property interest of the nonclaimants, as none had been asserted. *Id.* at 439 n.14.

34. *Id.* at 440, 441.

icantly.³⁵ Fourth, the court recognized the probable deterrent effect that such consequences would have upon named plaintiffs in bringing class actions and the effect that such consequences had in encouraging attorneys to settle at very early stages.³⁶ Thus, the Second Circuit anticipated that such fee awards could promote class actions by alleviating the anxiety of potential plaintiffs concerned about investing a great deal of time and money for little gain and by mitigating the enormous pressure on attorneys to settle.

II. ALTERNATIVE JUSTIFICATIONS OF FEE AWARDS FROM UNCLAIMED CLASS JUDGMENTS

A. *Quasi-Contract: Not a Violation of the American Rule*

When a court levies attorneys' fees against an unclaimed portion of a class judgment, doctrinal difficulties arise regarding the exact theory on which such awards may be justified. If such awards may be justified as an acceptable exercise of a court's equitable powers, *i.e.*, based on quasi-contract, one must inquire whether such awards are consistent with the American Rule without additional justification by reference to an exception. Unfortunately, the rule may be phrased in two ways which, although similar, vary enough to make resolution of this issue difficult. If the rule is stated to prohibit the prevailing party from collecting attorneys' fees from the losing party,³⁷ it may be argued that awards against unclaimed class judgments do not violate the American Rule since the award is taxed against the prevailing class and not the losing party. If, however, the rule is stated to require only that each party pay for his or her own litigation costs,³⁸ such awards may be viewed as a violation of the rule because nonclaiming class members would be required to pay legal expenses which would otherwise be incurred by claiming class members.

The majority opinion in *Van Gemert IV* illustrates the difficulty in articulating an analysis of the American Rule and other doctrines which have developed concerning attorneys' fees in class action litigation. Although the court indicated that its holding in

35. *Id.*

36. *Id.*

37. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

38. Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 639 (1974).

Van Gemert IV was consistent with the American Rule and its rationale,³⁹ it nevertheless undertook a discussion of the common fund, or common benefit, doctrine,⁴⁰ an exception to the American Rule. The mere presence of such a discussion may carry the suggestion that the court was uneasy with its conclusion that this holding is consistent with the American Rule.⁴¹ Alternatively, the discussion of the common fund doctrine may merely reflect a desire to complement the main thrust of the court's analysis. In any event, the court, apparently proceeding with the belief that the American Rule prohibited charging the losing party with fees incurred by the prevailing party, noted that the prevailing party and not Boeing was being assessed the attorneys' fees.⁴² This position has merit when one considers that the award did not increase Boeing's liability since the fees were not recovered from Boeing directly but from a predetermined judgment. Boeing could not suffer even an economic loss if fees were levied against the unclaimed judgment since Boeing was seemingly precluded from recapturing any unclaimed judgment.⁴³

Appreciating the merit of the position that such an award

39. 590 F.2d at 441-42.

40. *Id.* at 437-39. For a discussion of the common fund doctrine, see text accompanying notes 45-89 *infra*.

41. If the court were entirely convinced that its holding is consistent with the American Rule, then resort to a discussion of an exception to the rule would be unnecessary. The presence of such a discussion carries an implication that the holding may mark a departure from established doctrine and that alternate grounds for support may be necessary.

42. 590 F.2d at 441-42.

43. Under N.Y. ABAND. PROP. LAW (Consol.) § 1200 (1976), unclaimed funds under court control eventually escheat to the state. This section provides:

All money or other property which shall have been, or shall hereafter be paid into or deposited in the custody of, or be under the control of, any court of the United States in and for any district within the state, or shall have been or hereafter shall be in the custody of any depository, registry, clerk, or other officer of such court, and the rightful owner or owners thereof either (a) shall have been or shall be unknown for a period of ten consecutive years; or (b) shall have died or shall die without having disposed thereof and without having left or without leaving heirs, next-of-kin or distributees; or (c) shall have abandoned or shall abandon such funds or property, are declared to have escheated or to escheat, together with all interest accrued thereon, to and to become or to become the property of the state.

Id. This statute has been interpreted to preclude a defendant from recovering unclaimed portions of a negative judgment once the proceeds are within court dominion. In *Pennsylvania R.R. v. United States*, 98 F.2d 893 (3d Cir. 1938), a railroad company was held liable to bondholders for repayment of principal on the bonds. The defendant railroad was not entitled to recover unclaimed principal which remained in the United States Treasury. *Id.* at 894. The Third Circuit held that only the state or those possessing title could collect the remaining money. Section 1200 as interpreted by *Pennsylvania Railroad* would seem to control the disposition of unclaimed funds in *Van Gemert IV*, thus precluding Boeing from retrieving any of the judgment it was ordered to pay.

would not violate the American Rule, it seems clear that any justification based on the common fund exception to that rule would be unnecessary. A court need only show a benefit conferred upon nonclaiming class members by either the named, claiming class members or by their attorneys to justify the award of fees from the unclaimed portion of the judgment.⁴⁴

B. *The Common Fund Doctrine*

The facial inconsistency of the *Van Gemert IV* opinion in discussing the common fund exception to the American Rule and in finding its award consistent with the rule may be viewed as an unarticulated presentation of alternative arguments. The court, in discussing the applicability of the common fund exception was, in effect, responding to the argument that if the American Rule merely requires each party to bear its own litigation costs, then the rule is violated when nonclaiming class members may be said to be paying what would otherwise be the legal expenses of claiming class members. Significantly, the common fund doctrine may not only be applicable in the *Van Gemert* situation, it may adequately and independently justify the award in that case.

The common fund doctrine, premised on quasi-contractual theory, permits a party to recover the reasonable value of litigation costs when a person who is not a party to the action derives a legal benefit from the judgment.⁴⁵ The doctrine may be considered a specific application of quasi-contract to group situations, as it prevents unjust enrichment of the nonparty beneficiaries at the expense of the litigators.

