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Class Actions—The Nebraska Procedure

I. INTRODUCTION

The class action represents an exception to the fundamental legal principle "that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."[1] Invented by the courts of equity, class actions were preserved by the drafters of the Field Code[2] by an amendment adopted in 1849.[3] Nebraska remains one of the few states that continue to use procedural statutes based on the Field Code, and its class action statute, section 25-319 of the Nebraska Revised Statutes,[4] is almost identical to the class action provision of the Field Code.[5]

This article will first briefly discuss the historical development of class actions. It will then analyze the Nebraska statute and relevant case law, with particular emphasis on the types of class actions that are maintainable under Nebraska law. This article will show that the Nebraska class action statute is much more restrictive than Rule 23 of the Federal Rules of Civil Procedure[6] and has

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1. Hansberry v. Lee, 311 U.S. 32, 40 (1940).
2. Act of Apr. 12, 1848, ch. 379, 1848 N.Y. Laws 497. The Field Code was named for the chairman of the three-man commission that drafted the Code, David Dudley Field. C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 22 (2d ed. 1947).
3. Act of Apr. 11, 1849, ch. 438, § 119, 1849 N.Y. Laws 639. *See* text accompanying note 8 *infra*.
4. NEB. REV. STAT. § 25-319 (Reissue 1979). *See* text accompanying note 27 *infra*.
5. Act of Apr. 11, 1849, ch. 438, § 119, 1849 N.Y. Laws 639. *See* text accompanying note 8 *infra*. The states besides Nebraska that have class action statutes patterned after the Field Code include: California, CAL. CIV. PROC. CODE § 382 (West 1973); Oklahoma, OKLA. STAT. ANN. tit. 12, § 232 (West 1960); and South Carolina, S.C. CODE § 15-5-50 (1977).
6. FED. R. CIV. P. 23.

seldom been applied by the Nebraska Supreme Court in a manner favorable to the plaintiff.

II. HISTORICAL PERSPECTIVE OF CLASS ACTIONS

Class actions were created by the courts of equity to remedy situations in which strict adherence to the rule of compulsory joinder would frustrate the purpose of the courts of equity—to render justice. Thus, in instances where the parties interested in the subject matter of a lawsuit were so numerous that joinder of all was impossible, the courts of equity developed the class or representative action to enable a decree to be entered. In order for class actions to be brought, however, the courts of equity required that the number of persons involved be such that it was impracticable to settle the controversy completely, and that a joint interest or a community of interest exist among the numerous persons.[7]

Class actions were incorporated into the Field Code by an 1849 amendment which provided the following exception to the compulsory joinder rules: "[A]nd when the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."[8] While the above provision is stated in the disjunctive, indicating that the mere fact that parties are numerous is sufficient to satisfy the requirements of the statute, the courts construing statutes patterned after the Field Code provision have required a "common interest" despite the language of the statute.[9]

This construction of the Field Code provision is consistent with the language of Equity Rule 38, the class action rule adopted in the federal courts prior to the adoption of the Federal Rules of Civil Procedure. Equity Rule 38 provided: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."[10] Thus, Equity Rule 38 made it clear that both numerosity of parties and a common interest were required before a class action was maintainable.

The next major development in the federal system was the adoption in 1938 of the original Rule 23 of the Federal Rules of Civil Procedure. This rule limited class actions to persons constituting a class "so numerous as to make it impracticable to bring them all

7. Simeone, *Class Suits Under the Codes*, 7 W. RES. L. REV. 5, 12 (1955).
8. Act of Apr. 11, 1849, ch. 438, § 119, 1849 N.Y. Laws 639.
9. Simeone, *supra* note 7, at 15.
10. Fed. Equity R. 38, 226 U.S. 659 (1912).

before the court," provided that the named parties "fairly insure the adequate representation of all."[11] The rule further specified three types of class actions[12] that have become known as "true," "hybrid," and "spurious."[13] These classifications were "dependent upon the jural relationships of the members of the class."[14] Professor James Moore, the primary draftsman of original Rule 23, recommended that a judgment in a true class action bind all members of the class and that a judgment in a hybrid class action bind the rights of the class with respect to the property involved, but that a judgment in a spurious class action should not bind nonappearing members of the class.[15] The courts adopted these recommendations for the three types of class actions.[16] The spurious class action in reality is a misnomer because the absence of a binding judgment on nonappearing "class" members made it an entirely different creature than the class action developed in the courts of equity.[17]

In 1966, the present Rule 23[18] was adopted, and "the federal system detached itself from the restrictive notion, conceived under the Field Code and ratified by the Moore rule, that the propriety of

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11. FED. R. CIV. P. 23, 308 U.S. 689 (1939).
12. *Id.* The rule provided:

> (a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
>
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

Id.

13. 3B MOORE'S FEDERAL PRACTICE ¶¶ 23.08-.10 app. (2d ed. 1980).
14. *Id.* ¶ 23.08[1], at 23-2505. A true class suit required a "joint, common, or derivative" right. *Id.* In a hybrid class suit there existed, "in lieu of joint or common interests, the presence of property which called for distribution or management." *Id.* ¶ 23.09, at 23-2571. Finally, in a spurious class action, there were no jural relationships between the members of the class; there were simply common questions of law or fact. *Id.* ¶ 23.10[1], at 23-2602. *See* note 12 *supra*.
15. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L. REV. 551, 570-76 (1937).
16. For a discussion of how the courts treated these three types of class actions under the original Rule 23, see 3B MOORE'S FEDERAL PRACTICE ¶ 23.11[1]-[4] app. (2d ed. 1980).
17. *See* M. GREEN, BASIC CIVIL PROCEDURE 81 (1972).
18. FED. R. CIV. P. 23.

class actions depends on pre-existing intraclass jural relations."[19] Rule 23, as amended, is divided into five parts. First, it spells out the prerequisites for any class action: (1) a class so numerous that joinder is impracticable; (2) a question of law or fact common to the class; (3) the claims or defenses of the representatives are typical of the class; and (4) the representatives fairly and adequately protect the interests of the class.[20] Second, the rule designates three types of class actions, which resemble the three types in the original Rule 23, but specifies as to the third type of class action, more detailed instructions for the guidance of the court.[21] Third, Rule 23 attempts to define the duties of the judge in the conduct of class actions.[22] Fourth, the rule provides for protective orders which the court may enter during the course of class action litigation.[23] Finally, Rule 23 states that a class action cannot be dismissed or compromised without court approval and prior notice to all members of the class.[24] By adding the notion that the mere presence of common questions of law or fact could result in a judgment binding on absent class members, the restructured rule considerably broadened the types of cases that can be prosecuted or defended as class actions with binding effect on nonappearing members[25] of the class.

