## CHAPTER 1700. CLASS ACTIONS



**Editor's Note**

The explanatory comments for Rules 1701 to 1716 appear after Rule 1716.

### Rule 1701. Definitions. Conformity.

(a) As used in this chapter

''Class action'' means any action brought by or against parties as representatives of a class until the court by order refuses to certify it as such or revokes a prior certification under these rules.

''Residual funds'' are funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorney's fees, and other court approved disbursements to implement relief granted.

(b) Except as otherwise provided in this chapter, the procedure in a class action shall be in accordance with the rules governing the form of action in which relief is sought.

**Source**

The provisions of this Rule 1701 adopted June 30, 1977, effective September 1, 1977, 7 Pa.B. 1956; amended May 11, 2012, effective July 1, 2012, 42 Pa.B. 2954. Immediately preceding text appears at serial page (326661).

### Rule 1702. Prerequisites to a Class Action.

One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action 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;

(4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709; and

(5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

**Source**

The provisions of this Rule 1702 adopted June 30, 1977, effective September 1, 1977, 7 Pa.B. 1956.

## Rule 1703. Commencement of Action. Assignment to a Judge.

(a) A class action shall be commenced only by the filing of a complaint with the prothonotary.

(b) Upon the filing of the complaint the action shall be assigned forthwith to a judge who shall be in charge of it for all purposes.

**Source**

The provisions of this Rule 1703 adopted June 30, 1977, effective September 1, 1977, 7 Pa.B. 1956.

## Rule 1704. Form of the Complaint.

(a) The complaint shall include in its caption the designation ''Class Action''.

(b) The complaint shall contain under a separate heading, styled ''Class Action Allegations'', averments of fact in support of the prerequisites of Rule 1702 and the criteria specified in Rules 1708 and 1709 on which the plaintiff relies.

(c) The plaintiff may join in the complaint claims for equitable, declaratory and monetary relief arising out of the same transaction or occurrence or series of transactions or occurrences.

**Source**

The provisions of this Rule 1704 adopted June 30, 1977, effective September 1, 1977, 7 Pa.B. 1956.

## Rule 1705. Preliminary Objections.

All preliminary objections to the complaint permissible under Rule 1028(a) shall be raised at one time. Issues of fact with respect to the Class Action Allegations may not be raised by preliminary objections but shall be raised by the answer.

**Source**

The provisions of this Rule 1705 adopted June 30, 1977, effective September 1, 1977, 7 Pa.B. 1956; amended November 19, 1991, effective January 1, 1992, 21 Pa.B. 5637. Immediately preceding text appears at serial pages (146708) to (146709).

## Rule 1706. Form of the Answer.

In all actions the averments of fact under ''Class Action Allegations'' shall be deemed admitted unless denied in conformity with Rule 1029.

**Source**

The provisions of this Rule 1706 adopted June 30, 1977, effective September 1, 1977, 7 Pa.B. 1956; amended December 16, 1983, effective July 1, 1984, 13 Pa.B. 3999. Immediately preceding text appears at serial page (31826).

## Rule 1706.1. Joinder of Additional Defendants.

Any defendant or additional defendant may only join as an additional defendant any person not a party to the action, or may assert a cross-claim against another party to the action, who may be

(1) solely liable on the plaintiff's cause of action, or

(2) liable over to the joining party on the plaintiff's cause of action, or

(3) jointly or severally liable with the joining party on the plaintiff's cause of action.

**Official Note:** The right of joinder under Rule 1706.1 of an additional defendant based upon liability ''on the plaintiff's cause of action'' is not as broad as the right under Rule 2252(a) governing the joinder of additional defendants generally.

Similiarly, the right of cross-claim under this rule is not as broad as the right under Rule 1031.1 governing cross-claims generally.

**Source**

The provisions of this Rule 1706.1 adopted April 4, 1990, effective July 1, 1990, 20 Pa.B. 2283; amended March 23, 2007, effective June 1, 2007, 37 Pa.B. 1480. Immediately preceeding text appears at serial page (255287).

## Rule 1707. Motion for Certification of Class Action. Time for Filing. Hearing.

(a) Within thirty days after the pleadings are closed or within thirty days after the last required pleading was due, the plaintiff shall move that the action be certified as a class action. The court may extend the time for cause shown. If the plaintiff fails to move for certification, the court if so notified shall promptly set a date for a certification hearing.

(b) The court may postpone the hearing to a later date pending the disposition of other motions or to permit discovery with respect to the class action issues.

(c) The hearing shall be limited to the Class Action Allegations. In determining whether to certify the action as a class action the court shall consider all relevant testimony, depositions, admissions and other evidence.

**Official Note:** See Rule 1710(a) for the form of the court's opinion and order.

**Source**

The provisions of this Rule 1707 adopted June 30, 1977, effective September 1, 1977, 7 Pa.B. 1956; amended April 12, 1999, effective July 1, 1999, 29 Pa.B. 2266. Immediately preceding text appears at serial page (253383).

## Rule 1708. Criteria for Certification. Determination of Class Action as Fair and Efficient Method of Adjudication.

In determining whether a class action is a fair and efficient method of adjudicating the controversy, the court shall consider among other matters the criteria set forth in subdivisions (a), (b) and (c).

(a) Where monetary recovery alone is sought, the court shall consider

(1) whether common questions of law or fact predominate over any question affecting only individual members;

(2) the size of the class and the difficulties likely to be encountered in the management of the action as a class action;

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

(i) inconsistent or varying adjudications with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct;

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

(4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues;

(5) whether the particular forum is appropriate for the litigation of the claims of the entire class;

(6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions;

(7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.

(b) Where equitable or declaratory relief alone is sought, the court shall consider

(1) the criteria set forth in subsections (1) through (5) of subdivision (a), and

(2) whether the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final equitable or declaratory relief appropriate with respect to the class.

