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Long-Run Economic Loss: Conflicting Interests of Class Members: *Blankenship v. Omaha Public Power District*, 195 Neb. 170, 237 N.W.2d 86 (1976)

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Note

Long-run Economic Loss: Conflicting Interests of Class Members

Blankenship v. Omaha Public Power District,
195 Neb. 170, 237 N.W.2d 86 (1976).

I. INTRODUCTION

In order to maintain a class action in either the state or federal court system the representative party must fairly and adequately protect the interests of the other class members.¹ It is axiomatic that a representative cannot adequately protect the interests of the class if his interests are antagonistic to or in conflict with those of the class he purports to represent.² The Nebraska Supreme Court in considering the issue of adequacy of representation has applied an economic standard to determine when there is a conflict of interest within a class.³ In *Blankenship v. Omaha Public Power District*⁴ the court held that if any party in the class stands to suffer a long-run economic loss as a result of his inclusion in the class, the representative party will have a conflict of interest with the other class members.⁵ This note will examine the court's authority and

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1. A general rule for all class actions is that the named plaintiff must adequately represent the unnamed class members. See Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B.U.L. Rev. 407, 496 (1969) (a comprehensive examination of procedural problems in state class actions).
 2. Wright & Miller, *Federal Practice and Procedure*, § 1768 (1972). Cases holding that a representative party cannot have interests antagonistic to the members of the class are: *Redmond v. Commerce Trust Co.*, 144 F.2d 140 (8th Cir.), cert. denied, 323 U.S. 776 (1944); *Molina v. Sovereign Camp, W.O.W.*, 6 F.R.D. 385 (D. Neb. 1947). See also note 35 *infra*.
 3. *Blankenship v. Omaha Public Power District*, 195 Neb. 170, 237 N.W.2d 86 (1976).
 4. *Id.*
 5. This holding was based on the court's interpretation of its earlier decision in *Evans v. Metropolitan Utilities Dist.*, 185 Neb. 464, 176 N.W.2d 679 (1970). In *Evans* the plaintiff brought a class action on behalf of himself and all other ratepayers against Metropolitan Utilities District [hereinafter referred to as M.U.D.] to enjoin the making of payments to the City of Omaha under NEB. REV. STAT. § 14-1401 (Reissue 1974). Plaintiffs also sought to recover from the City of Omaha all the

rationale for imposing this economic standard and will discuss the standard's future viability.

II. FACTS OF THE CASE

Robert Blankenship, a customer of Omaha Public Power District, brought a class action alleging that the "late payment charges" imposed by the Omaha Public Power District were usurious.⁶ He alleged two causes of action. In the first cause he sought an accounting and refund on behalf of all those ratepayers of defendant who, in the past five years, had paid the late charges or forfeited discounts.⁷ In the second cause of action he sought an injunction against future imposition of such late charges on behalf of all those customers who would be forced to pay the allegedly illegal charge.

The Omaha Public Power District moved for summary judgment,⁸ alleging that the action could not be maintained as a class

money paid to it since 1947 under said statute by M.U.D. Some of the ratepayers were within the taxing district of Omaha and others were not. In striking down the class action because of a conflict of interest the court stated:

Will all of the ratepayers of MUD from 1947 through 1966 be benefited by plaintiff's action if the plaintiff is successful in securing a judgment of \$4,445,850? It is obvious that the city could pay such judgment only by the levy of a substantial tax against the taxpayers of the city, many of whom would also be MUD ratepayers. The record would indicate that this would require a levy in excess of 5 mills. Plaintiff has lived both inside and outside the city limits during the period in question, but is at present a resident of the city. Without question, ratepayers who are not taxpayers would benefit if a recovery were made. This would include all the ratepayers outside the city limits and those ratepayers within the city who are not taxpayers. All other ratepayers, and these would constitute the larger group, would undoubtedly suffer a loss because they would be taxed for sufficient funds to pay not only the judgment for the amount of the recovery but also for the costs and expenses of the litigation. Their interest cannot be said to be sufficiently identical with other ratepayers to permit plaintiff to maintain this action on behalf of all ratepayers.

Id. at 468, 176 N.W.2d at 681.