III. THE NEBRASKA STATUTE

The Nebraska class action statute, originally enacted in 1867 as Section 43 of the Nebraska Code of Civil Procedure,[26] provides: "When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."[27] Although the statute is stated in the disjunctive, the Nebraska Supreme Court has never taken the position that numerosity alone satisfies the statute.[28]

19. Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 629-30 (1971).
20. FED. R. CIV. P. 23(a).
21. FED. R. CIV. P. 23(b).
22. FED. R. CIV. P. 23(c).
23. FED. R. CIV. P. 23(d).
24. FED. R. CIV. P. 23(e).
25. *See generally* 3B MOORE'S FEDERAL PRACTICE ¶¶ 23.02-.97 (2d ed. 1980). This article does not purport to analyze class actions under Rule 23. For a criticism of the broad scope of Rule 23 as amended in 1966, see Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375 (1972).
26. Act of Feb. 12, 1866, tit. III, § 43, 1866-1877 Neb. Laws 134 (current version at NEB. REV. STAT. § 25-319 (Reissue 1979)).
27. NEB. REV. STAT. § 25-319 (Reissue 1979).
28. *See* note 9 & accompanying text *supra*.

The Nebraska Supreme Court has not limited the class action statute to actions in equity, but has construed the statute as "an application of the equitable doctrine of virtual representation . . . [which is] applicable in appropriate circumstances to law actions."[29] The doctrine of virtual representation, which is the principle underlying the class action developed in the courts of equity, allows a court to proceed to a decree if the named parties fairly represent nonappearing class members in the litigation of issues in which all have a common interest.[30] This doctrine "represents a well recognized exception to the general rule that no person is bound by a judgment or decree except parties or those who stand in privity with parties."[31] It has long been applied in cases involving the unborn[32] and in class or representative actions.[33]

This incorporation of the equitable class action device in all civil actions is consistent with the Field Code framers' preference for equitable principles of procedure.[34] The framers viewed the common law rules of procedure as too " 'fixed, rigid, arbitrary and technical' " in comparison to the " 'natural and flexible' " principles of procedure in the equity suit.[35]

In construing the class action statute, the Nebraska Supreme Court, in *Evans v. Metropolitan Utilities District*,[36] defined the proper representative plaintiff as follows: "The general rule is that

29. Blankenship v. Omaha Pub. Power Dist., 195 Neb. 170, 175, 237 N.W.2d 86, 89 (1976).
30. Hansberry v. Lee, 311 U.S. 32 (1940). *See also* Archer v. Musick, 147 Neb. 344, 23 N.W.2d 323 (1946) (representative must have the power to satisfy judgment on behalf of all members of the class), *vacated on other grounds*, 147 Neb. 1018, 25 N.W.2d 908 (1947).
31. Garside v. Garside, 80 Cal. App. 318, 324, 181 P.2d 665, 671 (1947).
32. *See id.* at 323-25, 181 P.2d 670-72, and cases cited therein; Drake v. Frazer, 105 Neb. 162, 179 N.W. 393 (1920).
33. *See* Padway v. Pacific Mut. Life Ins. Co., 42 F. Supp. 569, 576 (E.D. Wis. 1942), and cases cited therein.
34. C. KIEGWIN, CASES IN CODE PLEADING § 39, at 324 (1926).
35. *Id.* § 39, at 325 (quoting 1 J. POMEROY, EQUITY JURISPRUDENCE § 113). With respect to the common law principles of joinder of parties, the criticism was harsh:

> The doctrines of the common law concerning the parties to actions, their joint or several rights and liabilities, and the form of judgment based upon these respective kinds of right and liability, are the crowning technicality of the system, resting upon verbal premises which mean nothing, and built upon from these premises by the most accurate processes of mere verbal logic. It was a fundamental principle that no one could be a plaintiff unless he was, alone or jointly with the co-plaintiffs, entitled to the whole recovery, nor a defendant unless he was, alone or jointly with the co-defendants, liable to the entire demand.

Id. § 39, at 325.
36. 185 Neb. 464, 176 N.W.2d 679 (1970).

a plaintiff in a class action must have an interest in the controversy common with those for whom he sues and there must be that unity of interest between them that the action may be brought by them jointly."[37] As this language indicates, the class action requirements are to be interpreted in conjunction with the joinder rules. Thus, in order to define the types of class actions which are allowable under the Nebraska statute, an examination of the Nebraska joinder rules is necessary.

IV. JOINDER OF PARTIES AND CAUSES OF ACTION

Under the Nebraska permissive joinder statute, plaintiffs *may* be joined only if they have "an interest in the subject of the action, and in obtaining the relief demanded."[38] Defendants, on the other hand, *may* be joined if they have or claim "an interest in the controversy adverse to the plaintiff" or "[are] necessary part[ies] to a complete determination or settlement of the question involved therein."[39] The Nebraska compulsory joinder statute requires that parties *must* be joined if they are "united in interest."[40] Also, multiple causes of action which are joined must affect all parties in the same capacity.[41]

Although *Evans* established the necessity of applying the joinder statutes to determine the proper scope of class actions in Nebraska, it is not clear whether the permissive or compulsory joinder sections are applicable. In *Evans*, the Nebraska Supreme Court stated the general rule that a representative of a purported class must have that type of "interest in a controversy common with those for whom he sues and there must be that unity of interest between them that the action *may* be brought by them jointly."[42] The use of the word "may" indicates that the permissive joinder statutes are applicable. But, the *Evans* court also required

37. *Id.* at 467, 176 N.W.2d at 681.
38. NEB. REV. STAT. § 25-311 (Reissue 1979). This section provides: "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this chapter." *Id.*
39. *Id.* § 25-317. This section provides: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein." *Id.*
40. *Id.* § 25-318. This section provides: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason being stated in petition." *Id.*
41. *Id.* § 25-702. This section provides: "Except for product liability actions, the causes of action so united must affect all the parties to the action, and not require different places of trial." *Id.*
42. 185 Neb. at 467, 176 N.W.2d at 681 (emphasis added).

a "unity of interest"[43] between the plaintiffs, which approximates the "united in interest" language of the compulsory joinder statute.

In order to determine which joinder statute is appropriate, it is necessary to examine the historical basis of joinder. The concept of joinder in the courts of equity was more liberal than the common law joinder rules.[44] At common law, a plaintiff had to

> be interested in the whole of the recovery, so that one judgment could be rendered for all the plaintiffs *in solido*; that a judgment should be given to one person for a certain sum of money or for certain lands or chattels be awarded to another plaintiff, was regarded as the sheerest impossibility.[45]

In other words, there had to exist a joint interest and a right of recovery as if the plaintiffs were a single party. This is similar to the compulsory joinder notion that was carried into the Field Code.[46]

In equity, however, there was no requirement that all plaintiffs have a joint or identical interest.[47] Rather, a material interest in the subject matter of the suit[48] or "a community of concern in the subject matter and objects of the suit"[49] sufficed.