The common fund doctrine was first discussed by the Supreme Court in *Trustees v. Greenough*,⁴⁶ where a holder of bonds financed by a state trust brought the trust within court control to prevent the trustees from fraudulently converting the trust assets.⁴⁷ The Court permitted the bondholder to recover legal expenses from the trust, and held that a trust should bear the cost of its own administration and protections.⁴⁸ *Greenough* thus established that one who preserves a fund shared by others is entitled to

44. See text accompanying notes 78-129 *infra*.

45. See notes 4-6 *supra*.

46. 105 U.S. 527 (1881).

47. *Id.* at 528-29.

48. *Id.* at 532.

compensation for legal expenses incurred.⁴⁹

Shortly after *Greenough*, the Supreme Court extended the common fund doctrine by providing for direct payment of legal fees to attorneys. In *Central Railroad & Banking Co. v. Pettus*,⁵⁰ unsecured creditors of a railroad obtained a lien on behalf of a group of creditors.⁵¹ The attorneys were awarded additional compensation from the firm's assets for the benefits bestowed on the absentee creditors.⁵² The Court stated, "when an allowance is proper on account of solicitor's fees, it may be made directly to the solicitors themselves, without any application by their immediate client."⁵³ Thus, the right to seek contribution for legal costs from co-beneficiaries was extended into an individual right of the attorney.⁵⁴

The common fund doctrine has also been expanded to compel parties receiving less direct and less tangible benefits to share the legal expenses involved in acquiring those benefits. In *Sprague v. Ticonic National Bank*,⁵⁵ a plaintiff sued to establish her right as a beneficiary of a trust.⁵⁶ Through her success, the plaintiff ensured the beneficiary status of fourteen other persons, none of whom had been involved in this litigation.⁵⁷ Relying on its equitable powers to grant attorneys' fees, the Court held that fairness required each beneficiary to bear a proportionate share of the expenses when access to the trust—a fund—was created, notwithstanding the fact that the trust beneficiaries had not been parties to the litigation.⁵⁸ *Sprague* may be significant to *Van*

49. Dawson, *Lawyers and Involuntary Clients: Attorneys Fees From Funds*, 87 HARV. L. REV. 1597, 1612-15 (1974).

Notably, under *Greenough*, where an existing fund is protected, a benefit can accrue to parties sharing in the fund, notwithstanding the fact that an express claim by these parties is not made. The Court's actions in protecting the trust base resulted in a more secure trust which in turn produced lower risk (and higher value) bonds. Thus, it was unnecessary for a bondholder to file a claimed benefit since the Court activity and the mere holding of the bonds created a benefit which could not be refused.

50. 113 U.S. 116 (1885).

51. *Id.* at 118-19.

52. *Id.* at 126-27.

53. *Id.* at 124-25.

54. Dawson, *supra* note 49, at 1602-03.

55. 307 U.S. 161 (1939).

56. *Id.* at 162-63.

57. *Id.* at 166.

58. *Id.* at 167. Addressing this irregularity, Justice Frankfurter recognized that although the rights of the other trust beneficiaries would not be maintained through *res judicata*, these rights could be established by *stare decisis*. *Id.* The Court believed that the certainty of favorable judgment in future actions against the trustee in favor of other putative trust beneficiaries, which was created by the plaintiff's efforts, could constitute a benefit

Gemert IV in that the Court extended the common fund rationale to include those who indirectly (or perhaps even unknowingly) receive a benefit from litigation.

Other cases have expanded the common fund rationale even further. These cases concern the types of benefits which may lead a court to require beneficiaries to contribute to the legal expenses incurred. In fact, the discussion in these cases has become so removed from traditional equitable principles and from situations such as *Greenough* that doctrinal difficulties abound. For example, using the quasi-contract rationale upon which the common fund doctrine was developed, courts have required attorney fee contribution from those receiving benefits which are unrelated to any identifiable fund.⁵⁹ Thus, it is unclear whether a new doctrine has been developed—a distinct “common benefit” exception to the American Rule—or whether the common fund doctrine has evolved to allow benefits to create a fund, just as access to funds had created benefits in prior cases.

In one of these cases, *Mills v. Electric Auto-Lite Co.*,⁶⁰ minority shareholders sought rescission of a corporate acquisition alleging that the takeover was tainted by the dissemination of a misleading proxy solicitation.⁶¹ The Court affirmed a Seventh Circuit order which required the corporation to pay plaintiffs their costs and expenses.⁶² Taking note of *Sprague's* expansion of the common fund doctrine to include those parties indirectly benefiting from a plaintiff's action,⁶³ the Court noted that Mills' fellow shareholders had similarly benefited.⁶⁴ The Court found that the fact that Mills had conferred a nonmonetary benefit (rescission of an unfair takeover) did not preclude the application of the *quantum meruit* rationale which formed the basis of the common fund doctrine.⁶⁵

to the other trust beneficiaries, for which they should share the legal costs. The Court found that an award of attorney's fees from the beneficiaries of plaintiff's actions, who were not parties to the litigation which created the benefit, could be sanctioned. *Contra*, *Felton v. Finley*, 69 Idaho 381, 209 P.2d 899 (1949).

59. *See, e.g.*, *Hall v. Cole*, 412 U.S. 1 (1973) (union members, fired from employment, were reinstated); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) (corporate merger rescission); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) (antitrust settlement); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) (antitrust settlement).

60. 396 U.S. 375 (1970).

61. *Id.* at 377-78.

62. *Id.* at 390.

63. 396 U.S. at 393.

64. *Id.* at 393-97.

65. *Id.* at 394-96. The Court stated:

The fact that this suit has not yet produced, and may never produce, a monetary

The innovative approach of *Mills* is directly applicable to *Van Gemert IV*. In both cases, a subclass of plaintiffs contended that other beneficiaries should be required to contribute for attorneys' fees. Since the benefits conferred in each case were of a nonmonetary nature—recission in *Mills*,⁶⁶ the right to seek damages in *Van Gemert*⁶⁷—the award in *Van Gemert* may be a reasonable application of the *Mills* approach.