6. The merits of the plaintiff's case (whether the late payment charges were in fact usurious) were never considered by the district court or the Supreme Court.
7. The Omaha Public Power District established by affidavits that the total of the "forfeited discounts" for the five years in question was \$2,409,397.31 or approximately \$500,000.00 annually. It also showed by affidavits that if it were required to make refunds of the forfeited discounts and/or to discontinue this billing procedure new higher rates would have to be charged. 195 Neb. at 172, 237 N.W.2d at 88.
8. Nebraska's Summary Judgment Act provisions are found in NEB. REV. STAT. §§ 25-1330 to 25-1336 (Reissue 1975).

suit because there was a conflict of interest between the class members.⁹ The District Court granted the defendant's motion for summary judgment and the plaintiff appealed.¹⁰

The Supreme Court of Nebraska upheld the trial court's summary judgment,¹¹ using the following rationale. If the plaintiff

9. The Omaha Public Power District based its conflict of interest argument on the Nebraska Supreme Court decision of *Evans v. Metropolitan Utilities Dist.*, 185 Neb. 464, 176 N.W.2d 679 (1970). See note 5 *supra*. The plaintiff tried to distinguish *Evans* from the facts of this case by pointing out that in *Evans* there were two distinct groups within the class:

[A] group of allegedly wronged M.U.D. customers who would bear no part of the financial burden of restoration of monies if the suit were successful on the one hand, and, on the other, a group of allegedly wronged M.U.D. customers who would bear a substantial part of the burden if the suit were successful. This latter group were taxpayers and, simultaneously, customers.

Brief for Appellants at 11. The plaintiff argued that in the present case there was no division of the class. If the plaintiff were successful, all Omaha Public Power District ratepayers would bear proportionally the financial burden for the past wrongful actions of the management of the utility. This distinction, however, was not persuasive with the court.

10. The trial judge concluded that:

If plaintiff were to succeed upon the first cause of action, it would be required that defendant accumulate a fund in excess of \$2,000,000,000.00. Its only source would be its rate payers. The result would be that, in some instances, members of the successful class would be subjected to a rate increase (or denied a rate decrease, as the case may be) which would, in dollars or cents, exceed the amount of their recovery, even ignoring the fact that the fund would itself be diminished on account of attorney fees prior to its distribution.

The same result is reached in the second cause of action, though with less clarity. Were plaintiff to succeed, defendant would necessarily be required to modify its rates so as to maintain the \$500,000.00 plus annual income which would otherwise be lost to it. Of the class, in this instance, including all the rate payers, no doubt some would be financially advantaged while some would financially disadvantaged over any period of time.

195 Neb. at 176, 237 N.W.2d at 90.

11. The plaintiff raised the issue as to whether the right of a party to sue as a representative of a class could be determined on a motion for summary judgment. The court replied:

Plaintiff urges that a motion for summary judgment is not an appropriate method for disposing of the issue of the plaintiff's right to sue as representative of a class and that the trial court erred in so doing. His position is that the remedy of summary judgment is available only to determine whether or not there is a factual issue upon which legal liability rests and that the right to represent a class is not such an issue. . . .

If under the undisputed facts the right of a plaintiff to sue as representative of a class is one of law, then there appears to be no reason why that portion of the plaintiff's "claim"

succeeded on the merits of the proposed class action, the Omaha Public Power District would have to increase its rates. The reason for the increase was twofold. First, to make the necessary refunds required by the first cause of action; and second, to replace the lost revenues from the enjoining of the imposition of future late payment charges.¹² These increased rates would be shared by all ratepayers, including members of the class.¹³ Because there were some ratepayers within the class who paid the penalty only once or rarely, they probably would be damaged economically in the long-run by the increased rates.¹⁴ Therefore, the court concluded that there was a potential conflict of interest between the representative party and the other class members which precluded the maintenance of the class action.¹⁵

III. DUE PROCESS REQUIRES NO CONFLICTS OF INTEREST

Most states have enacted class action statutes which fall into one of three groups.¹⁶ They are modeled after the 1848 Field Code of New York, the 1938 Federal Rule, or the 1966 amended Federal Rule.¹⁷ All three types of class action statutes require that

should not be determined under the provision of the statute authorizing such judgment upon "all or any part thereof." § 25-1330, R.R.S.1943. No party cites any case directly on point and we have found none. Defendant called to our attention *Coffelt v. Arkansas Power & Light Co.*, 248 Ark. 313, 451 S.W. 2d 881, which involved a claim such as the one at issue here and was decided upon summary judgment. However, there was in that case no challenge on the class action aspect of the suit. We hold that the right of a party to sue as representative of a class may be raised by a motion for summary judgment.

Id. at 173-74, 237 N.W.2d at 88-89.

12. *Id.* at 179, 237 N.W.2d at 91.

13. *Id.*

14. *Id.* The court in effect was weighing the recovery of each class member against the potential cost of obtaining the recovery.