The Field Code adopted the principles of equity with respect to joinder of parties and introduced the permissive joinder of parties concept into all civil actions, including those seeking legal relief.[50] Under the Field Code, "various persons having a common interest in a certain subject matter of litigation" were allowed to "join in the pursuit of their rights to the extent that the relief sought [was] of common interest, although they may [have] share[d] that common interest in unequal proportions."[51] However, the original Field Code provisions governing permissive joinder were later amended to "authorize joinder of parties when there are common questions of law or fact and the right to relief asserted by or against multiple parties arises from the same transaction or occurrence or series of transactions or occurrences."[52] Thus, the amended Field Code introduced the "common question of law or fact" principle into determining whether joinder was proper. This principle allows the joinder of parties in more situations than does the original Field Code and its counterparts. Significantly, Ne-

43. *Id.*
44. C. KIEGWIN, *supra* note 34, § 41, at 329-35.
45. *Id.* § 41, at 331 (quoting J. POMEROY, CODE REMEDIES § 115).
46. *See* note 53 & accompanying text *infra*.
47. C. KIEGWIN, *supra* note 34, § 41, at 331.
48. *Id.* § 41, at 330 (quoting J. STORY, EQUITY PLEADINGS § 72 (1840)).
49. *Id.* § 41, at 332.
50. Act of Apr. 12, 1848, ch. 379, §§ 97-98, 100, 1848 N.Y. Laws 497.
51. C. KIEGWIN, *supra* note 34, § 41, at 337.
52. Homburger, *supra* note 19, at 616.

braska has *not* amended its permissive joinder statute to adopt the "common question of law or fact" analysis.

The Field Code (and thus the Nebraska statute) retained in its compulsory joinder statute the common law requirement that parties who are "united in interest" *must* be joined.[53] As indicated earlier, the class action provision became a part of the Field Code in an 1849 amendment which created an exception to compulsory joinder.[54] The Court of Appeals of New York, in *Brenner v. Title Guarantee & Trust Co.,*[55] construed this provision as follows:

> The Code section was intended to embody without change both the general rule and the exception to that rule "in accordance with the then existing practice of courts of equity." Its purpose was not to provide for the joinder in one action of separate causes of action owned by different plaintiffs. Its purpose was rather to retain "in the new practice the same rules by which to determine whether the proper parties were before the court, which then prevailed in the courts of chancery. . . ." In those cases where it applied, one person may prosecute a cause of action or interpose a defense for the benefit of others, who are not parties to the action, but only where they might properly be joined as parties because they have a common or general interest *or* are united in interest.[56]

Significantly, the *Brenner* court refused to expand the scope of representative actions to the level of the amended permissive joinder rules[57] and thus allow "common question of law or fact" analysis to govern class actions. However, the court correctly recognized that the scope of the equitable class action and the Field Code class action were defined by the joinder provisions of the courts of equity. The *Brenner* court apparently required the parties to be "united in interest" *or* have a "common and general interest,"[58] which is broader than the compulsory joinder requirement.

While the Nebraska class action statute immediately follows the compulsory joinder statute, it is an independent provision. This separation is logical because class actions were developed in the courts of equity which operated under more liberal joinder rules. Since the equity joinder rules were incorporated into the original Field Code, it follows that the permissive joinder rules should control the scope of properly maintainable class actions in Nebraska.[59]

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53. C. KIEGWIN, *supra* note 34, § 41, at 336.
54. *See* text accompanying note 8 *supra*.
55. 276 N.Y. 230, 11 N.E.2d 890 (1937).
56. *Id.* at 235, 11 N.E.2d at 892 (citation omitted) (emphasis added).
57. *Id.* at 238, 11 N.E.2d at 893. *See* note 52 & accompanying text *supra*.
58. 276 N.Y. at 235, 11 N.E.2d at 892-93.
59. *See generally* Berkshire v. Douglas County Bd. of Equalization, 200 Neb. 113, 262 N.W.2d 449 (1978), wherein the Nebraska Supreme Court recognized that the technical requirements of section 25-319 can be met without the class

It must be remembered, however, that the joinder rules of the original Field Code and the Nebraska statutes are narrower than the "common question of law or fact" approach adopted in the amended Field Code permissive joinder sections and in Rule 23 of the Federal Rules of Civil Procedure. As the Nebraska class action statute is limited in scope by these narrow joinder rules, the types of class actions properly maintainable in Nebraska are more limited than those brought under Rule 23[60] or the amended Field Code.[61] Although the Nebraska Supreme Court has never directly addressed the distinction between the actions allowable under Rule 23 and those maintainable under the Nebraska statute, its decisions construing the Nebraska statute reveal it is extremely difficult to bring a successful class action in Nebraska.[62]

V. THE NEBRASKA CLASS ACTION REQUIREMENTS

An analysis of the Nebraska Supreme Court class action decisions reveals numerous prerequisites to maintaining a class action. The court's decisions have generally been unfavorable to plaintiffs, and the court has imposed the following prerequisites to bringing a class action in Nebraska: proper joinder, no potentiality of a conflict of interest, necessity, and manageability. This section will examine each of these factors, and conclude with a brief examination of the procedural requirements for class actions in Nebraska.

A. Joinder Requirement

In *Evans v. Metropolitan Utilities District*,[63] the Nebraska Supreme Court recognized that class actions were subject to the requirement that the members of the class be unified to the extent the suit could be brought jointly. Significantly, the court cited *Certia v. University of Notre Dame du Lac*[64] as authority for this "general rule."[65] In *Certia*, the Indiana court construed a class action statute identical to the Field Code provision[66] as follows:

members being considered as necessary parties. The holding was that an action can meet the technical requirements of section 25-319 but still be disallowed as a class action because the result would be the same whether the action was brought as a class action or as an individual action.

60. FED. R. CIV. P. 23(a)(2).
61. *See* text accompanying note 52 *supra*.
62. *See* notes 63-130 & accompanying text *infra*.
63. 185 Neb. 464, 467, 176 N.W.2d 679, 681 (1970). *See* notes 36-37 & accompanying text *supra*.
64. 82 Ind. App. 542, 141 N.E. 318 (1924).
65. 185 Neb. at 467, 176 N.W.2d at 681.
66. *See* text accompanying note 8 *supra*.

