# Federal Rule of Civil Procedure 23(a)(3) Typicality Requirement: The Superfluous Prerequisite to Maintaining a Class Action

Rule 23(a) of the Federal Rules of Civil Procedure contains four prerequisites to bringing a class action.[1] A prospective class representative must satisfy each prerequisite—numerosity, commonality, typicality, and representativeness—to maintain a class action in federal court. Most courts, however, have either ignored the 23(a)(3) typicality requirement or have equated it with other provisions in rule 23.[2] Few courts or commentators have acknowledged the existence of any independent meaning of the typicality prerequisite.[3]

This Comment will review the historical background of the typicality requirement[4] and the treatment of the requirement by courts and commentators.[5] The Comment will also review and criticize attempts to attribute independent significance to the typicality requirement.[6]

## I. Historical Background

When the preliminary draft of the modern Federal Rules of Civil Procedure was promulgated in 1936, it contained no single rule governing class actions.[7] Proposed rules 26 and 27 concerned compulsory and permissive

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1. FED. R. CIV. P. 23 provides in part:
(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.
2. *See* text accompanying notes 32–97 *infra*.
3. *See* text accompanying notes 98–112 *infra*.
4. For a general discussion of the problems of previous equitable remedies that class actions were created to remedy, see Z. CHAFFEE, SOME PROBLEMS OF EQUITY (1950) and W. WALSH, A TREATISE ON EQUITY 553 (1930). *See* text accompanying notes 22–31 *infra*.
5. *See* text accompanying notes 32–112 *infra*.
6. *See* text accompanying notes 113–116 *infra*.
7. *See* Rules of Civil Procedure For The District Courts of The United States And The Supreme Court of The District of Columbia (Preliminary Draft 1936).

joinder, but dealt sparsely with the class action.[8] Professor James W. Moore[9] felt that the law governing class actions was already in a confused state, largely because class actions were viewed as inextricably bound up with jurisdiction and because of the question of the binding effect of a class action judgment.[10] As a result, he urged the acceptance of a separate rule for class actions.[11] His proposal, which introduced the famous "true," "hybrid," and "spurious" classes,[12] was accepted, with modifications, as rule 23 of the Federal Rules of Civil Procedure. The modified version 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:
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> (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;
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> (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
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> (3) several, and there is a common question of law or fact affecting the several and a common relief is sought.[13]

The first rule 23, however, created only confusion about the law of class actions. The rule had at least three major problems.[14] First, it perpetuated the problem of the binding effect of a class action on absent class members. The rule contained no express language regarding absent class members, leaving courts to face the same problems they had encountered under previous equity rules.[15] Ironically, Professor Moore's tentative draft of rule 23 had included the following section:

> (b) Effect of Judgment. The judgment rendered in the first situation [true] is conclusive upon the class; in the second situation [hybrid] it is conclusive upon all parties and privies to the proceeding, and upon all claims whether presented in the proceeding or not, insofar as they do or may affect specific property involved in the proceeding; and in the third situation [spurious] it is conclusive upon only the parties and privies to the proceeding.[16]

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8. *Id.* at 44–48.

9. Professor Moore served as special research assistant to the Supreme Court's drafting committee for the Federal Rules of Civil Procedure. He continues to be a leading American scholar of federal civil procedure and jurisdiction.

10. *See* Moore, *Federal Rules of Civil Procedure: Some Problems Raised By the Preliminary Draft,* 25 GEO. L.J. 551 (1937).

11. *Id.*

12. When a right was joint, common, or derivative, it was considered a "true" class action. When the right was joint and specific property was involved, the action was deemed to be "hybrid." When the right was several and there were common questions of law or fact that predominated, the action was a "spurious" class action. *See* Moore, *Federal Rule of Civil Procedure: Some Problems Raised By the Preliminary Draft,* 25 GEO. L.J. 551, 572–76 (1937). The terms "joint," "common," and "several" were quite ambiguous, and the courts had considerable difficulty with these terms. *See* 1 NEWBERG ON CLASS ACTIONS § 1216 (1977) [hereinafter cited as NEWBERG].

13. FED. R. CIV. P. 23, 308 U.S. 663, 689 (1939).

14. *See* NEWBERG, *supra* note 12, § 1216 at 316.

15. *Id.*

16. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft,* 25 GEO. L.J. 551, 571 (1937).