15. The court did reverse and remand the trial court's dismissal of the suit to allow the plaintiff, Robert Blankenship, to proceed on a cause of action individually.

16. See Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 612 (1971) (an analysis of the current status of class actions in most state jurisdictions); Jaworski & Padgett, *The Class Action in Texas: An Examination and a Proposal*, 12 HOUS. L. REV. 1005 (1975). In addition to the three types of class action statutes mentioned, some jurisdictions recognize the common law class action. See Starrs, *supra* note 1, at 425. See also Comment, *Illinois: A Common Law Approach*, 68 NW. U.L. REV. 1094 (1974).

17. For an individual analysis of each state's class action rule or statute and corresponding case law see Starrs, *supra* note 1, at 433-94. See also Homburger, *supra* note 16.

there be no conflict of interest between the representative party and the other class members.¹⁸

Nebraska's class action statute, modeled after the Field Code,¹⁹ 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.²⁰

The phrase "a common or general interest of many persons" embodies the requirement that there be no conflict of interest between the parties.²¹ This is illustrated by the Nebraska Supreme Court decision of *Evans v. Metropolitan Utilities District*²² where the court stated:

The general rule is that 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 might be brought by them jointly. Persons having an interest adverse to those of parties purported to be represented cannot maintain a representative or class suit on behalf of the latter.²³

The rationale behind the conflict of interest requirement is that most jurisdictions,²⁴ including Nebraska,²⁵ give binding effect to decrees in class action. Therefore, the absent members of the class are bound by the results of the action. This binding effect of class action decrees raises substantial due process questions. If the

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18. See note 1 *supra*. For a discussion of the amended Federal Rule's requirement that there be no conflict of interest see notes 53-56 and accompanying text, *infra*.
 19. See Mattis & Mitchell, *The Trouble With Zahn: Progeny of Snyder v. Harris Further Cripples Class Actions*, 53 NEB. L. REV. 137, 170 (1974). See also Starrs, *supra* note 1, at 433.
 20. NEB. REV. STAT. § 25-319 (Reissue 1975).
 21. Starrs, *supra* note 1, at 501. This phrase, however, has created confusion in the courts on another point. The question is whether "and" should be substituted for "or" in the statute, thereby requiring both a common or general interest and parties so numerous as to make it impracticable to bring them all before the court. For a discussion of this see Homburger, *supra* note 16, and Mattis & Mitchell, *supra* note 19.
 22. 185 Neb. 464, 176 N.W.2d 679 (1970). See note 5 for analysis of the case *supra*.
 23. *Id.* at 467, 176 N.W.2d at 681 (citations omitted).
 24. For an examination of those jurisdictions giving binding effect to decrees see Starrs, *supra* note 1, at 442.
 25. In *Hickman v. Loup River Pub. Power Dist.*, 173 Neb. 428, 113 N.W.2d 617 (1962), the Nebraska Supreme Court held that a class action will have a binding effect on all members of the class. See also *Gant v. City of Lincoln*, 193 Neb. 108, 225 N.W.2d 549 (1975).

members are to be bound conclusively by the result of an action prosecuted or defended by a party claiming to represent their interests, basic notions of fairness and justice demand that they receive adequate representation.²⁶

In most contexts, however, notice of the action is the touchstone that satisfies the due process requirements.²⁷ The notice should be sufficient to give the party an opportunity to appear and to join in the lawsuit or to challenge the claims of representation.

It was this type of notice which the United States Supreme Court required in *Eisen v. Carlisle & Jacquelin*.²⁸ The Nebraska supreme court in *Gant v. City of Lincoln*,²⁹ however, established a more flexible standard for the due process requirement of notice in class actions.³⁰ The court in *Gant* determined that *Eisen* was decided solely upon Rule 23 of the Federal Rules of Civil Proce-

26. See Wright & Miller, *supra* note 2, § 1765. The requirement that members of a class receive adequate representation is illustrated by the leading case of *Hansberry v. Lee*, 311 U.S. 32 (1940). In the course of the opinion it was stated:

Because of the dual and potentially conflicting interests of those who are putative parties to the agreement in compelling or resisting its performance, it is impossible to say, solely because they are parties to it, that any two of them are of the same class. Nor without more, and with the due regard for the protection of the rights of absent parties which due process exacts, can some be permitted to stand in judgment for all.

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 that protection to absent parties which due process requires.

Id. at 44-46.