(c) Where both monetary and other relief is sought, the court shall consider all the criteria in both subdivisions (a) and (b).

**Source**

The provisions of this Rule 1708 adopted June 30, 1977, effective September 1, 1977, 7 Pa.B. 1956.



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## Rule 1709. Criteria for Certification. Determination of Fair and Adequate Representation.

In determining whether the representative parties will fairly and adequately assert and protect the interests of the class, the court shall consider among other matters

(1) whether the attorney for the representative parties will adequately represent the interests of the class,

(2) whether the representative parties have a conflict of interest in the maintenance of the class action, and

(3) whether the representative parties have or can acquire adequate financial resources to assure that the interests of the class will not be harmed.

**Source**

The provisions of this Rule 1709 adopted June 30, 1977, effective September 1, 1977, 7 Pa.B. 1956.

## Rule 1710. Order Certifying or Refusing to Certify a Class Action. Revocation. Amendment. Findings and Conclusions.

(a) In certifying, refusing to certify or revoking a certification of a class action, the court shall set forth in an opinion accompanying the order the reasons for its decision on the matters specified in Rules 1702, 1708 and 1709, including findings of fact, conclusions of law and appropriate discussion.

(b) In certifying a class action, the court shall set forth in its order a description of the class.

(c) When appropriate, in certifying, refusing to certify or revoking a certification of a class action the court may order that

(1) the action be maintained as a class action limited to particular issues or forms of relief, or

(2) a class be divided into subclasses and each subclass treated as a class for purposes of certifying, refusing to certify or revoking a certification and that the provisions of these rules be applied accordingly.

(d) An order under this rule may be conditional and, before a decision on the merits, may be revoked, altered or amended by the court on its own motion or on the motion of any party. Any such supplemental order shall be accompanied by a memorandum of the reasons therefor.

(e) If certification is refused or revoked, the action shall continue by or against the named parties alone.

**Source**

The provisions of this Rule 1710 adopted June 30, 1977, effective September 1, 1977, 7 Pa.B. 1956.

## Rule 1711. The Plaintiff Class. Exclusion. Inclusion.

(a) Except as provided in subdivision (b) or as otherwise provided by the court, in certifying a plaintiff class or subclass the court shall state in its order that every member of the class is included unless by a specified date a member files of record a written election to be excluded from the class.

(b) If the court finds that

(1) the individual claims are substantial, and the potential members of the class have sufficient resources, experience and sophistication in business affairs to conduct their own litigation; or

(2) other special circumstances exist which are described in the order, the court may state in its order that a person shall not be a member of the plaintiff class or subclass unless by a specified date the person files of record a written election to be included in the class or subclass.

**Source**

The provisions of this Rule 1711 adopted June 30, 1977, effective September 1, 1977, 7 Pa.B. 1956; amended April 12, 1999, effective July 1, 1999, 29 Pa.B. 2266. Immediately preceding text appears at serial page (253386).

## Rule 1712. Order. Notice of Action.

(a) After the entry of the order of certification and after hearing the parties with respect to the notice to be given, the court shall enter a supplementary order which shall prescribe the type and content of notice to be used and shall specify the members to be notified. In determining the type and content of notice to be used and the members to be notified, the court shall consider the extent and nature of the class, the relief requested, the cost of notifying the members and the possible prejudice to be suffered by members of the class or by other parties if notice is not received. The court may designate in the notice a person to answer inquiries from, furnish information to or receive comments from members or potential members of the class with respect to the notice.

(b) The court may require individual notice to be given by personal service or by mail to all members who can be identified with reasonable effort. For members of the class who cannot be identified with reasonable effort or where the court has not required individual notice, the court shall require notice to be given through methods reasonably calculated to inform the members of the class of the pendency of the action. Such methods may include using a newspaper, television or radio or posting or distributing through a trade, union or public interest group.

(c) The notice shall be prepared by and given at the expense of the plaintiff in the manner required by the order. A proposed form of notice shall be submitted for approval to the court and to all named defendants, who may file objections thereto within ten days. The court may require a defendant to cooperate in giving notice by taking steps which will minimize the plaintiff's expense including the use of the defendant's established methods of communication with mem-

bers of the class, provided, however, that any additional costs thereby incurred by the defendant shall be paid by the plaintiff.

**Official Note:** Illustrative of the means of reducing the expense of individual notice is the inclusion of the notice in a mailing normally made by the defendant to members of the class.

(d) If a defendant asserts a counterclaim against a plaintiff class or subclass, the expense of a combined notice of the plaintiff's claim and of the defendant's counterclaim shall be allocated between the parties as the court may order.

**Source**

The provisions of this Rule 1712 adopted June 30, 1977, effective September 1, 1977, 7 Pa.B. 1956.

## Rule 1713. Conduct of Actions.

(a) 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, other than notice under Rule 1712, 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;

(3) permitting an interested person to intervene in accordance with Rules 2326 et seq. governing Intervention;

(4) imposing conditions on the representative party or an intervener;

(5) taking any action to assure that the representative party adequately represents the class;

(6) dealing with other administrative or procedural matters.

(b) Any such order may be revoked, altered or amended as may be appropriate from time to time.

**Source**

The provisions of this Rule 1713 adopted June 30, 1977, effective September 1, 1977, 7 Pa.B. 1956.

## Rule 1714. Compromise. Settlement. Discontinuance.

(a) No class action shall be compromised, settled or discontinued without the approval of the court after hearing.

(b) Prior to certification, the representative party may discontinue the action without notice to the members of the class if the court finds that the discontinuance will not prejudice the other members of the class.

(c) If an action has been certified as a class action, notice of the proposed compromise, settlement or discontinuance shall be given to all members of the class in such manner as the court may direct.