In applying these concepts to *Van Gemert* one must refer to the recent discussion of attorneys' fees by the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*.⁶⁸ This case is most notable for the Court's rejection of attorney fee awards based solely on the theory that the plaintiffs, in bringing suit, were acting as "private attorneys general." Although the Court found that this theory had served as the motivating factor behind many statutory provisions,⁶⁹ it held that in the absence of such a provision, the theory could not justify an attorney fee award.⁷⁰ Indeed, the Court found that such an award could not be justified by any theory representing an exception to the American Rule. Addressing the common fund exception, the Court found it to be inapplicable, noting that the environmental benefits established by the plaintiff's suit in this case were too difficult to trace or measure, thus making impossible a proportionate allocation of legal expenses among those who benefited according to the amount of benefit received.⁷¹ Accordingly, the Court outlined four specific requirements for application of the common fund or common benefit doctrine: (1) the class of beneficiaries must be relatively small and

recovery from which the fees could be paid does not preclude an award based on this rationale. Although the earliest cases recognizing a right to reimbursement involved litigation that had produced or preserved a "common fund" for the benefit of a group, nothing in these cases indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses.

Id. at 392.

66. See note 65 *supra*.

67. See note 24 *supra*.

68. 421 U.S. 240 (1975).

69. *Id.* at 263.

70. *Id.* at 263-71.

71. *Id.* at 263-68. The Supreme Court held that public interest litigation involving benefits accruing to the general public is ill-suited to the application of the common fund doctrine. Instead, use of the doctrine should be limited to those situations where the costs can be proportionately spread among those prevailing litigants who directly and measurably benefited from the litigation. The environmental benefits accruing to the general public in *Alyeska* were difficult to trace or measure, in that it was not possible to determine whether the environmental protection would be enjoyed proportionately by the citizenry. *Id.* at 270.

easily identifiable; (2) the benefits must be traceable with accuracy to the recipients; (3) the cost of "creating, increasing, or preserving" the fund must be capable of being charged *pro rata* to the beneficiaries; and (4) there must be a practical way of levying the *pro rata* charge.⁷²

In *Van Gemert IV*, the Second Circuit found the prerequisites for a common fund as set forth in *Alyeska*.⁷³ The *Van Gemert* class was of reasonable size and its members were readily identifiable by certificate number,⁷⁴ the economic benefit accruing to each bondholder was calculated as the exchange difference for each debenture,⁷⁵ the legal fees could be accurately assessed on a *pro rata* basis against the damages calculated for each debenture,⁷⁶ and court control over the judgment funds would permit assessment by judicial order.⁷⁷ Thus, the award in *Van Gemert* may be justified (at least facially) by the common fund or common benefit exception to the American Rule.

III. A KEY ISSUE: HAS A BENEFIT BEEN CONFERRED?

A fundamental question raised by either of the alternative rationales outlined above is whether the nonclaiming class members, against whose portion of the class judgment an attorneys' fee award may be charged, actually received a benefit by virtue of the actions of the named plaintiffs or their attorneys. Under the theory of quasi-contract, without the conferral and acceptance of a benefit no one is enriched and there is no wrong to remedy through an award.⁷⁸ Resort to the common fund doctrine, with its basis in quasi-contract,⁷⁹ would also require finding a benefit to nonclaiming class members. Notably, even if a class met the tests for common fund application set out in *Alyeska*⁸⁰ a benefit inquiry must still be made since the *Alyeska* requirements assume that there is a benefit and deal instead with the problem of quantifying it for a proportional allocation of attorneys' fees.⁸¹

In *Van Gemert* it is difficult to tell whether the nonclaimants

72. *Id.* at 265 n.39.

73. 590 F.2d at 438-39.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. See note 6 *supra*.

79. See note 45 *supra* and accompanying text.

80. See note 72 *supra* and accompanying text.

81. See note 71 *supra* and accompanying text.

actually benefited from the class' representation. This problem is highlighted by the low percentage of class members who claimed a part of the judgment.⁸² Under contract law, a legal benefit is defined as the acquisition of a right or interest not previously possessed.⁸³ Traditionally, a benefit was not confined to a material advantage or pecuniary gain, rather it was related to a change in legal position.⁸⁴

In dealing with this problem the *Van Gemert IV* court declared, "If a plaintiff class-member is adjudicated to have an interest in a fund, he has benefited"⁸⁵ The *Van Gemert IV* dissent, however, raised two cogent rebuttals. First, the dissent contended that all class members may not necessarily be considered as parties to the class litigation and therefore were neither bound to a negative result nor privileged to benefit from a positive result.⁸⁶ Second, the dissent claimed that even if the class members could be considered as parties to the litigation, a knowing acceptance of a benefit would be required.⁸⁷ An evaluation of these arguments follows.

A. *Whether Nonclaiming Class Members are Parties to the Litigation*

The majority in *Van Gemert IV* apparently found the nonclaimants to be parties, based upon Federal Rule of Civil Procedure 23(b)(1) and its requirements for class certification.⁸⁸ This rule provides that no class member can opt out of the suit after notice and the passage of a specified time after the class has been certified by the court.⁸⁹ Once the *Van Gemert* class was certified,

82. At the time of the *Van Gemert IV* decision, only twenty percent of the judgment fund in escrow had been claimed. 590 F.2d at 444.

83. *In re Skirk's Estate*, 186 Kan. 311, 321, 350 P.2d 1, 10 (1960) (benefit is the acquisition of some legal right to which one would not have otherwise been entitled). For a discussion of benefits in quasi-contract see Note, *Quasi-Contracts—Meaning of "Benefit" in an Action upon Quantum Meruit*, 9 Wis. L. Rev. 111 (1933). See generally 1 WILLISTON, CONTRACTS § 102(a) (3d ed. 1957).