27. Wright & Miller, *supra* note 2, § 1765.
28. 417 U.S. 156 (1974). In *Eisen* the United States Supreme Court required that individual notice be given to "all members of the class who could be identified through reasonable effort."
29. 193 Neb. 108, 225 N.W.2d 549 (1975). In *Gant* the plaintiff brought a class action on behalf of himself and all other Lincoln policemen and firemen to recover money deducted from their pay for pension purposes. The court determined that under § 25-319 individual notice to class members need not be given.
30. *Annual Survey of Nebraska Law*, 9 CREIGHTON L. REV. 6 (1975) (a concise discussion of the *Gant* decision).

due and that *Eisen* was not authority for the proposition that due process requires individual notice to each class member.³¹ Therefore, the court, relying on Nebraska's class action statute,³² held that individual notice to class members was not required so long as "the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it."³³

Thus, because individual notice of the class action is not required in Nebraska to comply with due process, the courts look long and hard at the common interest requirement to see that no conflict of interest exists. They are obligated to assure that the legal rights of the absent parties are not jeopardized because of inadequate representation by the representative party.³⁴

IV. ANALYSIS AND COMPARISON OF THE COURT'S AUTHORITY AND RATIONALE

The concept that there can be no conflict of interest between the representative party and the other members of the class is supported unanimously by the courts.³⁵ The crucial determina-

31. 193 Neb. at 112, 225 N.W.2d at 552.

32. NEB. REV. STAT. § 25-319 (Reissue 1975).

33. 193 Neb. at 111, 225 N.W.2d at 552. As the *Annual Survey of Nebraska Law*, *supra* note 31, at 8, correctly stated:

The Nebraska Court relied heavily upon the standard set out in *Hansberry v. Lee* to satisfy the due process requirement. Quoting *Hansberry*, the court said:

Here, as elsewhere, the Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits . . . nor does it compel the adoption of the particular rules thought by the Court to be appropriate for the federal courts. With a proper regard for divergent local institutions and interests . . . this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it. . . . It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties.

34. See Comment, *The Class Representative: The Problem of the Absent Plaintiffs*, 68 Nw. U.L. Rev. 1133 (1974).

35. See, e.g., *Sommers v. Abraham Lincoln Fed. Sav. and Loan Ass'n.*, 66 F.R.D. 581 (E.D. Pa. 1975); *American Fin. System, Inc. v. Harlow*, 65 F.R.D. 94 (D. Md. 1974); *Al Barnett & Son, Inc. v. Outboard Marine Corp.*, 64 F.R.D. 43 (D. Del. 1974); *Leisner v. New York Tel. Co.*, 358 F. Supp. 359 (S.D.N.Y. 1973).

tion, however, is what constitutes a conflict of interest. Courts have different, even opposing, views of the degree of conflict needed to preclude the class action.³⁶ In *Blankenship*, the potential economic ramifications of winning on the merits was enough of a conflict of interest to preclude the maintenance of the class action.³⁷

This type of potential economic conflict, which inheres in the granting of monetary relief, is rarely considered.³⁸ Most courts assume that the granting of damages, often on the massive scale necessary in class actions, will accrue to the benefit of class members.³⁹ Recently, however, there appears to be a slowly emerging judicial awareness of the potential economic conflict analysis.⁴⁰

A. Consideration of Economics in State Courts

Most state courts have paid little attention to the potential economic conflicts of interests within a class as a result of winning on the merits of the lawsuit.⁴¹ In *Luitweiler v. Northchester*

36. Note, *Albertson's, Inc. v. Amalgamated Sugar Co.—Preclusion of a Class Action by Speculation*, UTAH L. REV. 842, 844 (1974) (a discussion of recent federal cases conflicting on this requirement).

37. In interpreting *Evans* the court stated:

As we read that case, 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 classification will "have an interest adverse to those" of the party he purports to represent with the result 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.

195 Neb. at 175-76, 237 N.W.2d at 90.

38. Note, *Class Actions: Defining the Typical And Representative Plaintiff Under Subsections (a)(3) and (4) Of Federal Rule 23*, 53 B.U.L. REV. 406, 418 (1973) (a comparison of cases finding the economics irrelevant and others which follow the economic conflict analysis).