Nevertheless, the drafters failed to include this section in the final draft of rule 23, a failure attributable to the belief that the effect of judgment was a matter of substance and not one of procedure.[17] The drafters stated, "The Committee consider it beyond their function to deal with the question of the effect of judgments on persons who are not parties."[18]

The second major problem with rule 23 was the difficulty courts had in determining whether a case fit into the "true," "hybrid," or "spurious" category.[19] For example, one commentator noted this difficulty in a discussion of *Deckert v. Independence Shares Corp.*:[20]

> [P]laintiffs claimed that their suit on behalf of defrauded creditors was "hybrid" and defendant contended it was "spurious." The district court said merely that it was a "class bill." . . . In the course of reversing, the court of appeals classified it as "spurious." . . . The Supreme Court decided it was maintainable but gave it no name. . . . The case returned to the district court, which decided it was "hybrid." . . . When it came again to the court of appeals, the court said "names are not important."[21]

The final problem with original rule 23 was its lack of safeguards to assure procedural fairness in a class action. For example, no provision was made to accord notice to the class members. Courts were left to fashion their own rules regarding notice.

Because of these problems, rule 23 was amended in 1966, thereby taking its present form.[22] To provide more manageable standards,[23] the Advisory Committee eliminated the "true," "hybrid," and "spurious" distinctions and added provisions concerning notice and the binding effects of a class action.[24] The numerosity and commonality requirements of rule 23(a)[25] were consistent with Equity Rules of 1842 and 1912,[26] and the adequate representation requirement of rule 23(a)(4) had made its first formal appearance in original rule 23.[27] Also with this revision, the typicality requirement made its appearance. Prior to the 1966 revision, the typicality issue had arisen only when courts were deciding whether a "spurious" class action could be maintained.[28] In

17. *See* Moore and Cohn, *Federal Class Actions — Jurisdiction & Effect of Judgment*, 32 ILL. L. REV. 555 (1938).

18. *Id.* at 556.

19. *See* NEWBERG, *supra* note 12, § 1216 at 316.

20. 311 U.S. 282 (1940).

21. 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1752, at 512 n.39 (citations omitted) (1972).

22. FED. R. CIV. P. 23, 39 F.R.D. 95 (1966).

23. FED. R. CIV. P. 23, Advisory Committee Note.

24. *Id.*

25. *See* note 1 *supra*.

26. Rules of Practice For the Courts of Equity of the United States, Rule 48, 42 U.S. (1 How.) lvi. (1843), provided:

> Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

*See also* Rules of Practice for the Courts of Equity of the United States, Rule 38, 226 U.S. 627, 659 (1912).

27. *See* text accompanying note 13 *supra*.

28. *See* 7 C.WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1764 at 611 (1972).

order to decide, a court had first to determine whether the common questions of law or fact of the class were predominant in the action. Whether or not a claim was "typical" was a crucial part of this determination.

The Committee, however, failed to explain the addition of the typicality requirement.[29] One member of the Advisory Committee later noted that the Committee did not begin its work with the notion that typicality would be a separate prerequisite to bringing a class action.[30] He pointed out that the main purpose of the clause was to ensure that the interests of those representing a class were "squarely aligned" with those of the represented group.[31] However, the Committee's failure to explain the addition of the typicality requirement has only contributed to confusion in applying and interpreting the requirement.

## II. Interpretation and Application of the Typicality Requirement: No Independent Significance

Most courts and commentators have taken the position that the rule 23(a)(3) typicality requirement has no independent significance,[32] and Professor Moore asserts that "there is no need for this clause, since all meanings attributable to it duplicate requirements prescribed by other provisions in Rule 23."[33] The following discussion reviews and analyzes some approaches utilized in treating the typicality prerequisite.

### A. *Analogy to Rule 23(a)(2) Commonality Requirement*

Typicality has often been equated with the commonality requirement of rule 23(a)(2), which provides that one may maintain a class action if "there are questions of law or fact common to the class."[34] In *Satterwhite v. City of Greenville*,[35] for example, the court adopted this approach. The plaintiff was a woman who applied for the position of municipal airport manager for the City of Greenville, Texas. After not being hired for the position, she filed a sex discrimination suit under Title VII of the Civil Rights Act of 1964.[36] She sought to represent a class composed of present and prospective female employees alleged to be victims of the defendant's discriminatory hiring and employment practices. The court refused to certify the case as a class action, largely because of a conflict of interest. The court held that the defendant was justified in not hiring the plaintiff since her husband was both a prime user and tenant at the airport. The court concluded, "[T]he conflict of interest issue

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29. *Id. See* FED. R. CIV. P. 23 (Advisory Comm. Note).

30. *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of The Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967).

31. *Id.* at 387 n.120.

32. Note, *Federal Civil Procedure—Class Actions—Rule 23(a)(3) Typicality Requirement Has Independent Meaning*, 25 KAN. L. REV. 126, 129 (1976) [hereinafter cited as *Class Actions*].