84. See *Robinson v. Kenney*, 526 S.W.2d 115, 119 (Tenn. App. 1973) (for one party to benefit, it is not necessary for something concrete and tangible to move from one to the other party); *Stelmack v. Glen Alden Coal Co.*, 339 Pa. 410, 414, 14 A.2d 127, 131 (1940).

85. 590 F.2d at 439.

86. *Id.* at 443 (Van Graafeiland, J., dissenting). See Dawson, *supra* note 49, at 1648 n.10. Without being a party to the litigation, one's rights cannot be subject to litigation. Cf. *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939); *Trustees v. Greenough*, 105 U.S. 527 (1881); notes 49 & 58 *supra*.

87. 590 F.2d at 444 (Van Graafeiland, J., dissenting).

88. *Id.* at 438 n.11.

89. FED. R. CIV. P. 23(b)(1). There is no provision to allow a person to opt out of a

no other forum could have adjudicated the nonclaimants' rights. Thus, the fundamental nature of a 23(b)(1) class action indicates that nonclaimants may indeed be viewed as actual parties to the litigation since a court may effectively determine their rights in a fund.⁹⁰

Some case law indicates that nonclaiming class members should not be considered as parties to the litigation for all purposes. Generally, these cases recognize the collateral estoppel ramifications of a class action on absentee plaintiffs but refuse to include absentees as parties to actions which derive from the original claim⁹¹—e.g., counterclaims against a class,⁹² discovery,⁹³ or settlement appeals.⁹⁴

In *Donson Stores, Inc. v. American Bakeries Co.*,⁹⁵ absent class members were held not to be parties for purposes of Federal Rule of Civil Procedure 13 which governs counterclaims.⁹⁶ The district

23(b)(1) class. Accordingly, certification as a class member binds one to the judgment through *res judicata*, although it may be subject to collateral attack for insufficiency of representation or inadequate litigation of a material issue. See, e.g., *Hansberry v. Lee*, 311 U.S. 32 (1940).

The necessity of *res judicata* in 23(b)(1) class actions is understandable when one considers one purpose of such action—to protect the party opposing the class from facing inconsistent judgments. This purpose would be severely frustrated if class members were not bound by the judgment. See FED. R. CIV. P. 23(b)(1)(A).

90. The *Van Gemert IV* dissent argued that nonclaiming class members were not parties to the class action litigation. 590 F.2d at 443 (Van Graafeiland, J., dissenting). Notably, one of the cases cited by the dissent, *Lamb v. United States Sec. Life Co.*, 59 F.R.D. 25 (D.C. Iowa 1973), is not strong support for this argument. In fact, *Lamb* may be read as supporting the majority's argument. In *Lamb*, a class action was brought based on violations of federal securities law. *Id.* at 25. The court first ordered that class representatives notify all class members to apprise them of the opportunity of all class members to opt out. *Id.* at 38. Subsequently, the court also required that each class member be advised of potential liability for legal fees if a party remained within the class. *Id.* at 49. One may argue that when the two *Lamb* orders are taken together they hold that absentees in a 23(b)(3) class action should be notified of potential liability for legal fees. Consequently, since it is unlikely that the court should have ordered notice without intending to hold all class members liable for attorney's fees, notwithstanding whether the member claimed a share of the judgment, *Lamb* seems to support the position of the *Van Gemert IV* majority that nonclaiming class members should have their judgment shares subject to a deduction for attorneys' fees.

91. See notes 92–94 *infra*.

92. E.g., *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 485, 489 (S.D.N.Y. 1973). See notes 95–100 *infra* and accompanying text.

93. E.g., *Wainwright v. Kraftco Corp.*, 54 F.R.D. 532, 534 (N.D. Ga. 1972). See notes 101–04 *infra* and accompanying text.

94. E.g., *In re Four Seasons Sec. Laws Litigation*, 525 F.2d 500, 504 (10th Cir. 1975). See notes 105–09 *infra* and accompanying text.

95. 58 F.R.D. 485 (S.D.N.Y. 1973).

96. *Id.* at 487. A group of grocery stores brought a class action against several baking firms alleging a conspiracy to fix the price of bread in violation of the Clayton Act. *Id.* The

court felt that it would be improper to permit adjudication of the counterclaim against the class as a whole because the counterclaim involved questions of fact that were unique to individual class members.⁹⁷ The court determined that adjudication of particular facts and individual situations fell outside the scope of a class action.⁹⁸ Not only would the commonality requirement of Rule 23(a)(2) be abridged if pursuit of claims against class members on highly individual questions was permitted,⁹⁹ but since defenses would be based on individual conduct, the requirement of Rule 23(a)(3) that the defenses of named and unnamed plaintiffs be similar would be abridged as well. Further, individual charges would have precluded effective representation by the named plaintiffs. Therefore, the court in *Donson* held that absentees were not proper parties to a counterclaim.¹⁰⁰

Absentees have also not been considered parties for discovery purposes. In *Wainwright v. Kraftco Corp.*,¹⁰¹ absentee members were held not to be required to answer interrogatories pursuant to Federal Rule of Civil Procedure 33.¹⁰² Since the named plaintiffs were the parties responsible for litigating the class' claim, the court reasoned that a finding that absentee members are proper parties for discovery would convert class actions into massive joinders,¹⁰³ thus emasculating the representative nature of class actions.¹⁰⁴

Absentee parties have also been considered nonparties for settlement appeals. In *In re Four Seasons Securities Law Litigation*,¹⁰⁵ an absentee member of a 23(b)(3) class was not permitted to challenge the adequacy of a settlement.¹⁰⁶ The knowledge of the representative plaintiff was imputed to absentees, thereby precluding an assertion of insufficient settlement by an absentee.¹⁰⁷

defendants in *Donson* counterclaimed alleging knowing inducement of price discrimination, a violation of the Robinson-Patman Act. *Id.*

97. *Id.* at 489.