(d) Nothing in these rules is intended to limit the parties to a class action from suggesting, or the court from approving, a settlement that does not create residual funds.

**Source**

The provisions of this Rule 1714 adopted June 30, 1977, effective September 1, 1977, 7 Pa.B. 1956; amended May 11, 2012, effective July 1, 2012, 42 Pa.B. 2954. Immediately preceding text appears at serial pages (253387) to (253388).

## Rule 1715. Judgment.

(a) Except by special order of the court, no judgment by default or on the pleadings or by summary judgment may be entered in favor of or against the class until the court has certified or refused to certify the action as a class action.

(b) A judgment entered on preliminary objections in a class action before certification shall bind only the named parties to the action.

(c) A judgment entered in an action certified as a class action shall be binding on all members of the class except as otherwise directed by the court.

(d) In all cases the judgment shall be framed by the court and shall specify or describe the parties who are bound by its terms.

**Source**

The provisions of this Rule 1715 adopted June 30, 1977, effective September 1, 1977, 7 Pa.B. 1956.

## Rule 1716. Residual Funds.

(a) Any order entering a judgment or approving a proposed compromise or settlement of a class action that establishes a process for the identification and compensation of members of the class shall provide for the disbursement of residual funds.

(b) Not less than fifty percent (50%) of residual funds in a given class action shall be disbursed to the Pennsylvania Interest on Lawyers Trust Account Board to support activities and programs which promote the delivery of civil legal assistance to the indigent in Pennsylvania by non-profit corporations described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended. The order may provide for disbursement of the balance of any residual funds in excess of those payable to the Pennsylvania Interest on Lawyers Trust Account Board to the Pennsylvania Interest on Lawyers Trust Account Board, or to another entity for purposes that have a direct or indirect relationship to the objectives of the underlying class action, or which otherwise promote the substantive or procedural interests of the members of the class.

**Source**

The provisions of this Rule 1716 adopted May 11, 2012, effective July 1, 2012, 42 Pa.B. 2954.

## Rule 1717. Counsel Fees.

In all cases where the court is authorized under applicable law to fix the amount of counsel fees it shall consider, among other things, the following factors:

(1) the time and effort reasonably expended by the attorney in the litigation;

(2) the quality of the services rendered;

(3) the results achieved and benefits conferred upon the class or upon the public;

(4) the magnitude, complexity and uniqueness of the litigation; and

(5) whether the receipt of a fee was contingent on success.

**Official Note:** The rule does not determine when fees may be awarded. That is a matter of substantive law.

The order in which the factors are listed is not intended to indicate the priority or weight to be accorded them respectively.

**Source**

The provisions of this Rule 1716 adopted June 30, 1977, effective September 1, 1977, 7 Pa.B. 1956; renumbered as Rule 1717 May 11, 2012, effective July 1, 2012, 42 Pa.B. 2954. Immediately preceding text appears at serial pages (253388).

**Explanatory Note**

The Pennsylvania Rules of Civil Procedure governing class actions, promulgated June 30, 1977, and effective September 1, 1977, are the culmination of more than a two-year study of a vast array of resource material embodying practically every point of view. The role and purpose of class actions in modern society, particularly those involving consumer actions or other types of actions involving many thousands of members with potential for vast amount of damage claims, has caused more debate and roused more passion than practically any other subject in the preceding decade.

Some look upon it as the most effective tool for the protection of individual rights in every field, rights which could not be effectively asserted by individual actions. They consider action by public officials to protect these rights to be inadequate; the attorneys for the class are deemed in effect private attorneys general spurred on by the prospect of substantial fees contingent upon the successful outcome of the action. Others characterize class actions as affording the opportunity for legalized blackmail, forcing defendants into tactical positions where surrender by settlement, even in non-meritorious cases, often becomes the most expeditious course of terminating the litigation.

The Committee has tried to ignore these polemics and to consider the matter objectively recognizing that sharp differences of opinion will necessarily exist. Many desirable approaches to class action problems involve substantive rather than procedural solutions. The new Uniform Class Action Act approved by the Commissioners on Uniform State Laws in August 1976 which was carefully studied by the Committee presents a number of substantive solutions. These are beyond the power of the Procedural Rules.

In broad outline the Committee has attempted to retain all the best features of Federal Rule 23 excluding those which seem inappropriate or unsuccessful and all the best features of the Uniform Class Action Act. The Committee also has included novel provisions not found in the Federal Rule or in the Uniform Class Action Act. These combinations should simplify and improve class actions in Pennsylvania.

## Appendix A
## ANALYSIS OF THE RULES

### Rule 1701. Definition. Conformity.

Subdivision (a) defines ''Class Action'' to include any action brought by or against parties as representatives of a class until the court refuses to certify it as such or revokes a prior certification.

This definition follows language in *Bell v. Beneficial Consumer Discount Company*, 465 Pa. 225, 348 A.2d 734 (1975), that ''when an action is instituted by a named individual on behalf of himself and a class, the members of the class are more properly characterized as parties to the action. A subsequent order of a trial court allowing an action to proceed as a class action is not a joinder of the parties not yet in the action. The class is in the action until properly excluded.''

This definition becomes important in determining the effect of the commencement of a class action as tolling the statute of limitations as to the members of the class other than the named representatives. It carries into effect the decision of the United States Supreme Court in *American Pipe and Construction Company v. State of Utah*, 414 U. S. 538, 38 L. Ed.2d 713, 94 S. Ct. 756 (1974), in which the Court held that the commencement of an action as a class action suspends the applicable statute of limitations during the interim period from commencement

until refusal to certify as to all putative members of the class who would have been parties if the action had been certified as such.