39. Note, *supra* note 38.

40. See *Albertson's Inc. v. Amalgamated Sugar Co.*, 62 F.R.D. 43 (D. Utah 1973), *aff'd*, 503 F.2d 459 (10th Cir. 1974) (class action was denied because if plaintiffs prevailed on the action defendants would be forced to charge actual freight rates which would place some members of the class in a subordinate competitive position to other class members—thus a conflict of interest existed). For discussion of this case see Note, *supra* note 36. See also *Lucas v. Wisconsin Electric Power Co.*, 466 F.2d 638 (7th Cir.), *cert. denied*, 409 U.S. 1114 (1973) (see discussion of case at notes 62-66 and accompanying texts *infra*); *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (8th Cir.), *vacated*, 409 U.S. 815 (1972) (see discussion of case at notes 60-66 and accompanying texts *infra*); *Group Hosp. Serv., Inc. v. Barrett*, 426 S.W.2d 310, 315 (Tex. Civ. App. 1968) (radiologists' class action against Blue Cross disallowed because some class members might object due to the fact that if Blue Cross lost, the insurance rates might rise). Note, *supra* note 39, advocates that the courts use this type of analysis.

41. See, e.g., *Javor v. State Board of Equalization*, 12 Cal. 3d 790, 527 P.2d

Corp.,⁴² a class action was brought by a group of tenants against their landlord because of a monthly surcharge imposed on tenants who purchased their propane gas from someone other than the landlord. The tenants sought recovery of past payments and an injunction from future imposition of the surcharge. In holding the class action maintainable the court stated that there were no adverse interests within the class since all parties would benefit from the relief sought.⁴³

In *Luitweiler* the court apparently assumed that the granting of damages and the enjoining of future surcharges would be to the benefit of the tenants. It did not consider the fact that winning on the merits of the suit might cause the landlord to raise the rents which in the long-run could outweigh the benefits of the suit to some tenants.

In *Miami Beach v. Jacobs*,⁴⁴ a class action was held to be proper where the class members sought repayment for fees paid to the city for connection to the water supply. The court did not consider that the long-run economic effect of winning the lawsuit might be an increase in taxes.

Likewise, in *Rugalstad v. Farmers Union Grain Terminal Association*⁴⁵ a farmer brought a class action suit on behalf of all farmers who had obtained advances from the elevator, alleging that the interest rates were usurious. The court held that this was a proper class action and that the representative party fairly and adequately would protect the interests of the other class members.⁴⁶ Again, the court like numerous others,⁴⁷ did not consider the long-run economic effect of winning the lawsuit in determining the adequacy of representation.

If these courts had considered the economic standard set down in *Blankenship* they probably would have come to different results.

1153, 117 Cal. Rptr. 305 (1974); *State v. Dickinson*, 305 S.2d 848 (Fla. 1975); *Northview Constr. Co. v. St. Clair Shores*, 395 Mich. 497, 236 N.W.2d 396 (1975), *aff'd on rehearing*, — Mich. —, 249 N.W.2d 290 (1976); *Lusky v. Capasso Bros.*, 118 N.J. Super. 369, 287 A.2d 736 (1972); *Scarborough v. Elmira Housing Authority*, 78 Misc. 2d 885, 358 N.Y.S.2d 861 (1974); *Mussullem v. Diners Club, Inc.*, 69 Wis. 2d 437, 230 N.W.2d 717 (1975). These cases did not even consider or discuss the possible economic conflict of interest.

42. 456 Pa. 530, 319 A.2d 899 (1974).

43. *Id.* at 534, 319 A.2d at 902.

44. 315 So. 2d 227 (Fla. App. 1975).

45. 226 N.W.2d 370 (N.D. 1975).

46. *Id.* at 375.

47. See note 41 *supra*.

However, none of these courts considered the long-run economic effect of winning the lawsuit in determining the maintenance of the class action. Each of them clearly found that there was adequate representation and therefore that no conflict of interest existed.

The failure of these courts to consider the economic effect of winning the lawsuit can indicate one of two conclusions: (1) the courts failed to realize the potential economic conflict of interests resulting from the winning of the lawsuit; or (2) the courts realized the economic analysis but concluded that it was not a relevant inquiry for determining the maintenance of the class action.⁴⁸ If the latter conclusion is the correct interpretation of these decisions, how can the *Blankenship* opinion be reconciled? One solution is that the Nebraska Supreme Court has made a policy decision to be especially protective of the interests of public utility companies.⁴⁹ Therefore this type of economic analysis will be confined to class actions involving utility companies as defendants.

B. Federal Court Decisions Considering Economic Standard

State courts often have looked to federal decisions for guidance in the class action area.⁵⁰ The Nebraska Supreme Court in *Blankenship* followed this practice. It stated that the policy underlying its holding in *Evans v. Metropolitan Utilities District*,⁵¹ which was the basis for the decision in *Blankenship*,⁵² appealed to be the same as that underlying Rule 23 (a) (3) and (4) of the Federal Rules of Civil Procedure.⁵³ Although there is some doubt as to the precise meaning of the "typicality" requirement of 23 (a) (3),⁵⁴ subsections (a) (3) and (4) generally have been con-

48. Note, *supra* note 38, also came to this conclusion when analyzing the federal cases of *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968); and *Thomas v. Clarke*, 54 F.R.D. 245 (D. Minn. 1971). It concluded that the reason the courts are reluctant to dismiss the case on such grounds is because the class action procedure may be the only vehicle by which substantive claims, individually too small to justify judicial action, can be heard.