98. *Id.*

99. *Id.*

100. *Id.* The court in *Donson* was also concerned that counterclaims against a 23(b)(3) class might be used as a tactical device to encourage potential class members to opt out by threatening liability rather than success. *Id.*

101. 54 F.R.D. 532, 534 (N.D. Ga. 1972).

102. *Id.*

103. *Id.* at 534. Rule 33 interrogatories can be directed only to parties to the litigation. FED. R. CIV. P. 33.

104. *Id.* See also *Fischer v. Wolfenbarger*, 55 F.R.D. 532, 534 (N.D. Ga. 1972).

105. 525 F.2d 500 (10th Cir. 1975).

106. *Id.* at 504.

107. *Id.* at 502.

As in *Wainwright*,¹⁰⁸ the *Four Seasons* court also believed that the representative nature of class actions would be derogated by an appeal of a settlement by the absentee members.¹⁰⁹

In summary, absentee class members have been considered parties for some purposes but not for others.¹¹⁰ Yet, the cases in this area seem to follow similar analyses. One concept that is common to the cases is the respect courts have for the representative role of the named plaintiffs. Thus, counterclaims based upon unlawful conduct of individual members have not been permitted because effective representation is impaired. Discovery has not been directed to absentees because they are not truly litigants, and settlement appeals have been limited to those who truly represent the class' interests. In essence, absentee members should not be considered parties when such treatment would obscure the notion of class representation.

However, the circumstances in which absentees are not considered parties do not seem to relate to the question of fee awards. From the case law in this area, one may validly argue that class members should be considered proper parties unless a threat to class representation or other circumstances endangering the class or the action as a class action would arise from their inclusion. Since this threat is not readily apparent in regard to fee awards, nonclaiming members should be considered parties to whom fees can be charged. Therefore, the position of the *Van Gemert IV* majority that nonclaimants might be considered parties seems correct.¹¹¹

B. *Whether Knowing Acceptance of a Benefit is Required*

The *Van Gemert IV* majority reasoned that since both claiming and nonclaiming members had a vested right to claim the awarded damages by virtue of their party status in the litigation, all class members had received a legal benefit.¹¹² This is consonant with the traditional definition of a legal benefit, the acquisition of a right not previously possessed.¹¹³ If the right to make a claim is a benefit, nonassertion of that right is irrelevant.¹¹⁴

108. 54 F.R.D. 534 (N.D. Ga. 1972). See notes 101-04 *supra* and accompanying text.

109. 525 F.2d at 503.

110. See notes 91-109 *supra* and accompanying text.

111. 590 F.2d at 440 n.15.

112. *Id.* at 439.

113. See notes 83-84 *supra*.

114. The majority in *Van Gemert IV* stated that any requirement that absentees actual-

As noted above, however, the *Van Gemert IV* dissent argued that class members must knowingly accept benefits before being obliged to pay attorneys' fees.¹¹⁵ In *Lea v. Paterson Saving Institution*,¹¹⁶ the Fifth Circuit held that a benefit must be clearly shown before an attorney can recover for his or her contribution.¹¹⁷ The court reasoned that the class of nonobjecting creditors in a bankruptcy settlement had not accepted any benefits from the petitioning attorney's representation of objecting creditors.¹¹⁸ A refusal of the attorney's services was construed as a refusal of any subsequent benefits, thus the Fifth Circuit declined to invoke the common fund doctrine.¹¹⁹ The bankruptcy action in *Lea* differed from the class action of *Van Gemert* in several respects. First, because *Lea* was an action in bankruptcy, the court in *Lea* apparently believed it could not use the equitable powers normally associated with class actions.¹²⁰ Second, since the bankruptcy proceedings had a statutory basis, the *Lea* court felt that fees could be distributed only pursuant to the statute. Since that statute did not provide for common fund recovery,¹²¹ *Lea* is not wholly applicable to the question of the propriety of an equitable fee award in class actions.

*Haynes v. Rederi A/S Aladdin*¹²² also supports the concept that members must expressly accept a benefit to be liable for paying attorneys' fees. In that case, the Fifth Circuit refused to order contribution because a "beneficiary" had explicitly refused to accept the services of the plaintiff's attorney.¹²³ The court concluded that this refusal prevented knowing acceptance by the insurer of

ly file a claim was foreclosed by *Trustees v. Greenough*, 105 U.S. 527 (1881). 590 F.2d at 439 n.14. For a discussion of this proposition, see note 49 *supra*.

115. 594 F.2d at 444 (Van Graafeiland, J., dissenting).

116. 142 F.2d 932 (5th Cir. 1944).

117. *Id.* at 934. An attorney claimed that his activities as counsel for a class of objecting creditors eventually benefited nonobjecting creditors by securing a more favorable bankruptcy plan. *Id.* at 932. The court refused to order the nonobjecting creditors to pay a part of his fees. *Id.* at 934-35.

118. *Id.* at 935.

119. *Id.*

120. *Id.* at 933.

121. *Id.*

122. 362 F.2d 345 (5th Cir. 1966). In *Haynes*, a longshoreman sued shipowners for injuries incurred while in their employ. His attorney sought contribution for fees from the plaintiff's insurer, who had intervened to recover compensation for payment of medical bills and lost wages. *Id.* at 347. The insurer recovered the compensation due to the plaintiff's success in the action. *Id.* at 348.

123. *Id.* at 351.

the benefit of recovered compensation.¹²⁴

Both *Lea* and *Haynes* involved situations where parties had refused the services of the petitioning attorneys. Both can be distinguished from *Van Gemert IV* since neither case was a class action, nor was there a refusal of legal services in *Van Gemert*.