Subdivision (b), Rule 1701, conforms the practice and procedure except as otherwise specifically provided to the form of action in which relief is sought, which could ordinarily be assumpsit, trespass, equity or declaratory judgment. The exceptions are primarily concerned with the pleadings as provided by later rules.

The rules do not deal specifically with jurisdiction over non-resident members of the class. This issue becomes of importance in view of recent decisions of the United States Supreme Court respecting Federal jurisdiction in many types of class actions based on diversity, which must now be brought in state courts.

In *Snyder v. Harris*, 394 U. S. 332, 89 S. Ct. 1053, 22 L. Ed.2d 319 (1969), and *Zahn v. International Paper Co.*, 414 U. S. 291, 38 L. Ed.2d 511, 94 S. Ct. 505 (1973), the Court held that, in diversity cases and in other cases where statutes impose a jurisdictional amount, claims of individual class members below the minimum cannot be aggregated to meet the jurisdictional requirement. Each member's claim must separately qualify.

In *Klemow v. Time, Incorporated*, 466 Pa. 189, 352 A.2d 12 (1976), certiorari denied, 429 U. S. 828, 97 S. Ct. 86, 50 L. Ed.2d 91 (1976), an action nominally brought on behalf of all subscribers to Time magazine, the court in footnote 15 stated that ''because the jurisdiction of the courts of the Commonwealth is territorially limited, the class may consist only of Pennsylvania residents. The class may also include nonresidents who submit themselves to the jurisdiction of the state courts.''

This holding would require nonresidents in this type of ''national'' consumer class action to intervene or to appear through an opt-in procedure which is provided for by Rule 1711(b)(2).

Klemow does not definitely decide the status of nonresidents where the subject matter of the action is a res or fund within Pennsylvania or is an attack on corporate action of a Pennsylvania corporation involving only bondholders or creditors in other jurisdictions. Nor did it involve a situation where Pennsylvania has the most significant relationship to all aspects of the transaction, so that Pennsylvania might assume jurisdiction over non-resident members of the class in a manner parallel to long-arm jurisdiction over non-resident defendants.

Jurisdiction over non-residents is clearly substantive and not procedural and for this reason is not dealt with in the rules.

## Rule 1702. Prerequisities to a Class Action.

The prerequisites of present Rule 2230 are numerosity of parties, impracticability of joining all as parties and adequate representation of the interests of all. To these prerequisites Rule 1702 adds others, namely, that there are questions of law or fact common to the class, the claims or defenses are typical and the class action provides a fair and efficient method of adjudication of the controversy.



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However, the rule deliberately declines to adopt that part of Federal Rule 23 which requires that, in actions based on common questions of law and fact, a class action be ''*superior* to other available methods for the fair and efficient adjudication of the controversy''. The Federal rule lists the matters pertinent to a finding of superiority.

Rule 1702(5) provides that, if the other criteria are met, a class action need provide only a ''fair and efficient'' method for adjudication of the controversy, Rule 1708, *infra*, lists the criteria which the court will consider to determine if the action meets this standard.

The rule further varies from the Federal rule in making this standard applicable to all class actions. The Federal rule applies its ''superiority'' standard only to actions based on common questions of law and fact. It may be that the criteria in Rule 1708 will, as a practical matter, make the class action ''superior'' to other forms of action. If so, so much the better from the point of view of good judicial administration. However, such ''superiority'' is not required.

''Superior'' is a comparative term. A ''fair and efficient'' standard avoids questions of whether ''better'' alternatives exist or conversely whether a class action will be ''inferior'' to other alternatives. The court may weigh the need for class action relief objectively, without the need to search for other possible ''superior'' judicial remedies, which will exclude the class action. For example, if a class action is a fair and efficient form of action, the court should not reject it because it believes a ''test case'' would be a ''superior'' technique. Cf. *Katz v. Carte Blanche*, 496 F.2d 747 (C.A.3d 1974), cert. denied 419 U. S. 885, 95 S. Ct. 152, 42 L. Ed.2d 125 (1975).

However, where a specific statutory remedy is provided for the processing of claims, numerosity of claims will not justify a class action. See *Lilian v. Commonwealth*, 467 Pa. 15, 354 A.2d 250 (1976). This follows the classic principle that a statutory form of relief must be followed exclusively.

It is significant that the opinion in *Klemow*, *supra*, left open the question of ''superiority'' stating in footnote 14 ''We need not here decide whether there are, in certain cases, additional criteria which one who attempts to bring a class action must meet, e.g., as required under the federal practice, that the class action is superior to other available methods for handling the controversy...'' Rule 1702 will decide this open question.

Rules 1701 and 1702 make clear that ''parties'' are defined to mean the named parties to the action who represent the class. The court must find that the representative parties will fairly and adequately protect the interests of the class.

## Rule 1703. Commencement of Action. Assignment to a Judge.

Rule 1703 provides that a class action can be commenced only by the filing of a complaint in the form provided by Rule 1704. The rule further provides that upon the filing of the complaint the action must be forthwith assigned to an individual judge who shall be in charge of the action for all purposes as long as it

continues as a class action. This will be important in multi-judge counties. Obviously, if the initially assigned judge becomes ill or for other sound reasons, the President Judge, or the Administrative Judge, may reassign the case to another judge to assure its efficient handling.

A class action may not be commenced by writ as provided under the assumpsit, trespass or equity rules. If so commenced, it will not toll the statute as to members of the class. In order to toll the statute as to the class, the action must be commenced by a class action complaint.

Further, if the complaint does not comply with Rule 1704, it will not commence a class action.

Even if the action seeks declaratory relief, the complaint is mandatory. A petition under the Declaratory Judgment Act may not be used.

## Rule 1704. Form of the Complaint.

Rule 1704 includes novelties in the form of complaint. Although the general pleading rule of the form of action in which relief is sought will apply, there are three special requirements.

(1) The caption must include the designation ''Class Action''.