> [T]he party who sues must have an interest in the controversy common with those for whom he sues, and there must be that unity of interest between him and all such other parties that would entitle them to maintain the action if suit was brought by them jointly. The action is, in effect, brought by all of the parties, and the party named as the plaintiff stands simply as the representative of himself and all of the others.
>
> If the interest is separate, then the action must be brought separately by each person interested, for those having a separate interest cannot join in the action.[67]

In *Certia*, the purported members of the class owned cemetery lots at various locations in the defendant's cemetery.[68] The representative plaintiff brought the purported class action to enjoin burials in the walkways of the cemetery.[69] The Indiana court held that the plaintiff could not bring the action because the interests of the various class members were separate, and that the plaintiff could only bring his action with respect to the cemetery lots in which he had an interest.[70] The court further held that the plaintiff only had a right of "ingress and egress to his own lot," and that the interest of the plaintiff and of other lot owners was not a "common interest."[71]

Professor Homburger interpreted the *Certia* construction of the Field Code type of class action statute as follows: "In states with narrow rules of permissive joinder, courts relied upon those rules to justify a narrow construction of the class action provision . . . ."[72] He further stated that "in states with liberal joinder provisions, courts refused to construe those provisions as an expression of legislative intent to broaden the class action rule as well."[73] Professor Homburger's thesis was that even in liberal permissive joinder states, the Field Code class action provision

> carried into the [Field] Code's unitary system of procedure at law and in equity the burden of an old line of equity cases which, in the absence of independent grounds for equity jurisdiction, refused to entertain bills of peace to avoid multiplicity of suits unless a bond of "privity" existed between the multiple parties.[74]

As discussed previously, the Nebraska permissive joinder stat-

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67. 82 Ind. App. at 544, 141 N.E. at 319 (citations omitted).
68. *Id.* at 543, 141 N.E. at 319.
69. *Id.*
70. *Id.* at 547, 141 N.E. at 320.
71. *Id.*
72. Homburger, *supra* note 19, at 615.
73. *Id.*
74. *Id.* Professor Homburger was of the opinion that *Evans* indicated that the Nebraska Supreme Court was among the courts that were "applying the Field Code rule obediently to toe the traditional line of privity." *Id.* at 624 n.87. With this contention the authors of this article respectfully disagree, noting that the court in *Evans* cited *Certia* as authority for the general rule quoted in the text accompanying note 37 *supra*. *Evans* required that the members of the class be able to bring the action jointly, which is a different concept than the slippery doctrine of "privity."

utes should control the scope of the Nebraska class action statute.[75] Thus, each prospective plaintiff, including absent members of a class, must have a common interest in the relief demanded.[76] The relief demanded must have some common feature; while the parties need not be affected equally, they must all be affected in some capacity.[77] Individuals who have a separate interest and sustain separate damages may not join in the same action.[78]

The scope of the common interest requirement in Nebraska may be gleaned from the few Nebraska decisions which have construed the permissive joinder provisions. In the early Nebraska case of *Trompen v. Yates*,[79] the Nebraska Supreme Court recognized that section 40 of the Nebraska Code of Civil Procedure (now section 25-311—relating to joinder of plaintiffs) encompassed "the equity practice of taking into the action everybody who claims an interest in its subject-matter."[80] The court elaborated upon this statement in *Oss v. Hartford Accident & Indemnity*,[81] where it allowed an alleged owner of twenty-five head of cattle, a receiver for a bank that held a mortgage on a portion of the cattle, and a holder of a chattel mortgage on a portion of the cattle, to join as plaintiffs under section 25-311 to recover the proceeds of a sale of the cattle

75. *See* notes 59-62 & accompanying text *supra*.

76. NEB. REV. STAT. §§ 25-311, -702 (Reissue 1979).

77. McNish, *Joinder and Splitting of Causes of Action in Nebraska*, 26 NEB. L. REV. 42, 56 (1946). Professor McNish argued that the class action statute did not provide for an enlargement of joinder of actions. *Id.* He also took the position, however, that this section "merely constitute[s] an exception to the compulsory joinder of parties statutes." *Id.* at 56-57. As stated in the text accompanying notes 42-62 *supra*, however, the authors disagree with the latter position.

78. C. KIEGWIN, *supra* note 34, § 42, at 339.

79. 66 Neb. 525, 92 N.W. 647 (1902).

80. *Id.* at 530, 92 N.W. at 649. The *Trompen* court cited Munson v. New York Cent. & H.R.R. Co., 32 Misc. 282, 65 N.Y.S. 848 (1900), a New York case which allowed an insurer who had paid for part of the damage to join with an insured to sue the tortfeasor. 66 Neb. at 531, 92 N.W. at 649. The court also quoted an English chancery court's declaration: "'All persons having a common right which is invaded by a common enemy, although they may have different rights *inter se*, are entitled to join in respect to that common enemy right.'" *Id.* (quoting Ellis v. Bedford, 68 Law J. Ch. 289 (1899)). Moreover, the court in *Trompen* referred to Missouri, K.&T. Ry. Co. v. Haber, 56 Kan. 694, 44 P. 632 (1896), a Kansas case which held that the joining of 145 parties in one action for damages against a railroad responsible for spreading splenic fever among cattle was not error. 66 Neb. at 531, 92 N.W. at 649. In that case, however, Kansas law gave a lien on cattle to those injured by reason of the communication of splenic fever, and thus there existed a common right to assert the lien among the 145 parties. 56 Kan. at 703, 44 P. at 639. No mention was made of a class action, however, as the 145 individual parties apparently were all named as parties. *Id.*

81. 130 Neb. 311, 264 N.W. 897 (1936).

from the issuer of an indemnity bond.[82] The court held that all plaintiffs had a direct interest in the bond issued to insure payment because the bond's language was comprehensive enough to include mortgagees within the bond's protection.[83] Thus, the plaintiffs in *Oss* had an interest in the relief demanded, although in unequal proportions. Finally, in *Board of Education v. Winne*,[84] the Nebraska Supreme Court referred to section 25-311 in conjunction with section 25-301[85] as affording a remedy to "interested parties."[86]

Thus, if plaintiffs wish to join together in Nebraska, a joint interest in the sense that they seek relief *in solido* is not required. The test appears to require a common interest in the relief demanded, even though such interest is in unequal proportions—in other words, there must be some damage that affects all prospective plaintiffs. If the action could be maintained separately for separate relief, joinder is improper because there is no common interest in the relief demanded:

> In general, the various codes provide that all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs. . . .
>
> The permissive joinder under the code has a very wide range of application. It is immaterial in what proportions the plaintiffs may be severally concerned. . . . Persons, however, who have separate interests and suffer separate damages may not join.[87]

The Nebraska Supreme Court offered some guidance as to joinder of causes of action and defendants in *Sickler v. City of Broken Bow*.[88] In *Sickler*, the court set forth the following test to determine whether there is more than one cause of action for purposes of applying section 25-702:

> In determining whether more than one cause of action is stated, the main test is whether more than one primary right or subject of controversy is presented, other tests being whether recovery on one ground would bar recovery on the other, whether the same evidence would support the different counts, and whether separate actions could be maintained for separate relief.[89]

The *Sickler* court held that causes of action "involving different defendants cannot be joined unless each cause affects them all and

82. *Id.* at 316, 264 N.W. at 899.
83. *Id.* at 315-16, 264 N.W. at 899.
84. 177 Neb. 431, 129 N.W.2d 255 (1964).
85. NEB. REV. STAT. § 25-301 (Reissue 1979) (action must be prosecuted in the name of the real party in interest unless otherwise provided for in NEB. REV. STAT. § 25-304 (Reissue 1979)).
86. 177 Neb. at 436, 129 N.W.2d at 258.
87. 1 BANCROFT'S CODE PLEADING § 142, at 257-58 (1926).
88. 143 Neb. 542, 10 N.W.2d 462 (1943).
89. *Id.* at 544-45, 10 N.W.2d at 464.

they have a joint or common liability or interest; separate causes against separate defendants cannot be lawfully joined."[90] The court further held, without specifically mentioning section 25-317 (permissive joinder of defendants), that in an injunction action, "[i]t is only where the act sought to be enjoined is threatened or being performed by more than one that all may be joined as defendants."[91] Therefore, in order for defendants to be properly joined, they must all participate in the act causing the alleged damage or injury.