Yet even if these cases may be persuasive on the question of when a benefit has been accepted, an analysis of Federal Rule of Civil Procedure 23(b)(1) reveals that a nonclaimant could not have refused the named plaintiffs' representation.¹²⁵ Since the rule contains no opt out provision, a nonclaimant in a 23(b)(1) action cannot refuse to be a class member. Once a person is a member of a certified class, the judgment of the class action is binding¹²⁶ and the party's rights are fully adjudicated.¹²⁷ If a certified member is bound by a negative judgment, it seems fair that he or she should share in a favorable judgment as well. Accordingly, a person should be regarded as receiving a benefit in a 23(b)(1) class action merely by being a certified member of a successful class.

Applying this analysis to the facts in *Van Gemert*, the class in *Van Gemert IV* was awarded a favorable judgment.¹²⁸ Each member, bound by this judgment, impliedly received the right to a share of it. Since the nonclaimants did not previously possess this right, the *Van Gemert IV* majority seems correct in finding that the nonclaimants accepted a benefit.¹²⁹

In conclusion, application of the court's equitable power to make fee awards under quasi-contract or the common fund doctrine in *Van Gemert IV* seems substantively proper in justifying such awards. Case law fails to reveal a reason why nonclaimants should not be considered parties for purposes of fee awards. Finding a legal benefit in the right to claim damages is also consonant with the traditional definition of a benefit. Since the bestowal of a benefit on the nonclaimants would have resulted in unjust enrichment, the *Van Gemert* situation appears a proper invocation of either justification rationale.

124. *Id.*

125. See note 89 *supra*.

126. See 590 F.2d at 440 n.15; note 107 *supra*. See also *Freiman v. Texas Gulf Sulphur Co.*, 38 F.R.D. 336 (N.D. Ill. 1965).

127. The judgment in a class action is normally secure from collateral attack unless the absentees can show that they were inadequately represented. See, e.g., *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973).

128. 553 F.2d at 812. See note 24 *supra* and accompanying text.

129. 590 F.2d at 439.

IV. POLICY CONSIDERATIONS OF A FEE AWARD FROM
UNCLAIMED PORTIONS OF A CLASS ACTION
JUDGMENT

Since recovery of attorneys' fees from the unclaimed portion of a class action judgment is a significant extension of equitable powers, and since such awards may have considerable effects on the viability of class actions, it is important that policy as well as precedent should suggest the proper course. The *Van Gemert IV* majority supported the fee award with two persuasive policy arguments.¹³⁰ One is the expectation that named plaintiffs will be encouraged to institute class actions if the fear of bearing the legal expenses of an entire class is removed.¹³¹ The second policy is the mitigation of pressures on attorneys to settle as early as possible.¹³²

Regarding the latter consideration, the court recognized the increasing tendency of class counsel to seek early settlement,¹³³ which arises from the fact that fees are generally guaranteed in a settlement agreement and are often absorbed by the defendant.¹³⁴ Notably, the fact that attorneys might not receive adequate fees if denied access to unclaimed judgments would also stimulate this tendency.¹³⁵

Procedures which encourage settlement create problems for the viability of class actions in two ways. First, class recovery may be limited even in the most meritorious situations. Second, wealthy defendants are generally willing to settle in order to avoid the threat of massive liability. If it is beneficial for class counsel to settle as well, a class stands little chance of having the merits of its claim litigated, directly conflicting with the purpose of class actions—allowing the small claimant, through aggregation with

130. *Id.* at 440-41.

131. *Id.*

132. *Id.*

133. *Id.* at 441. *Accord*, Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47 (1975).

For an economic analysis of the pressures on class action attorneys to settle, see *Saylor v. Lindsley*, 456 F.2d 896 (2d Cir. 1972). Judge Friendly, analogizing a derivative action to a class action, maintained that the incremental increase in fees from settlement to judgment may not justify the additional legal work required to win a judgment. He stated that a relatively small settlement often produces fees bearing a higher ratio to the cost of the work than the larger fees from judgment bear to the cost of extensive discovery and litigation. *Id.* at 900-01.

134. See *Blank v. Talley Indus.*, 390 F. Supp. 1, 3 (S.D.N.Y. 1975).

135. See note 35 *supra* and accompanying text.

others, access to the courts.¹³⁶ The *Van Gemert IV* award may be expected to more adequately align the attorneys' fiscal interests with those of the class¹³⁷ and to encourage both plaintiff and attorney to pursue and litigate more actively truly meritorious class actions.

Addressing a competing consideration, legal scholars disagree on the desirability of awarding fees from unclaimed funds where significant amounts of funds remain unclaimed.¹³⁸ Suits of this kind have been characterized as lawyers' suits.¹³⁹ Some commentators note the inequity in a situation where attorneys may profit more from a class action than the claiming class members.¹⁴⁰ Others state that fee awards such as *Van Gemert IV* will produce lawsuits "not likely to benefit anyone but the lawyers who bring them"¹⁴¹

Such considerations give force to the argument that a policy which prevents abuse of class actions is preferable to one which discourages settlement.¹⁴² Underlying this argument is concern about the attorneys' incentive to represent the interests of absentee members adequately.¹⁴³ Specifically, class counsel may have little incentive to locate class members if his or her fees did not depend on the assertion of individual damage claims.¹⁴⁴

It is difficult to determine which policy should be given greater weight. Some commentators have suggested that social changes have produced the increased incidence of class actions.¹⁴⁵

136. See Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

137. 590 F.2d at 441.

138. For commentary which criticizes class actions for inadequate distribution of damages to class members, see Simon, *Class Action—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 375-92 (1973). Simon also condemns use of the class action as a prophylactic device to deter or punish defendants. *Contra*, M. GREEN, B. MOORE, JR. & B. WASSERSTEIN, *THE CLOSED ENTERPRISE SYSTEM* (1972), where it is noted that the goal of antitrust class actions "is achieved with equal effectiveness whether the damage payments are made to actual victims, victims' lawyers, or someone selected at random from the telephone book." *Id.* at 215.

139. Simon, *supra* note 138 at 377.

140. *Id.* at 378-79.