(2) The complaint must set forth under a separate heading styled ''Class Action Allegations'' the averments of fact necessary to support the prerequisites of a class action as set forth in Rule 1702 and the implementing criteria specified in Rules 1708 and 1709.

(3) The plaintiff may join in the complaint claims for equitable, declaratory and monetary relief arising out of the same transaction or occurrence or series of transactions or occurrences. This is broader than Pa. R.C.P. 1020(d) which at present permits only joinder of assumpsit and trespass arising out of the same transaction or occurrence.

The requirement of the ''class action allegations'' is fundamental. It impels the plaintiff to plead in detail all the facts which will support his right to this special remedy. It segregates these from the rest of the complaint and from the substantive averments of the plaintiff's cause of action. Most important of all, it permits the application of Rules 1705 and 1706, which exclude the use of preliminary objections to raise issues of fact with respect to the class action allegations, and requires such issues to be raised in the answer. Hopefully, this will reduce dilatory proceedings during the pleading stage.

## Rule 1705. Preliminary Objections.

The defendant may file any applicable preliminary objections either to the class action allegations or to the underlying merits of the class action claims or to both. As stated above, he may not use preliminary objections to raise issues of fact with respect to the class action allegations. All objections must be raised at the same time or they will be considered waived, except, of course, objections to the com-

plaint which under Rule 1032 are not waived, namely, the defense of failure to state a claim upon which relief can be granted and the defense of failure to join an indispensable party.

In class actions in equity, the defenses of laches and failure to exercise or exhaust a statutory remedy, and the existence of full, complete and adequate non-statutory remedy at law, are available as preliminary objections. See Rule 1509; *Lilian v. Commonwealth of Pennsylvania*, 467 Pa. 15, 354 A.2d 250 (1976) (adequate statutory administrative procedure).

## Rule 1706. Form of the Answer.

In all class actions, including actions in trespass, all the averments of fact under the ''class action allegations'' will be deemed admitted unless specifically denied in conformity with Rule 1029. The special defense pleading rules in trespass will apply to all the substantive provisions of the complaint, but will not apply to the class action allegations. They must always be answered or they will be admitted.

Contrary to the Federal rule, a general denial is insufficient, nor is a denial sufficient if made in ''haec verba''. The assumpsit form of specific denial is required.

## Rule 1707. Motion for Certification of Class Action. Time for Filing. Hearing.

A hearing on certification of the action as a class action is mandatory in all cases. The plaintiff has the burden of moving for a certification hearing. The motion must be filed within 30 days after the pleadings are closed or within 30 days after the last required pleading is due. This prevents a party from delaying the certification hearing by delaying the filing of a pleading when due. If the plaintiff fails to move, the court if so notified must promptly set a date for certification hearing. A representative party who does not move promptly may be charged with failure to represent the class adequately and runs the risk of removal under Rule 1713(a)(5).

In cases where discovery is essential or where other motions are pending, the court may extend the time for filing the motion for certification, but in doing so, it must not allow the matter to drag along indefinitely and must fix a date certain for the postponed hearing.

The motion for certification and the hearing thereon is the stage at which certification is determined. As noted above, preliminary objections are not the proper procedure for attacking the merits of class action averments. Any cases holding otherwise will no longer be authoritative.

The hearing is confined to a consideration of the class action allegations and is not concerned with the merits of the controversy or with attacks on the other averments of the complaint. Its only purpose is to decide whether the action shall continue as a class action or as an action with individual parties only. In a sense,

it is designed to decide who shall be the parties to the action and nothing more. Viewed in this manner, it is clear that the merits of the action and the right of the plaintiff to recover are to be excluded from consideration.

As a practical matter, they cannot be considered. Since the certification hearing is not to be held until the pleading stage is concluded, attacks on the form of the complaint or demurrers to attack the substance must already have been filed and disposed of. The defendant will have already filed an answer on the merits.

At the certification hearing, the court will have before it the class action allegations in the complaint, the defendant's answer to these allegations, any depositions or admissions relating to these allegations and any testimony relating to those allegations that may be offered at the hearing.

## Rule 1708. Criteria for Certification of Class Actions.

Rule 1708 sets forth the criteria to be considered by the court in determining whether the class action is a fair and efficient method for adjudication of the controversy.

The Rule first sets out in subdivision (a) the criteria to be applied where only monetary recovery is sought. It then sets out in subdivision (b) the criteria to be applied where only equitable or declaratory relief is sought. Finally, in subdivision (c) it sets out the criteria to be applied when both monetary recovery and equitable relief are sought.

The criteria in subdivisions (1) to (5) of subdivision (a) are taken almost verbatim from Federal Rule 23(b)(1), (2) and (3), except that the requirement of ''superiority'' in class actions based on common questions of law or fact is omitted.

Two additional criteria are provided in subdivisions (6) and (7) of subdivision (a) which are not set forth in the Federal rule.

The first additional criterion permits the court to consider whether the complexity of the issues and the expenses of litigating separate claims of individual class members are of such magnitude as to exclude separate action by individual class members. This follows the Federal case law.

The second additional criterion permits the court to consider whether the damages which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action, with its attendant burdens on the judicial system and judicial manpower.

The Uniform Class Action Act in Section 3(a) uses somewhat similar criteria requiring the court to consider whether in view of the complexities of the issues and the expenses of the litigation the claims of the individual class members are insufficient to afford significant relief to the members of the class. This criterion points up a policy question on which opinion between plaintiffs and defendants is sharply divided.

In many consumer class actions the individual amounts may be very small, but the aggregate may be large and maintenance of the class action might have a deterrent effect on future violations by the defendant. Also, if the defendant's conduct is egregious, compelling refunds, even of inconsequential amounts, may be desirable from a public policy point of view. Perhaps the remedy may be legislative rather than procedural.