33. 3B MOORE'S FEDERAL PRACTICE § 23.06-2, at 23-185 (2d ed. 1980).

34. *See* note 1 *supra*. *See, e.g.*, Guy v. Abdulla, 57 F.R.D. 14, 17 (N.D. Ohio 1972).

35. 395 F. Supp. 698 (N.D. Tex. 1975).

36. 42 U.S.C. § 2000e (1976).

unique to this case vitiates both the commonality of law and fact questions and the typicality of the claims and defenses."[37] Because the plaintiff failed to establish a nexus between her claims and those of the proposed class, her claims could be neither common nor typical of the class.

The opinion in *Gibbs v. Titelman*[38] followed this like treatment of the commonality and typicality prerequisites. In that case, the plaintiff sought to have declared unconstitutional a Pennsylvania statutory scheme for the repossession of motor vehicles pursuant to conditional sales contracts. The plaintiff contended that the suit should proceed as a class action on the part of both plaintiffs and defendants, with the plaintiffs being those who had had their cars repossessed under the statutory scheme, and the defendants being those who had a license to repossess and had repossessed cars. Using similar criteria in finding that the typicality and commonality requirements were satisfied, the court allowed the case to proceed as a class action. The court stated, "That there is a common question of law is . . . clear. The validity of the statutory scheme relating to the repossession of motor vehicles, as it pertains to both classes, comprises the substance of this action."[39] The court concluded that the typicality requirement had been met, finding that the issues relating to the statutory scheme "[were] necessarily typical of the claims and defenses of each class."[40]

This treatment of rule 23(a)(3) by the courts in *Gibbs* and *Satterwhite* is understandable. If the claim of a litigant contains common questions of law and fact, it would be difficult indeed to then determine that the claim is not typical of the class. Logic suggests that the two are virtually the same.[41] Consequently, the rationale for having a typicality requirement is quite unclear.[42]

A class representative's claim has also been said to be typical "if it arises from the same event or practice or course of conduct that gives rise to claims of other class members, and his or her claims are based on the same legal theory."[43] This approach to typicality simply merges the requirement with commonality and eliminates the need for a separate requirement. Using this approach, the court in *Rakes v. Coleman*[44] stated, "The second requirement [typicality] in effect restates the first [commonality]."[45] The plaintiff in that case was attacking a Virginia practice by which officials confined alcoholics for "treatment and rehabilitation." Since all alcoholics were given the same

37. 395 F. Supp. 698, 701 (N.D. Tex. 1975).
38. 369 F. Supp. 38 (E.D. Pa. 1973).
39. *Id.* at 52.
40. *Id.*
41. "Common" is defined as "belonging equally to two or more; shared by all alike; joint." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 268 (1969). "Typical" is defined as "exhibiting the traits or characteristics peculiar to its kind, class, group, or the like." *Id.* at 1388.
42. *See* text accompanying notes 29-31 *supra*.
43. NEWBERG, *supra* note 12, § 1115b at 185.
44. 318 F. Supp. 181 (E.D. Va. 1970).
45. *Id.* at 190.

treatment, it followed that the defendants' action toward the plaintiff was common to all alcoholics who had been treated under the provision.

Likewise, in determining that the prerequisites for bringing a class action had been met, the court in *Adderly v. Wainwright*[46] found that an attack by the plaintiff on the Florida death penalty and Florida capital punishment cases provided "questions of law or fact common to the class, and which [were] typical of the claims of the class."[47] The plaintiff purported to represent more than fifty prisoners who had been subjected to those practices. Since all the class members had been sentenced under the Florida death penalty statute, they shared "common questions of law and fact." Although the prisoners may have received the death penalty for varying reasons, one prisoner's claim could still be found typical because all faced the same fate. Because of the treatment of typicality in *Adderly* and like cases,[48] it can be seen that the typicality requirement merely duplicates the commonality requirement.

B. *Analogy to Rule 23(a)(4) Adequate Representation Requirement*

Subsection (a)(4) of rule 23 provides that a class action may be maintained if the representative parties will "fairly and adequately protect the interests of the class."[49] This provision is premised on the idea that an individual adequately represents the class when his interests are aligned with those of the class members.[50] Consequently, a class representative will adequately represent a class if, in pursuing his interests through litigation, the class's interests will also be furthered. There has been considerable confusion among the courts,[51] however, in defining the typicality requirement so as to keep it separate from the adequate representation requirement.[52] The apparent reasoning is that it is logical that an individual's claims are "typical of those of the class if his interests are aligned with those of the class members."