As the foregoing Nebraska joinder cases did not involve class actions, it is necessary to examine the Nebraska cases in which class actions have been successfully prosecuted and determine whether the narrow Nebraska joinder rules were satisfied. *Doyle v. Union Insurance Co.*[92] represents the only instance in which the Nebraska Supreme Court affirmed a judgment allowing a class action which awarded money damages. While the class action aspect of *Doyle* was not challenged, the joinder rules were satisfied.

In *Doyle*, a policyholder of Old Union, a mutual insurance company, brought a class action initially seeking to restrain Old Union and its directors from selling the assets of the company. This equitable relief was denied, and the action proceeded as an action for damages.[93] The policyholders alleged that the directors of Old Union breached their fiduciary duties by acting in their own interest, selling Old Union for less than fair value, and failing to make full disclosure in proxy statements.[94] The Nebraska Supreme Court indicated that the action would have been derivative except that Old Union had been dissolved, stating: "A shareholders' suit of this kind is an equitable action, which, except for the fact of dissolution of Old Union, would have been for the benefit of the corporation and not the shareholders."[95]

While the court did not address this issue, a class action in a derivative suit is unnecessary because it adds nothing to the case.[96] Thus, it is probable that but for the dissolution of Old Union, a class action may not have been proper.

While the court in *Doyle* did not analyze the propriety of bringing the suit as a class action because it was not a contested issue, the facts withstand an analysis under the Nebraska joinder rules. The policyholders suffered a common damage at the hands of the

90. *Id.* at 545, 10 N.W.2d at 465.
91. *Id.* at 548, 10 N.W.2d at 465.
92. 202 Neb. 599, 277 N.W.2d 36 (1979).
93. *Id.* at 601, 277 N.W.2d at 38.
94. *Id.* at 602, 277 N.W.2d at 38.
95. *Id.* at 603, 277 N.W.2d at 39.
96. *See* notes 125-28 & accompanying text *infra*.

directors, and thus had the requisite common interest in the subject matter of the lawsuit. Also, each member of the class was entitled to an amount determinable only by reference to the total recovery and total shares of other policyholders. Thus, a common fund was present as each policyholder was entitled to a fractional interest of the total sum recovered.[97]

Moreover, *Doyle* is similar to one of the most common uses of the class action device in the courts of chancery—"actions by or against voluntary unincorporated associations to enforce or defend an action which the association had against an adversary."[98] In such cases, the rights of the group are asserted, not individual claims for individual relief.

Doyle should be contrasted to the New York case of *Society Milion Athena, Inc. v. National Bank of Greece*.[99] In that case, two customers of two banks attempted to bring a class suit against the banks on the grounds that the banks received and failed to repay deposits by the two plaintiffs and thousands of other depositors.[100] The New York court refused to allow a class action because there existed "no joint or common interest in any fund."[101] In the absence of this common interest, "each person wronged may determine for himself the remedy which he will seek for the wrong to him."[102] The rule followed by the New York court was simply: "Separate wrongs to separate persons, though committed by similar means and even pursuant to a single plan, do not alone create a common or general interest in those who are wronged."[103]

Doyle, on the other hand, involved policyholders who had a common interest in a wrong perpetrated against Old Union. The wrong was not directed at the policyholders individually, but collectively. Thus, the interests of the members of the class in *Doyle* were unified to the extent they could have brought the action jointly.

Although the Nebraska joinder rules do not embrace the concept of common questions of law or fact, dicta in *Gant v. City of*

97. *See* notes 109-12 & accompanying text *infra*. Old Union was sold under a contract of reinsurance which included a provision for the purchase of the assets of Old Union, and a distribution to the policyholders of their equity in the surplus funds of Old Union. 202 Neb. at 602, 277 N.W.2d at 38. Thus, the policyholders collectively suffered a damage, even though admittedly in unequal proportions. *See* text accompanying note 87 *supra*.

98. Simeone, *supra* note 7, at 7.

99. 281 N.Y. 282, 22 N.E.2d 374 (1939).

100. *Id.* at 292, 22 N.E.2d at 377.

101. *Id.* at 294, 22 N.E.2d at 377.

102. *Id.* at 292, 22 N.E.2d at 377.

103. *Id. See* Simeone, *supra* note 7, at 34-35, and authorities cited therein.

Lincoln[104] has caused considerable confusion because the Nebraska Supreme Court implied that a Rule 23(b)(3) type of class action could be brought in Nebraska. In *Gant*, a Lincoln policeman filed a class action to recover amounts which the City of Lincoln erroneously deducted from the salaries of policemen and firemen for pension purposes. The court stated:

> Parties entitled to share in the fund in question numbered approximately 400 and the amounts due each were relatively small thus discouraging and rendering impractical the bringing of individual suits; the questions of law and fact presented were common to all and definitely predominated over individual interests; the claims of the interested individuals were similar to plaintiff's; in representing his own interests, plaintiff necessarily was required to represent the interests of all members of the class represented; and the class action rendered unnecessary the proliferation of litigation by individual suits. The accepted requirements for a class action were present.[105]

Subsequently, in *Blankenship v. Omaha Public Power District*,[106] the Nebraska Supreme Court retracted this implication, holding:

> In *Gant* we did not determine whether or not the suit was properly brought as a class action. The question there was the power of the trial court to vacate the judgment after term. . . . Whatever else was said in that case about the characteristics of a class suit was dicta. We made no determination that *Gant* was a proper class action, we simply said that having so proceeded did not make the judgment void.[107]

Thus, the dicta in *Gant* concerning the requirements for a class action is not the law in Nebraska.[108]

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104. 193 Neb. 108, 225 N.W.2d 549 (1975).
105. *Id.* at 109, 225 N.W.2d at 551.
106. 195 Neb. 170, 237 N.W.2d 86 (1976).
107. *Id.* at 175, 237 N.W.2d at 89.
108. The *Gant* court cited Keedy v. Reid, 165 Neb. 519, 86 N.W.2d 370 (1957), and Jacobs v. City of Omaha, 181 Neb. 101, 147 N.W.2d 160 (1966), as authority for its statement on class actions. In *Keedy*, 45 individuals signed a petition to merge two school districts, and the court stated that the signers of the petition

> could have been made parties to the error proceeding in either of two ways,—by naming each as a party defendant in error and serving a summons upon each of them, or by serving summons upon one or more of the petitioners who are shown by proper allegations in the petition in error to be members of a class within the purview of section 25-319.