When the action is brought for monetary recovery only, the court is to consider all seven of these criteria.

If, however, the action is brought for equitable or declaratory relief only, criteria (6) and (7) are obviously inapplicable. In that case, subdivision (b) directs the court to consider criteria (1) to (5) only plus an additional criterion which is inapplicable to monetary relief, namely, whether the conduct of the opposing party has been such as to make equitable or declaratory relief appropriate with respect to the class.

Finally, if both monetary recovery and equitable or declaratory relief are sought, the court is to consider criteria (1) to (7) of subdivision (a) and also the special criterion of subdivision (b).

## Rule 1709. Criteria for Certification. Determination of Fair Adequate Representation.

The Federal Rules contain no specific criteria for determining the adequacy of representation by the representative parties or their attorneys. Rule 1709 is based on Federal case law and Section 3(b) of the Uniform Class Action Act approved by the Uniform Commissioners in August of 1976. The representative parties and their attorneys must have no conflict of interest, the attorneys must be able adequately to represent the interests of the class and the representative parties must have, or must be able to acquire, adequate financial resources to assure that the interests of the class will not be harmed.

A recent Federal decision has held that there is a conflict of interest where a lawyer is named as the representative party and a member of his firm is chosen as his counsel, if the amount of the potential attorney fee far outweighs the amount of the representative party's individual claim. *Kramer v. Scientific Control Corp.*, 534 F.2d 1085 (3rd Cir. 1976).

The Uniform Act in Section 17 contains provisions for the solicitation of funds to maintain the action under court supervision. Any such provisions seem more properly governed in Pennsylvania by the standards of professional conduct under the Code of Professional Responsibility and nothing with respect to them is included in the Rules.

## Rule 1710. Order Certifying or Refusing to Certify. Revocation. Amendment. Findings and Conclusions.

Subdivision (a) of Rule 1710 requires the court to file an opinion accompanying an order of certification or an order refusing to certify or an order of revocation of a previous order of certification. The opinion must set forth the basis for decision, including findings of fact, conclusions of law and appropriate discussion of the matters specified in Rules 1702, 1708 and 1709. Findings and conclusions are essential because an order refusing to certify or revoking a previous certification is a final and appealable order. *Bell v. Beneficial Consumer Discount Company*, 465 Pa. 225, 348 A.2d 734 (1975).

Subdivision (b) requires that an order of certification shall include a description of the class. This is self evident since, without it, there would be no foundation for the identification of the class members.

Subdivision (c) follows the Federal rule in permitting the court to limit the class action to particular issues or forms of relief, and to divide the proposed class into subclasses.

Subdivision (d) empowers the court to enter a conditional order of certification. It also permits the court to revoke, alter or amend an order of certification prior to a decision on the merits. The court may do this on its own motion or on motion of any party. Any such supplemental order must be accompanied by a memorandum of the reasons therefor.

## Rule 1711. The Plaintiff Class. Exclusion. Inclusion.

This Rule is new and provides a novel solution to the ''opt-out'', ''opt-in'' controversy. The general rule will be that every member of the class as defined in the court's order is included unless by a specified date he requests exclusion. The Federal rule now limits this opt-out procedure to 23(b)(3) class actions, i.e., common questions of law or fact, which were formerly called ''spurious'' class actions. Rule 1711(a) is stated in broader terms.

The right to self-exclusion under Rule 1711(a) cannot be absolute. To state the obvious a defendant party cannot be allowed to exclude himself from the action by his own choice. Accordingly, where a counterclaim is pleaded against the plaintiff class as a whole or against individual members thereof, the right to exclusion must be limited. The parties against whom the counterclaim is asserted become defendants as to the counterclaim and cannot be permitted to exclude themselves from the litigation. Pa. R.C.P. 232(a) will govern.

Likewise, where the members of the class have joint, as distinguished from several interests, in the subject matter and their joinder is compulsory under Pa. R.C.P. 2227(a), their right to self-exclusion should not be permitted.

In other situations the right to self-exclusion may be restricted by the court where the disposition of the claims of all members in one action outweighs the individual's right to self-exclusion. Thus, where the rights of class members are



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dependent on the resolution of questions of constitutional, statutory or contractual construction where the danger of inconsistent decisions with respect to individual members would confront the party opposing the class, the right to self-exclusion must be balanced against the interests of the defendant. Also to be considered are the benefits of judicial economy and the disposition of all claims in one action.

The court in its order of certification can take all these factors into account.

The Federal rule contains no provision for an opt-in procedure before a member may be considered as a member of the class. Some Federal courts, however, developed procedures approximating an opt-in requirement by requiring the filing of a proof of claim or a notice of intention to file a claim as a condition precedent to becoming or remaining a member of the class. Ordinarily this is not required until there is a fund available for distribution, but some decisions have imposed it prior to certification or in the order of certification.

Rule 1711(b) does not adopt the procedure for filing a claim. It gives the court the option to provide a true opt-in procedure only in certain limited instances, i.e., where (1) the individual claims are substantial and the potential members of the class have sufficient resources, experience and sophistication in business affairs to conduct their own litigation, or (2) other special circumstances exist which are described in the order. The rule does not attempt to define these ''other'' special circumstances which will vary in each particular case. Equally, this provision is not intended as a blank check to permit unbridled discretion in the court to require members of the class to opt in. The word ''other'' suggests that these special circumstances must be of the same magnitude and character as in (1). Obviously, the provision may never be applied to conventional consumer class actions involving numerous members of a class claiming only small amounts who could not conduct their own litigation.

One of its uses is suggested in *Klemow*, *supra*, which indicated that the court will have no jurisdiction over nonresidents unless they voluntarily appear. The opt-in procedure would provide a simple method of doing this. In such case there could be a dual form of order under Rule 1710; an opt-out for residents, an opt-in for nonresidents.