141. Petitioner's Brief for Certiorari at 8 (citing *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 567 (2d Cir. 1968) (*Eisen II*)).

142. *Id.* at 13.

143. *Id.* at 14.

144. *Id.*

145. For commentary suggesting that class actions fit contemporary conditions better than the traditional mode of two-party litigation, see Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and "The Class Action Problem"*, 92 HARV. L. REV. 664 (1979). Professor Miller states that the mass character of contemporary society has pro-

In balancing the need for class actions against their potential abuse, one should consider the intended function of Rule 23. The class action, a creation of English equity,¹⁴⁶ resulted from the need for a procedural device allowing a large group of people, united in interest, to enforce equitable rights.¹⁴⁷ Over the years, the class action has been recognized as a means of permitting a group with small individual claims to join as one entity for the adjudication of interests that could not practically be pursued individually.¹⁴⁸

The federal courts have not always interpreted the traditional view to be the intent of Rule 23. Consequently, the joinder of small claimants into one entity has been repeatedly frustrated. Plaintiffs are not permitted to aggregate their claims in 23(b)(2) or (b)(3) actions in order to meet jurisdictional requirements.¹⁴⁹ Named plaintiffs have also been required to pay the cost of notice to class members in 23(b)(3) actions.¹⁵⁰

The Second Circuit's willingness to award fees from the entire judgment seems to reverse this trend by exhibiting an intent to promote class actions in a manner which is consistent with the underlying policies which initially gave rise to the class action procedure. Such awards encourage named plaintiffs and attorneys to bring and litigate class actions by eliminating the fear of the exorbitant cost of litigating a class action.

V. THE POSSIBILITY OF ABUSE: CONFLICTS OF INTEREST ARISING FROM FEE AWARDS FROM THE UNCLAIMED PORTION OF A CLASS ACTION JUDGMENT

While the approach taken by the Second Circuit meritoriously favors a policy which promotes class actions, the potential for abuse of this procedure must be recognized. When a court awards

duced an inevitable need for class actions. He asserts that the possible abuse of class actions must be balanced against the need for a device which can remedy injury to many through the efforts of few. Professor Miller also suggests that the enormous increase in class actions may not be so much a result of lucrative fees as a result of internal social needs. *See also* Berger, *Class Actions*, 77 *CASE & COM.* 26 (1972), which notes Dean Wigmore's observation that "The class action is the greatest engine ever devised for the administration of complex, multiparty and protracted litigation." *Id.*

146. *See* *Hansberry v. Lee*, 311 U.S. 32, 41 (1940).

147. *See* *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948).

148. *See* *Kalven & Rosenfield*, *supra* note 136.

149. *Snyder v. Harris*, 394 U.S. 332 (1969) (class members in 23(b)(3) suit cannot aggregate claims to meet jurisdictional amount); *Pinel v. Pinel*, 240 U.S. 594 (1916) (class members cannot aggregate claims).

150. *See, e.g., Eisen v. Carlisle & Jacquelin*, 497 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974) (*Eisen III*).

fees from unclaimed portions of judgment funds, fundamental problems concerning conflicts of interest may arise.¹⁵¹ The non-claimants may be denied adequate representation when the class counsel requests a fee based upon their proportionate share of the fund. If the representation is inadequate, the nonclaimants' rights to due process may be violated.¹⁵²

One approach to the problem of conflicting interests in class actions depends upon judicial supervision to alleviate these conflicts.¹⁵³ Implicit in this method is the premise that all class members' interests are identical. If this is so, anything benefiting the claimants will also benefit the nonclaimants. Yet, it is difficult to say that there will be an identity of interest among all class members. For example, conflicting interests may surface once a judgment is awarded.

Two conflicts of interest were present in *Van Gemert*: one between the nonclaimants and the attorneys, the other between the nonclaimants and the claimants.¹⁵⁴ Regarding the first conflict, it may be a serious error to provide nonclaimants with only the representation of those attorneys who are attempting to collect fees from their share of the judgment.¹⁵⁵ In this situation, the attor-

151. Such an issue arose in *Van Gemert IV*, 590 F.2d at 443 (Van Graafeiland, J., dissenting).

152. For case law condemning a procedure which deprives a party of adequate representation, see *Berner v. Equitable Office Bldg. Corp.*, 175 F.2d 218 (2d Cir. 1949). *Berner* involved a corporate reorganization under the Bankruptcy Act. The conflict was between the attorney's loyalties to particular shareholders who were his clients and his loyalties to the class as a whole. The court held that once an attorney undertakes class representation, he is obliged to represent each and every class member in a fair and equal way. A violation of this duty deprives class members of due process of law. *Id.* at 220.

153. The *Van Gemert IV* majority adopted this position, stating that judicial supervision could vitiate any conflicts of interest. 590 F.2d at 440 n.16.

154. The conflicts of interest were financial. The fee award reduced the claimants' liability for legal fees as it diminished the nonclaimants' judgment share. The problem was that these conflicting interests were being represented by the counsel claiming fees against these interests. For further discussion of the conflicts associated with class actions, see Dam, *supra* note 133, at 56 (1975). Dam states:

The conflict of interest problem derives in the first instance from the representative character of the action. Not only is the named plaintiff a representative, but he is also a volunteer. He chose himself. His interests may not be identical with those of the class. . . . A more subtle, though by no means less important, conflict of interest is that faced by the lawyer for the class. His personal interest may be different from that of either the representative plaintiff or the class as a whole. His interest is his fee. If he does not obtain either a settlement or a judgment for the class, he will not receive any compensation.

Id. See also *Saylor v. Lindsley*, 456 F.2d 896, 901 (2d Cir. 1972) (discussing the propriety of a settlement opposed by a named plaintiff but supported by his attorney who believed it to be in the best interests of the class as a whole) and note 133 *supra*.

155. See note 152 *supra*.

neys and nonclaimants are in some ways adversaries. Allowing simultaneous representation to continue without guidelines may be an infringement upon the adversary system.