49. It is interesting to note that both *Blankenship* and *Evans* (the only cases where this economic standard has been imposed) involved utility companies being sued by their customers.

50. This is especially true with states that have passed class action statutes similar to Rule 23 of the Federal Rules of Civil Procedure.

51. 185 Neb. 464, 176 N.W.2d 679 (1970). See note 5 for discussion of the case *supra*.

52. See note 5 *supra*.

53. 195 Neb. at 177, 237 N.W.2d at 90.

54. *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559 (D. Minn. 1968). For an analysis of the "typicality" requirement see Note, *supra* note 38.

strued by the courts as incorporating the *Hansberry* prohibition of class actions⁵⁵ where the interests of the class members are in conflict.⁵⁶ Rule 23 (a) (3) and (4) provide that:

One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (3) the claims or defenses are typical of the claims or defenses of the class and (4) the representative parties will fairly and adequately protect the interests of the class.⁵⁷

Therefore these subsections are designed to guide a court in exercising its duty to protect the absent class members who will be bound by the judgment unless they opt out.⁵⁸

It is one thing to state the representation prerequisites of Rule 23, but it is quite another to find consistent application of these requirements.⁵⁹ The court in *Blankenship* seemed to rely heavily on the Eighth Circuit's application of the requirements in *Ihrke v. Northern States Power Co.*⁶⁰ In *Ihrke* the plaintiff brought a class

55. See notes 26 and 33 *supra*.

56. See, Note, *supra* note 36, at 844. *E.g.*, *City of Chicago v. General Motors Corp.*, 332 F. Supp. 285 (N.D. Ill. 1971), *aff'd*, 467 F.2d 1262 (7th Cir. 1972); *Schy v. Susquehanna Corp.*, 419 F.2d 1112, 1116-17 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970); *William Goldman Theatres, Inc. v. Paramount Film Distrib. Corp.*, 49 F.R.D. 35, 40 (C.D. Pa. 1969).

57. FED. R. CIV. P. 23(a) (3)-(4).

58. See Note, *supra* note 38, at 408. Subsection (c) (2) (B) of FED. R. CIV. P. 23 specifies that all members of the class, whether present or not, will be bound by the court judgment unless they request exclusion in advance.

59. Compare *Ihrke v. Northern Trust Co.*, 459 F.2d 566 (8th Cir.), *vacated*, 409 U.S. 815 (1972), with *Cottrell v. Virginia Electric Power Co.*, 62 F.R.D. 516 (E.D. Va. 1974).

60. 459 F.2d 566 (8th Cir.), *vacated*, 409 U.S. 815 (1972). Another case the court cited for its authority was *Gerlach v. Allstate Ins. Co.*, 338 F. Supp. 642 (S.D. Fla. 1972). In *Gerlach* the court held a class action to be improper because if the plaintiff's allegation concerning Allstate's truth-in-lending violations were sustained, the damages would render Allstate unable to meet its commitments to provide insurance. Therefore the court denied the class action on the basis that the class members, most of whom were policy holders, would prefer the policy coverage rather than damages. Note, *supra* note 38, in discussing *Gerlach*, also points to other recent decisions determining class action status by looking at the impact on the defendant. See, *e.g.*, *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972); *Rogers v. Coburn Fin. Corp. of DeKalb*, 54 F.R.D. 417 (N.D. Ga. 1972); *Garza v. Chicago Health Clubs*, 56 F.R.D. 548 (N.D. Ill. 1972).