Because of the opt-out or opt-in provisions of the rule, prothonotaries will have the responsibility, under court direction, of establishing adequate records and dockets providing easy access to and identification of those members of the class electing to opt out or opt in pursuant to the direction of the certification order.

## Rule 1712. Order. Notice of the Action.

This lengthy rule departs in important respects from the Federal rule, and provides a novel solution to the notice problem.

It provides that notice of the order of certification must be given to members of the class whether the action is for monetary recovery or for equitable or declaratory relief or for both. Federal Rule 23(c)(2) provides for individual notice of the certification to the members of the class only in 23(b)(3) actions, i.e.,

actions where the only ties between the class members are common questions of law or fact. The Federal rule does not require such notice in 23(b)(1) or (b)(2) classifications.

Rule 1712 relaxes the rigid requirement of personal individual notice required by *Eisen v. Carlisle and Jacquelin*, 417 U. S. 156, 40 L. Ed.2d 732, 94 S. Ct. 2140 (1974), in which the United States Supreme Court held that individual written notice required under 23(b)(3) to identifiable class members is mandatory and not discretionary and may not be waived by providing some other general form of notice. The decision was not based upon constitutional due process grounds but on judicial interpretation of the intent of the rule.

Notice in equitable or declaratory relief actions is discretionary under the Federal rules. Under Rule 1712 notice will be given in all types of class action irrespective of the form of relief sought.

Rule 1712(a) requires the court to include all the requirements of notice in its certification order. This includes (1) type and content of the notice, and (2) identity of the members of the class to be notified.

The court is given broad choices dependent on (1) extent and nature of the class, (2) relief requested, (3) cost of notification, and (4) possible prejudice to members not notified. The situation may be different in a pure injunction case and in a conventional action for monetary relief only.

As an administrative convenience, the court is given the privilege to designate a person other than the attorneys for the class to administer the notice procedure and to serve as a source of information to the members.

The mandate of Eisen that the plaintiff must pay the costs of the giving of the notice is retained, but the burden is minimized.

Rule 1712(b) further expands the court's discretionary power as to type of notice. Keeping in mind the requirements of due process, the court may require individual notice by personal service or by mail to all members who can be identified with reasonable effort or, in appropriate cases, notice through other methods which it determines are reasonably calculated to inform the members of the class of the pendency of the action. The latter may include newspaper notices, television, radio, posting and trade, union and public interest groups.

Where members of a union are members of the plaintiff class, inclusion of the notice in ordinary membership mailings or notice published in union publications regularly distributed to the members, or notices on the union employers' bulletin boards and other similar means of communication reasonably calculated to inform the members of the class are available. In equitable relief situations the use of news media, radio or television would suffice, depending on the circumstances and the reasonable probability that the class will be thereby informed. The Federal courts in 23(b)(2) class actions seeking equitable or declaratory relief have in many cases provided for these forms of notice.

Rule 1712(c) provides that the notice must be prepared by and given at the expense of the plaintiff. The Federal courts have differed as to whether the notice

should come from the court or be sent by the plaintiff. Following the practice of many Federal courts 1712(c) requires submission of the proposed notice to the parties and to the court with leave to file objections thereto in ten days.

Rule 1712(c) also includes a novel provision, which authorizes the court to minimize the plaintiff's expenses by requiring the defendant to make available to the plaintiff use of defendant's established methods of communication with members of the class. For example, the notice could be put in the same envelope with monthly mailing of bills or other normal mailings of the defendant to the members of the class or by delivery by hand by an electric or gas meter reader or a milkman to the patrons of the defendant company where those methods of communication are used by the defendant in the ordinary course of its business. The plaintiff may, however, be required to pay any additional costs incurred by the defendant, but these would rarely be substantial.

Rule 1712(d) provides that, if a defendant asserts a counterclaim against a plaintiff class, the court may allocate the cost of a combined notice between the parties. Since the procedure in the action follows the normal procedure governing the form of action in which relief is sought, a counterclaim may be available to a defendant. If the counterclaim is asserted against the members of the plaintiff class as a class the court must certify it as a ''defendant class action'' in which the original defendant is plaintiff in the counterclaim and the original plaintiffs are a defendant class in the counterclaim. While such counterclaims will be rare, they are a possibility under appropriate circumstances.

## Rule 1713. Conduct of Action.

During the course of the action the individual judge to whom the case has been assigned may find it necessary to make appropriate orders controlling the course of the action. These may be revoked, altered or amended. With one exception, Rule 1713 copies Federal Rule 23(d). It omits the Federal provision for an order amending the pleadings. This is unnecessary, since Pa. R.C.P. 1033 regulating amendment of the pleadings is already incorporated by reference by Rule 1701(b).

In addition to administrative and procedural matters, the court may require additional notices to some or all of the members of (1) steps in the action, or (2) the proposed extent of the judgment, or (3) an opportunity to signify whether they consider the representation fair and adequate. The court may also permit intervention. As to these interlocutory notices the rule specifically provides, as does Federal Rule 23(d), that the notice need be given only to some and not to all members of the class. Thus, where the members are a closely cohesive group, it is not essential that all be notified. The court may direct notice only to selected members such as officers or directors.

The court also may police the representative party, may impose conditions on his activity and, if necessary, may replace him.

## Rule 1714. Compromise. Settlement. Discontinuance.

Rule 1714 incorporates the provisions of present Pa. R.C.P. 2230 and Federal Rule 23(e) which provide that a class action may not be compromised, settled or discontinued without the approval of the court after notice to the members of the class and hearing.

However, it contains an important provision not found in either of those rules. It provides that prior to certification the representative party may discontinue the action with court approval without notice to the members of the class if the court finds that the discontinuance will not prejudice the members of the class. Discontinuance in such case should presume that there has been no private compensation to the representative party as a consideration for his discontinuance of the action.