The second *Van Gemert* conflict of interest concerned the divergent effects of the fee award on the claiming and nonclaiming members. Requiring nonclaimants to pay a share of attorneys' fees decreases their interest in the judgment, and relieves the claimants since they are responsible for less in legal fees. It may be difficult for counsel adequately to represent both claimants and nonclaimants in regard to fees, since the award is benefiting the former to the latter's disadvantage.

Practically, a class action is a claim made on behalf of many but actively pursued by only a few.¹⁵⁶ For this reason, class certification depends in large part on judicial confidence in the capacity of the named plaintiffs to adequately represent absentees.¹⁵⁷ One solution to the conflict of interests seemingly inherent in class actions would be to continuously examine certification during the course of the litigation of a class action.¹⁵⁸ In the event of a serious conflict of interest, certification could be revoked or the class could be redefined. This was done in *Gerstle v. Continental Airlines*,¹⁵⁹ where a class was restructured after certification but before the judgment on grounds that the named plaintiffs did not adequately represent all those persons who subsequently intervened as members.¹⁶⁰ Review and redefinition of the class membership was proper in *Gerstle* because Rule 23(c)(1) permits alteration of a class before a decision on the merits.¹⁶¹

Although Rule 23(c)(1) does not address the possibility of decertification *after* a decision on the merits, it seems consistent with the policies surrounding class certification (as seen in *Gerstle*) that a class could be similarly decertified or restructured even at such a late stage if the entire class cannot be fairly represented. Postjudgment decertification is admittedly a drastic measure, but

156. See Kalven & Rosenfield, *supra* note 148, at 684.

157. FED. R. CIV. P. 23(a)(4). One of the prerequisites of class certification is a determination that the representative parties will fairly and adequately protect the interests of the class.

158. See *Griffin v. Harris*, 571 F.2d 767 (3d Cir. 1978) (district court was permitted to reevaluate manageability of the class in its determination of damages); *Zenith Laboratories, Inc. v. Carter-Wallace, Inc.*, 64 F.R.D. 159 (D. N.J. 1974).

159. 50 F.R.D. 213 (D. Colo. 1970).

160. *Id.* at 220.

161. *Id. Contra, Samuel v. University of Pittsburgh*, 538 F.2d 991 (3d Cir. 1976) (decertification considered abuse of discretion).

it may be proper if the class cannot be fully represented in the distribution of damages, which would result in irreparable harm to certain class members.¹⁶²

There are less extreme Rule 23 procedures which would also ensure minority representation. Rule 23(c)(4) provides that a class can be broken into subclasses when appropriate;¹⁶³ a conflict between claimants and nonclaimants might justify such a division. The problem with such a division is the difficulty of managing and representing an entire class of nonclaimants because it is likely many of the nonclaimants will also be unknown absentee plaintiffs.

Rule 23(d)(2) presents a more feasible method of dealing with intraclass conflicts.¹⁶⁴ Under this rule, the court may make any orders necessary to provide members the opportunity to express feelings of dissatisfaction concerning the adequacy or fairness of class representation.¹⁶⁵ Also, under 23(d)(2), a member may intervene to present claims or defenses.¹⁶⁶ Perhaps in cases where class counsel petitions for fees from unclaimed judgment funds, the court should presume inadequate representation of the nonclaimants and appoint an attorney to represent their interests. This, however, would make the litigation more complex and expensive.

If courts continue to grant fee awards such as those granted in *Van Gemert IV*, conflicts of interest will undoubtedly occur. Leaving nonclaiming class members with only the counsel of the petitioning attorneys could result eventually in a harmful denial of adequate representation.¹⁶⁷ This is unacceptable because representation in the American legal system requires a whole-hearted effort at improving a client's position.¹⁶⁸ In situations where serious conflicts appear, appointment of independent counsel might be advisable to assist judicial supervision.

VI. CONCLUSION

Van Gemert IV, and its award of attorneys' fees from un-

162. See *Bentkowski v. Marfuerza Compania Maritima, S.A.*, 70 F.R.D. 401 (E.D. Pa. 1976) (where the court in dicta indicated that an improperly certified class is always subject to reconsideration).

163. FED. R. CIV. P. 23(c)(4).

164. FED. R. CIV. P. 23(d)(2).

165. *Id.*

166. *Id.*

167. Any due process error in *Van Gemert* was probably harmless because the nonclaimants were deprived only of some damages which they had no intention of collecting.

168. See note 152 *supra*.

claimed portions of a class judgment, is significant in two ways. First, the award in *Van Gemert IV* seemingly extends the power of the judiciary with regard to attorneys' fee awards beyond its previous boundaries.¹⁶⁹ Using either traditional quasi-contract doctrine or the common fund rationale, the *Van Gemert* majority has combined the equitable and legal concepts of benefits and the practical implications of the rules governing class action procedure.¹⁷⁰ This broad reading of "benefit," along with doctrinal uncertainty, could lead to a Supreme Court decision concerning an acceptance or rejection of this broad benefit concept or one which might consider the precise rationale of a court's power in this area.

A second significant impact of the *Van Gemert IV* decision relates to the effect awards such as the one granted in that opinion have on the future viability of class actions.¹⁷¹ This question highlights the conflicting policies which are effected by such awards—the policy of encouraging class actions through providing incentives for attorneys and plaintiffs to pursue meritorious actions through litigation (if such a course is in the best interest of the class) on the one hand¹⁷² and the policy of discouraging class actions in which only attorneys receive substantial gain on the other hand.¹⁷³ A Supreme Court decision in favor of one of these policies to the exclusion of the other will no doubt change the course of class action litigation.

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169. See notes 32–129 *supra* and accompanying text.

170. See notes 78–129 *supra* and accompanying text.

171. See notes 130–50 *supra* and accompanying text.

172. See notes 131–37 *supra* and accompanying text.

173. See notes 139–44 *supra* and accompanying text.