These cases are distinguishable from *Ihrke* and *Blankenship*, however, because in *Ihrke* and *Blankenship* the winning on the merits by the plaintiff will not force defendant out of business. Therefore the court is not faced with total annihilation of the defendant, just a possible increase in rates. Note, *supra* note 38, argues that this type of dis-

action to compel the defendant power company to provide a hearing before terminating service to its users. The court found that a conflict of interest existed within the class and that this violated the "typical" requirement of Rule 23 (a)(3). In coming to this conclusion the court analyzed the plaintiff's possibility of success and stated that:

It is highly unlikely that the claim of the Ihrkes that a hearing should be required after notice and prior to termination, is typical of the claims of the class. It is likely that some customers of Northern would feel that the additional expense of such a procedure, if it is indeed required, could conceivably result in a rate increase to all customers, and this certainly would not be considered desirable by all of the subscribers of Northern.⁶¹

This type of analysis also was adopted in *Lucas v. Wisconsin Electric Power Co.*,⁶² which involved a class action by customers against the power company for terminating service without notice upon nonpayment of the bill. Although no opinion was expressed as to whether this was a proper class action, the court in citing *Ihrke* declared that there was room to doubt whether all customers would desire the due process procedures because of possible increased rates.⁶³

The analysis and rationale of the *Ihrke* and *Lucas* opinions was strongly criticized in *Cottrell v. Virginia Electric Power Co.*⁶⁴ In

tinction should not be recognized. It asserts that the court should consider the economic effect in either case.

61. 459 F.2d at 572. Judge Lay in his concurring opinion disagreed with the court on the maintenance of the class action:

It seems to me that the claim brought here by the plaintiff is one that affects all subscribers to utility services and one in which all subscribers to utility services have a direct interest, to-wit, adequate notice prior to termination of the utility service. I deem this is sufficient interest under Federal Civil Procedure Rule 23 to allow plaintiff to sue as a representative of the class.

Id. at 573.

62. 466 F.2d 638 (7th Cir.), *cert. denied*, 409 U.S. 1114 (1973).

63. *Id.* at 644. Justice Sprecher's dissent, which Chief Justice Swygert joined, stated:

Finally, I believe that this is a proper class action . . . since its possible effect on public utility rates is purely incidental to the constitutional issues involved.

Id. at 672.

In the appellants' brief in *Blankenship* this type of argument was made to the court.

Adverse interest sufficient to defeat the claim of "identity of interests" have to be based on some legal interest as being urged for recognition in the court. *It certainly has to be more than a mere economic consequence.*

Brief for Appellants at 10 (emphasis added). However, the argument must have fallen on deaf ears.

64. 62 F.R.D. 516 (E.D. Va. 1974).

Cottrell a group of residential customers brought a class action against the electric company to compel an opportunity to be heard before termination of services. In holding the suit a proper class action, the court stated:

Typicalness is not a subjective test, authorizing a judge to dismiss a class action based on a substantial legal claim where he thinks some members of the class may prefer to leave the violation of their rights unremedied.⁶⁵ But it was exactly this erroneous interpretation of the term that was applied in *Ihrke v. Northern Power Co.* . . . and *Lucas v. Wisconsin Electric Power Co.* . . .⁶⁶

This type of subjective analysis was used by the Nebraska Supreme Court in denying class action status for the customers of Omaha Public Power District. The court determined that certain members of the class would prefer to pay the possible usurious rates rather than correct the violation of their rights.

This type of subjective analysis by the Supreme Court of Nebraska has evolved out of the court's decision in *Gant v. City of Lincoln*.⁶⁷ Because individual notice of the action is not given to all class members, the Nebraska Supreme Court now is required to substitute its subjective determination of the interests of the absent class members for the determination by the individual parties of their interests.⁶⁸ However, the court's subjective determination that some people would prefer to sit on their rights rather than enforce them because of the long-run economic effect of enforcement, is not the type of consideration a court should use to deny class action status. As one commentator correctly stated, this type of reasoning

is totally foreign to the theory of conflict of interests espoused by other courts and scholars. On this logic, it is difficult to visualize any class action that could be maintained, since it is always possible that there will be some mugwumps who would rather sit on their wrongs than fight to correct them.⁶⁹

Moreover, the interest which the court is seeking to protect in *Blankenship* is the absent members' interests in maintaining a possible illegal rate because it might be cheaper for them in the long-run. In an analogous opinion, however, the declaring of a

65. 3B MOORE'S FEDERAL PRACTICE, ¶ 23-327 (1976).

66. 62 F.R.D. at 520.

67. 193 Neb. 108, 225 N.W.2d 549 (1975). See notes 29-33 *supra*.

68. It might have been easier for the Nebraska Supreme Court to have required individual notice to everyone rather than subjectively determine each absent party's interest.