The court should conduct a careful inquiry before approving a request for discontinuance before certification. It should not be treated as a perfunctory matter. This is essential because the court has the responsibility to enter a finding that there will be no prejudice to other members of the class.

If the request for discontinuance is based upon the inability of the representative party to assume the costs of the litigation the court in its discretion should consider whether other representative parties might wish to bear such costs.

## Rule 1715. Judgment.

Rule 1715 deals with the entry and effect of a judgment entered before or after an order of certification.

Subdivision (a) contains the self-evident provision that, except by special order of the court, no judgment may be entered by default, on the pleadings or by summary judgment in favor of or against a class until the court has certified or refused to certify the action as a class action. It binds only the named parties.

Subdivision (b) contains the equally self-evident provision that, if a judgment is entered on preliminary objections before certification, it binds only the named parties. If the court finds that the complaint fails to state a cause of action and dismisses the complaint, it will not be technically *res judicata* as to other members of the class, since there has never been a determination by the court under Rule 1710(b) as to who constitutes the class. However, the principle of collateral estoppel, which now seems firmly embedded in Pennsylvania law, may be applicable if unnamed members of the class should thereafter bring their own action. As a practical matter, it seems unlikely that, if an appellate court has sustained the dismissal on the merits as in *Hoolick v. Retreat State Hospital*, 24 Pa. Cmwlth Ct. 218, 354 A.2d 609 (1976), other individual plaintiffs would commence further action.

Subdivision (c) provides that if the action has been certified as a class action, the judgment shall be binding on all members of the class except as otherwise directed by the court. The court should, of course, exclude from the effect of the

judgment those members of the class who have opted out or who have refused to opt in where an opt-in order was entered under Rule 1711(b).

Subdivision (d) provides that in all cases the judgment must be framed by the court and must describe the class which is bound by the terms and the individual defendants against whom the judgment is entered. Judgment can, therefore, never be entered by the prothonotary as an office judgment.

In connection with judgments neither Rule 1715 nor the Federal Rules deal with the form of relief or the distribution of monetary recovery and the procedures to be followed.

The Uniform Class Action Act of 1976, hereinbefore referred to, does address itself to this problem in Section 15(c). This section provides for distribution of unclaimed awards either to one or more States as unclaimed property or to the defendant. If the unclaimed awards are sought by a defendant, the court must consider unjust enrichment, the wilfulness or lack of wilfulness on the part of the defendant, the impact of the award on the defendant, the pendency of other actions, any criminal sanctions imposed on the defendant and the loss suffered by the plaintiff class.

Awards to the State, with or without escheat, are obviously substantive in nature and may require amendment of the Escheat Act of August 9, 1971, 27 P. S. 1-1.

The method of claiming and distributing awards to individual class members, while procedural in nature, is a matter to be determined in each individual case. The court is given ample power under Rule 1713 to make every necessary or appropriate order controlling the course of the action. This would, of course, include distribution. Should experience under the proposed rules indicate that a procedural rule to regulate distribution would be desirable, it can be framed to meet any problems which may have arisen.

Rule 1715 does not deal with the so-called ''fluid recovery'' doctrine, in which damages are assessed on the basis of the harm to the entire class without regard to the separate individual claims of members. The damages recovered are applied under the doctrine of ''cy pres'' for other uses benefiting present or future members of the class. Illustrations are bus-rider overcharges and consumer purchasers of the same service or product. In the anti-trust antibiotics overcharge cases the court approved a settlement award of damages unclaimed by individual class members to various State claimants to be applied by them for health care purposes.

The issues involved are more than procedural. They involve public policy considerations of substantive law upon which the Committee expresses no opinion.

## Rule 1716. Counsel Fees.

The Federal rule does not deal with counsel fees. They are governed by statute or traditional concepts developed by case law. Similarly, Rule 1716 contains no substantive provisions as to when an award of counsel fees may be made. It pro-

vides that they may be awarded only if applicable law so provides. However, the rule does empower the court, if fees are allowable, to regulate the amount of fees and expenses. The court is not bound by the amount or percentage of the fee set forth in a contingent fee agreement between the representative party and his attorney, although the contingent nature of the fee is a factor to be considered in approving the fee.

The rule sets forth a number of factors to be considered by the court in determining the amount of the fee.

(1) The time and effort reasonably expended by the attorney in the litigation. The keeping of accurate time records is therefore essential. These records should designate by whom the services were performed, i.e., partners, senior attorneys, associates, juniors, paralegals, etc., and their hourly rates. The time and effort factor is important, but it is not the sole criterion. The ingenuity and skill of counsel may in the course of only a few hours develop an entirely new theory of recovery where others have failed. On the other hand, the inexperience of an attorney may require the expenditure of needless, wasted hours.

(2) The quality of the services rendered. Counsel who possess or are reputed to possess more experience, knowledge and legal talent are entitled to and generally command compensation superior to counsel who are less endowed.

(3) The results achieved and benefits conferred upon the class or upon the public. The reference to the public benefit is not intended to incorporate an ''attorney general concept'' to support awards of attorneys' fees where such awards are not presently allowed under existing substantive principles or statutory authorizations. In *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U. S. 240, 44 L. Ed.2d. 141, 95 S. Ct. 1612 (1975), the court expressly rejected the private attorney general theory where the award of attorneys' fees had not been statutorily authorized or could not be claimed under the established principles of equity relating to awards from the creation of the fund.

(4) The magnitude, complexity and uniqueness of the litigation.

(5) Whether the receipt of a fee was contingent on success.

It is important to emphasize that the order in which these factors are listed in the rule is not in any way intended to suggest an order of priority on comparative importance in the determination of the fee.

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