165 Neb. at 520-21, 86 N.W.2d at 372. There was no mention of common questions of law or fact. In *Jacobs*, the court analyzed the propriety of a class action as follows: "There are so many persons involved whose rights are similar to those of the plaintiff that it was *impracticable to join them all as parties plaintiff*. This action is properly brought as a class action." 181 Neb. at 103, 147 N.W.2d at 162 (emphasis added). The court assumed joinder otherwise would be proper and made no analysis in terms of common questions of law or fact. Thus, there is no authority in *Keedy* and *Jacobs* supporting the inclusion of a "common question" test in the *Gant* court's list of requirements. It

While not at issue in *Gant*, the question arises whether the suit involved a proper class action under the Nebraska statute. The answer depends upon whether the action in *Gant* was to recover shares of a common fund, or was simply 400 separate claims for wages wrongfully deducted by an employer.

A common fund is a fund "owned" by more than one person with each person owning an interest in the entire fund.[109] In determining whether a common fund is present or whether the prayer for damages is a mere aggregation of separate and distinct claims, the following test[110] is helpful:

(1) If the representative plaintiff were to sue individually and the amount of his recovery could be determined without reference to other members of the purported class, then a common fund is not present, and a class action is improper.

(2) If the representative plaintiff were to sue individually and the amount of his recovery could only be determined by calculating his fractional share of the total amount of damages, then a common fund is present, and assuming that all other requirements are present, a class action is proper.

In *Gant*, it is unclear under which of two theories the suit was brought. It may have been brought against the City of Lincoln as custodian of the pension fund, with individual recoveries to be made in proportion to the ownership percentages of the policemen and firemen in the fund. Alternatively, the suit may have been brought against the City as the employer who wrongfully deducted amounts from the salaries of policemen and firemen, with individual recoveries to be made based on the amounts erroneously deducted on an individual basis. It would appear, however, that a common fund was present because the court mentioned the amount erroneously deducted[111] and approximated the number of "[p]arties entitled to share in the fund."[112] If a common fund were present in *Gant*, the requisite common interest among the members of the class was present for joinder purposes. If the policemen and firemen had separate and individual claims, on the other hand, the Nebraska joinder provisions would not have been satisfied.

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is therefore not surprising that the court in *Blankenship* retracted the "requirements" set forth in *Gant*.

109. Fisher v. Superior Oil Co., 390 P.2d 521, 526 (Okla. 1964).

110. *See* Cass Clay, Inc. v. Northwestern Pub. Serv. Co., 63 F.R.D. 34, 38 (D.S.D. 1974). Doyle v. Union Ins. Co., 202 Neb. 599, 277 N.W.2d 36 (1979), for example, involved a common fund under this test.

111. 193 Neb. at 109, 225 N.W.2d at 551.

112. *Id.*

B. Potentiality of Conflict of Interest

A second prerequisite to maintaining a class action in Nebraska is that the claims of the representative must be typical of the claims of the class, and the representative must fairly protect the interests of the class.[113] A tool used by the Nebraska Supreme Court to determine whether a representative fairly represents all members of the class is the "potentiality of conflict of interest" test which was applied by the court in *Blankenship v. Omaha Public Power District*.[114] The court, after adopting the doctrine of virtual representation, held that this doctrine implicitly requires "that there must be no conflict of interest between the representative and those represented."[115] The *Blankenship* court found a potentiality for conflict among the members of the class and the representatives,[116] and therefore upheld the trial court's dismissal of the class action aspect of the case upon a motion for summary judgment.

The court in *Blankenship* applied the following rule gleaned from *Evans*:

> As we read [*Evans*], its rule is that if *any* party included in the class stands to suffer an economic loss as the result of his inclusion, the party initiating the class action will "have an interest adverse to those" of the party he purports to represent with the result that the action is not being brought "for the benefit of all members of the class," and the claim as a class suit must therefore fail.[117]

The court in *Evans* dismissed the argument that the action was brought properly as a class action because there existed a possibility that some members of the purported class had an interest adverse to the representatives, stating: "Their interest cannot be said to be sufficiently identical with other ratepayers to permit plaintiff to maintain this action on behalf of all ratepayers."[118] In other words, the potential adverse interest made the class action improper because the purported class members did not have a common interest in the relief demanded.

This "potentiality of conflict of interest" test subsequently was applied by the Nebraska Supreme Court in *Kosowski v. City Betterment Corp*.[119] Citing both *Blankenship* and *Evans*, the court affirmed the district court's grant of a motion for summary judgment dismissing the class action.

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113. Blankenship v. Omaha Pub. Power Dist., 195 Neb. 170, 237 N.W.2d 86 (1976).
114. *Id.*
115. *Id.* at 175, 237 N.W.2d at 89-90.
116. *Id.* at 180, 237 N.W.2d at 90.
117. *Id.* at 175-76, 237 N.W.2d at 90 (emphasis added).
118. Evans v. Metropolitan Utilities Dist., 185 Neb. 464, 468, 176 N.W.2d 679, 681 (1970).
119. 197 Neb. 402, 405, 249 N.W.2d 481, 483 (1977).

A further illustration of the restrictive nature of this test is found in *Twin Loups Reclamation District v. Blessing*.[120] The Nebraska Supreme Court again relied upon the potentiality of conflict of interest analysis to affirm the trial court's denial of representative status.[121] Plaintiffs sought to represent a class of individuals owning land in an irrigation and/or reclamation district which had entered into contracts with the government for water reclamation and supply projects. The court pointed out that "included among the individuals owning land in the district are those who petitioned to be included in the districts and must be thought to favor the undertaking of such a project."[122] Further, the court noted that the purported class included "the very directors whose acts are challenged here."[123]

Thus, the "potentiality of conflict of interest" test is a severe hurdle to overcome even if the joinder requirements are met. This requirement that representatives and class members do not have adverse interests has its roots in due process:

> It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation. It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group, merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford the protection to absent parties which due process requires. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far.[124]

It must be emphasized, however, that the determination of no potential conflicts of interest is not alone sufficient to determine when a class action is authorized under section 25-319. The absence of adverse interests is not equivalent to the presence of the requisite common interest required by the joinder provisions. Furthermore, the following requirements also must be satisfied.