69. Starrs, *supra* note 1, at 501. This comment was made in reference to *Group Hosp. Serv., Inc. v. Barrett*, 426 S.W.2d 310, 315 (Tex. Civ. App. 1968).

conflict of interest within the class based on some members' possible interest in maintaining an illegal law was struck down.⁷⁰

In *Watson v. Branch County Bank*,⁷¹ a class action was brought challenging the constitutionality of the repossession provisions of the Uniform Commercial Code. The defendant asserted that this was not a proper class action due to a conflict of interest within the class. It contended that if these provisions were declared unconstitutional, the cost of credit would be increased to all members of the plaintiff's class and some members would not be able to secure any credit. This, it was contended, would be contrary to the "interests" of the plaintiff's class, and especially contrary to the interests of those who could no longer obtain credit.

After pointing out that Rule 23 (a)(4) directs the court to take particular care that absent plaintiffs' *legally protectable interests* are not lost unfairly or compromised through the class action⁷² the court stated:

If these repossession statutes are unconstitutional neither the named plaintiffs, nor others similarly situated nor the defendants have any *legally protectable interest in maintaining it, or at least such interest that would render this suit inappropriate as a class action*.⁷³

If the late payment charges in *Blankenship* were usurious, the absent class members had no legally protectable interest in preserving the illegal rates.⁷⁴ By denying class action status in *Blankenship*, the Nebraska Supreme Court protected the absent class members' interests in continuing the usurious rate. It is hard to rationalize the court's declaration of a conflict of interest by protecting an illegal interest. These types of interests are not ones that should render a suit inappropriate as a class action due to a conflict of interest between class members.

C. Application of the Economic Standard

The economic standard which the Nebraska Supreme Court

70. *Watson v. Branch County Bank*, 380 F. Supp. 945 (W.D. Mich. 1974).

71. *Id.*

72. *Id.* at 955.

73. *Id.* (emphasis added).

74. The court in *Blankenship* did not say that there was only a conflict in the relief sought by the plaintiffs, such as between damages or injunction, but that some members wanted no relief at all. For analysis on conflicts in relief sought see Comment, *The Class Representative: The Problem of The Absent Plaintiffs*, 68 NW. U.L. REV. 1133 (1974). The court held that both the damages sought and the injunction created a conflict of interest.

laid down in *Blankenship* is unworkable for a plaintiff seeking to bring a class action. In order to be certain that no conflict of interest exists, the representative party will have to weigh the individual long-run economic effect of winning the lawsuit for each prospective class member and then determine the class accordingly. Few plaintiffs seeking to represent a class will be able to show that there are no potential long-run economic conflicts of interests among any of the hundreds or even thousands of class members.⁷⁵ This type of individual consideration by the representative party to decide who will desire to enforce his rights should not be required.

While reasons might exist in individual cases which would lead to a desire to waive a right rather than bear proportionally the cost of its provision, absent evidence as to individual decisions, the presumptions must go against waiver. Thus plaintiffs need not affirmatively prove an individual calculus on the part of each class member that leads him to reject waiver. The showing that the court's decision will have the same practical effect on all members, i.e., each will pay any, marginal cost increase . . . is sufficient to satisfy plaintiffs' initial burden.⁷⁶

V. CONCLUSION

In view of the Nebraska Supreme Court's recent decision in *Gant v. City of Lincoln*,⁷⁷ which gave a boost to plaintiffs seeking to bring class actions in the state courts, it is hard to rationalize the *Blankenship* opinion. One possible theory is that because the *Gant* decision dispensed with individual notice to all class members the court bent over backwards to assure that the legal rights of absent parties were not jeopardized. With this rationalization, however, it is hard to understand how the absent class members could have a legal right in preserving an illegal rate.⁷⁸ A second theory is that this economic standard is to be confined to the facts of *Blankenship*.⁷⁹ The court in its opinion, however, did not evidence this as its intent.

In either case, the class action procedure for plaintiffs was severely curtailed in *Blankenship*. If this long-run economic loss standard is to be applied broadly in the future it will be hard to visualize any class action that can be maintained when the plaintiff is suing someone with whom he will be dealing in the future.⁸⁰

75. See Note, *supra* note 36, at 850.

76. 62 F.R.D. at 522.

77. See notes 29-33 and accompanying text *supra*.

78. See notes 71-74 and accompanying text *supra*.

79. See note 49 and accompanying text *supra*.

80. When the plaintiff brings a suit against someone he will be dealing

Therefore, although there is some case law supporting this economic analysis, the better approach is that the long-run economic effect of the lawsuit is irrelevant for determining the existence of a conflict of interest between the representative party and the other class members.

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with in the future there is always the possibility that the cost of the suit to the defendant will be passed on through increased prices for goods or services. Thus, under the court's long-run economic standard, the benefits of the lawsuit could be reduced to the plaintiffs and there is a possibility that some plaintiffs in the long-run could be at an economic loss as a result of the suit.