C. Necessity

Even if the joinder requirements are fulfilled and there appears to be no potential conflicts of interest, a class action may be improper if the same result can be reached by suing individually.

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120. 202 Neb. 513, 276 N.W.2d 185 (1979).
121. *Id.* at 523-24, 276 N.W.2d at 191.
122. *Id.* at 524, 276 N.W.2d at 191.
123. *Id.*
124. Hansberry v. Lee, 311 U.S. 32, 44-45 (1940).

In *Berkshire v. Douglas County Board of Equalization*,[125] the Nebraska Supreme Court held:

> We agree that technically the plaintiffs meet the requirements [of section 25-319]. . . .
>
> In determining whether a class action is properly brought, considerable discretion is vested in the trial court. . . . Here, we believe the trial judge could have properly determined that meeting the technical requirements of section 25-319 . . . is insufficient where no useful purpose is served by bringing a suit as a class action. *The plaintiffs are seeking relief indirectly*. The final result is the same whether the actions are class actions or individual actions.[126]

Berkshire involved an appeal by a taxpayer on behalf of all taxpayers in a school district from a decision of the Douglas County Board of Equalization that reduced tax revenues of the school district.[127] Thus, while the taxpayers of the district probably had the requisite common interest, the relief requested actually was derivative, and the court correctly ruled that a class action was not necessary.

Berkshire is significant because many cases have been brought in Nebraska in which the plaintiffs purported to represent all persons similarly situated, but in which the relief sought involved injunctive, derivative, or other equitable relief.[128] Examination of these cases reveals the reason for the *Berkshire* rule—in each case the result would have been identical without the class allegations. Under the rule in *Berkshire*, the trial court should deny the class in cases of this genre because the class action adds nothing to the lawsuit, and the final result would be the same whether a class action is brought or an individual action maintained.

D. Manageability

A class action may also be denied if it is unmanageable. In *Kosowski v. City Betterment Corp.*,[129] the Nebraska Supreme Court expressed the unmanageability aspect in terms of the difficulty or impossibility of identifying class members:

> Also supporting the District Court's granting of the defendant's motion is the inherent unmanageability of the plaintiffs' proposed class action. A total of 1,471,834 lottery tickets were sold by the defendant. No records have been maintained as to the identity of purchasers of lottery tickets. Certainly a substantial number of those who purchased lottery tickets and

125. 200 Neb. 113, 262 N.W.2d 449 (1978).
126. *Id.* at 115-16, 262 N.W.2d at 451-52 (emphasis added).
127. *Id.* at 115, 262 N.W.2d at 451.
128. *See, e.g.*, R-R Realty Co. v. Metropolitan Utilities Dist., 184 Neb. 237, 166 N.W.2d 746 (1969); Hickman v. Loup River Pub. Power Dist., 173 Neb. 428, 113 N.W.2d 617 (1962); May v. City of Kearney, 145 Neb. 475, 17 N.W.2d 448 (1945); Taxpayers League v. Wightman, 139 Neb. 212, 296 N.W. 886 (1941).
129. 197 Neb. 402, 249 N.W.2d 481 (1977).

> lost have discarded their losing tickets. Should the plaintiffs ultimately be successful and an award be recovered, it would be extremely difficult and impractical, if not impossible, to satisfactorily reach and identify, and distribute the award to, those entitled to share in it.[130]

Thus, if all the other requirements for bringing a class action are satisfied, a trial judge can still refuse class action status if he finds the action unmanageable.

E. Procedural Requirements For Class Actions

1. Petition

The Nebraska class action statute gives no guidance with respect to the proper procedure to initiate a class action in Nebraska. The general method is simply to plead that the action is brought on behalf of all persons similarly situated. However, a better practice is to define specifically the class in order to eliminate potential conflicts within a class.[131] Also, the petition should contain allegations showing the necessary joint or common interest, numerosity of parties, impracticability of bringing all members before the court, and that the representatives of the class fairly represent all members of the class.

2. Challenge of Class Status

Unlike Rule 23, there is no class certification procedure in Nebraska.[132] A party wishing to challenge the propriety of a class action prior to trial has two options: (1) demurrer,[133] or (2) summary judgment.[134] Obviously, attacking a class action by demurrer requires the defect to be apparent on the face of the pleadings.[135] Summary judgment allows evidence outside the pleadings to be offered to establish the impropriety of the class action, but there must be no genuine question of triable fact. In determining the propriety of a class action, the trial court has "considerable discretion."[136]

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130. *Id.* at 405, 249 N.W.2d at 483.
131. *See* notes 113-24 & accompanying text *supra*.
132. Twin Loups Reclamation Dist. v. Blessing, 202 Neb. 513, 523, 276 N.W.2d 185, 191 (1979).
133. *Id.*
134. *Id.*; Blankenship v. Omaha Pub. Power Dist., 195 Neb. 170, 177, 237 N.W.2d 86, 88-89 (1976); Note, *Civil Procedure—Class Actions—Summary Judgment—Nebraska Supreme Court Authorizes Summary Judgment for Disposition of Class Action Suit, Blankenship v. O.P.P.D.*, 195 Neb. 170, 237 N.W.2d 86 (1976), 10 CREIGHTON L. REV. 11 (1976).
135. "Speaking demurrers" are not allowed in Nebraska. Christopherson v. Christopherson, 177 Neb. 414, 416, 129 N.W.2d 113, 115 (1964).
136. Berkshire v. Douglas County Bd. of Equalization, 200 Neb. 113, 115, 262 N.W.2d

3. Appeal from Denial of Class

An appeal from an order denying a class action will only be allowed if the order is a final order. A "final order" is defined as "[a]n order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment."[137] Such a final order was found by the Nebraska Supreme Court in *Blankenship v. Omaha Public Power District* in the trial court's granting of a motion for summary judgment and dismissal of "the action without prejudice to the right of the plaintiff to sue on his own behalf."[138] The court allowed an appeal from this order, stating: "[There] was a final order in this case because the summary judgment determined the merits of the plaintiff's claim to represent the class and hence directly affected much of the relief for which he prayed."[139] If the court had not dismissed the lawsuit by its order in *Blankenship*, however, it is doubtful whether the order would have been appealable.

In contrast, "[t]he cases are legion which hold the sustaining of a demurrer . . . is not a final order from which an appeal can be taken."[140] It is doubtful whether the denial of a class action by the sustaining of a demurrer would ever be deemed a final order dismissing the action similar to the one entered in *Blankenship*.[141]

4. Notice to Class Members

Unlike Federal Rule 23(b)(3), the Nebraska class action statute does not require notice to absent class members. As the Nebraska Supreme Court stated in *Gant v. City of Lincoln*: "[W]e still adhere to the general rule which dispenses with such notice in representative actions."[142] The critical phrase is "in representative actions." The representative action which developed in the courts of equity did not include a Rule 23(b)(3) type of class action encompassing common questions of law or fact, the type of class action in which notice to absent class members is required by Rule 23.

The notice required in Rule 23(b)(3) actions was intended to

449, 452, (1978); Gant v. City of Lincoln, 193 Neb. 108, 110, 225 N.W.2d 549, 551 (1975).

137. NEB. REV. STAT. § 25-1902 (Reissue 1979).

138. 195 Neb. 170, 171, 237 N.W.2d 86, 87 (1976).

139. *Id.* at 174, 237 N.W.2d at 89. *See also* Green v. Terrytown, 188 Neb. 840, 199 N.W.2d 610 (1972) (dismissal of one of several defendants must be appealed at the time of dismissal).

140. Root v. School Dist. No. 25, 183 Neb. 22, 23, 157 N.W.2d 887, 878 (1968).

141. *See* text accompanying notes 138-39 *supra*.

142. 193 Neb. 108, 112, 225 N.W.2d 549, 553 (1975).

fulfill the requirements of due process.[143] Thus, if the Nebraska statute were expanded judicially[144] to encompass common questions of law or fact class actions similar to those allowed under Rule 23(b)(3), the statute would violate due process. In any event, the absence of a notice requirement supports the conclusion that class actions maintainable in Nebraska are limited to true representative actions and do not include the Rule 23(b)(3) "common question" class action.

5. Attorneys' Fees

Attorneys' fees are recoverable if authorized by statute or a uniform rule of practice.[145] There is no specific statute or rule allowing attorneys' fees in class actions. However, attorneys' fees may be deducted from amounts recovered if the services of an attorney result in the rescuing or preserving of a large amount of property or funds.[146] Thus, if a class action successfully preserves a common fund,[147] attorneys' fees may be recoverable from the fund before distribution to class members.

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143. Report of the Judicial Conference of the United States, *Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 73, 106-07 (1966). The committee stated:

> Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class procedure is of course subject.

Id.

144. The California Supreme Court, by judicial fiat, has expanded the California class action statute to encompass common questions of law and fact. *See* Darr v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967) and its progeny. California is one of the four states that have retained a class action statute patterned after the Field Code. *See* note 5 *supra*. The dangers inherent in this type of judicial legislation are self-evident.

145. Examples of Nebraska statutes which could allow an award of attorney's fees in a class action are: (1) NEB. REV. STAT. § 59-821 (Reissue 1978) (award of attorney's fees for actions brought for violations of contracts or combinations in restraint of trade or monopolization); (2) NEB. REV. STAT. § 59-1609 (Reissue 1978) (award of attorney's fees in actions brought for violations of the Consumer Protection Act); (3) NEB. REV. STAT. § 44-1525 (Reissue 1978) (award of attorney's fees in actions for unfair or deceptive acts in the insurance business); (4) NEB. REV. STAT. § 25-1801 (Reissue 1979) (limited award of attorney's fees in certain types of small claims if 90 days' notice of claim is given before suit initiated; presumably one notice on behalf of a class would be sufficient); and (5) NEB. REV. STAT. § 8-1118(1) (Reissue 1977) (award of attorney's fees in actions brought for violations of the Securities Act of Nebraska).

146. Gamboni v. County of Otoe, 159 Neb. 417, 437, 67 N.W.2d 489, 502 (1954).

147. *See* notes 109-12 & accompanying text *supra*.

VI. CONCLUSION

The Nebraska class action statute is restricted in scope to cases where the purported members of the class could be joined under the Nebraska joinder rules. As common questions of law or fact, without more, are insufficient for joinder purposes under Nebraska law, a class action based only on common questions of law or fact is not authorized under Nebraska law. Moreover, even if the joinder rules are satisfied, the Nebraska Supreme Court has taken an extremely restrictive approach. In only one case has the court allowed damages to be recovered by a class,[148] and in that case the class action issue was not contested. In other cases, the court imposed strict requirements, including the complete absence of conflicts of interest among members of the class[149] and the necessity of the class action to the ultimate relief requested in the litigation.[150] Therefore, as a practical matter, a plaintiff desiring to pursue a class action in Nebraska should file in federal court whenever possible because it is virtually impossible to maintain such an action in state court.

The basic thrust of this article was to analyze the Nebraska class action procedure and to explain the interrelationship between class actions and joinder. While Nebraska retains the narrow rules of permissive joinder originally enacted in the Field Code over 130 years ago, which necessarily limits the scope of class actions, any legislative committees proposing to revise the Nebraska procedural code must consider the problems inherent in procedural rules patterned after Rule 23. William Simon offered the following criticism:

> Whatever your view of the social benefits of converting the Federal judiciary into a small claims court, the result of this trend has been to frustrate the original goals of the intended reform. Instead of improving efficiency, the [1966] amendment [to Rule 23] has fostered a flood in class litigations which would not otherwise have been brought. Furthermore, some courts, reluctant to dismiss even the most unwieldy class action, have resorted to constitutionally doubtful procedural experiments to make manageable that which is not manageable. And in their zeal to accommodate class litigation, some courts have cavalierly disregarded or distorted the applicable substantive law.
>
> It cannot be said that the cost of thus converting the Federal judiciary into a small claims court has been offset by any substantital social benefit. The principal—perhaps only—beneficiaries have been lawyers. In combining great incentive for unprofessional conduct by lawyers with little

148. *See* notes 92-103 & accompanying text *supra*. In Gant v. City of Lincoln, the defendant initially consented to the class action, and then after the end of the term of court, attempted to attack the consent judgment by raising the class action issue. 193 Neb. 108, 109, 225 N.W.2d 549, 551 (1975).

149. *See* notes 113-24 & accompanying text *supra*.

150. *See* notes 125-28 & accompanying text *supra*.

> potential to benefit their clients, the amended Rule [23], as interpreted by some District Courts, poses serious threats to public confidence in the judiciary and the integrity of the bar.[151]

When New York was considering "reforming" its class action statute, Professor Homburger criticized the restrictive nature of the Field Code and quoted Mr. Justice Oliver Wendall Holmes on the contemporary usefulness of ancient legal institutions in general:

> When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.[152]

This article attempted to bring the Nebraska class action out of its cave. It is hoped that thoughtful consideration will be given to any "reform" of the Nebraska procedural code, and that the reformers understand that the representative action authorized by the Nebraska class action statute is a much different animal than the Rule 23(b)(3) class action. Moreover, even if a Rule 23 type statute is not adopted by Nebraska, liberalization of the Nebraska joinder rules, without express limitations in the class action area, could cause a procedural nightmare because the Nebraska class action statute has none of the due process safeguards incorporated into Rule 23 that were intended to protect the rights of absent class members in Rule 23(b)(3) actions. Thus, piecemeal incorporation of Federal Rule principles into the Nebraska procedural code could cause unintended complications.

151. Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 377 (1972).

152. Homburger, *supra* note 19, at 609 (quoting Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).