A prime example of this reasoning can be seen in the Second Circuit decision in *Inmates of the Attica Correctional Facility v. Rockefeller*.[53] The inmates of Attica, a New York state penal instiution, sought an injunction against any interrogation of inmates with regard to the September 1971 uprising there. The court found that the commonality requirement had been met because all the inmates would be subject to interrogation. It held, however, that the plaintiff's claims were by no means typical, pointing out that

> [s]ome [inmates] did not participate at all in the uprising, while others did. Some may be threatened with state prosecution, while others will not. Some, therefore,

46. 46 F.R.D. 97 (M.D. Fla. 1968).
47. *Id.* at 98.
48. *See also* Green v. Wolf Corp., 406 F.2d 291, 299 (2d Cir. 1968); Hyatt v. United Aircraft Corp., 50 F.R.D. 242, 247 (D. Conn. 1970).
49. *See* note 1 *supra*.
50. *See* text accompanying note 31 *supra*.
51. *See, e.g.*, Vernon J. Rockler and Co. v. Graphic Enterprises, Inc., 52 F.R.D. 335 (D. Minn. 1971).
52. *See* 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, 409 (1973).
53. 453 F.2d 12 (2d Cir. 1971).

> may be called upon to testify with respect to criminal acts committed by others, and may even desire to do so, while others may desire the opposite.[54]

Therefore, the court held, the interests of one group could not be adequately represented by members of another. The court's analysis appears quite valid. Indeed, if an individual's interests are not aligned with those of the class, then logically his interests are not "typical" of those of the class.

In applying the rule 23(a)(4) requirement, some courts have simply ignored the typicality requirement. For example, in *duPont v. Perot*,[55] a breach of fiduciary duty and common law fraud case, the court stated, "Since 23(a)(3) has been equated with the 23(a)(4) requirement . . . , discussion of both subdivisions will be conducted under 23(a)(4)."[56] Although the court said it would consider subsections (a)(3) and (a)(4) together, it simply examined whether the adequate representation requirement had been met and announced that "the requirements of Fed. R. Civ. P. 23(a)(3) and (4) [had] not been met."[57]

Significantly, the courts have utilized a variety of standards in this line of cases equating subsections (a)(3) and (a)(4) to determine whether a class action is appropriate. One commentator has grouped these approaches into three categories: the "benefit" test, the "no conflict" test, and the "exact equation" test.[58] Under the "benefit" test, a plaintiff's claim meets both the typicality and adequate representation requirements if the proposed class will benefit from the action. The well-known case of *Eisen v. Carlisle & Jacquelin*[59] falls into this category. In *Eisen*, which involved a proposed class of nearly four million odd-lot buyers on the New York Stock Exchange, the court found the typicality requirement satisfied, stating, "Although there are varying fact patterns underlying each individual odd-lot transaction, the same allegedly unlawful differential is charged to all buyers and sellers . . . , [and] all members of the class . . . will be helped if the rates are found to be excessive."[60] Examining the rule 23(a)(4) requirement, the court concluded that adequate representation, when read with "coextensive" interest,[61] "amounts to little more than an alternative way of stating that the plaintiff's claim must be typical of those of the entire class . . . ."[62]

The "no conflict" test requires that there be no conflict between the claims of the class representative and those of the class. If there is no conflict, unlike the situation in the *Attica* case,[63] the court will conclude that the plaintiff's claim must be typical and that he will fairly represent the interests

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54. *Id.* at 24.
55. 59 F.R.D. 404 (S.D.N.Y. 1973).
56. *Id.* at 409.
57. *Id.* at 412.
58. *See Class Actions*, *supra* note 32, at 130–32.
59. 391 F.2d 555 (2d Cir. 1968).
60. *Id.* at 562.
61. *See* text accompanying notes 72–82 *infra*.
62. 391 F.2d 555, 562 (2d Cir. 1968).
63. *See* text accompanying note 53 *supra*.

of all class members. In *Weiss v. Tenney Corp.*,[64] the court took the position that typicality means "only that plaintiff not have interests in conflict with those of the other members of the class."[65] The plaintiff brought an action under the Securities Act of 1933[66] and the Securities Exchange Act of 1934[67] alleging fraud and misrepresentation in the issuance of Tenney stock. Since all purchasers of the Tenney stock had relied on the same material misstatements and would have to offer proof of the same nature to support their claims, the court concluded, "Insofar as plaintiff relies on section 11 [of the Securities Act of 1933] to gain recovery, his interests are not in any manner adverse to or in conflict with others in the same class."[68]

To meet the "exact equation" test, one must positively show that he can adequately represent the interests of the class. This approach differs from the "no conflict" test in that it places a heavier burden on the plaintiff to show that his claims are in fact typical and that he will adequately represent the class.[69] *Mudd v. Busse*[70] illustrates the application of this test. The case involved an action brought by pretrial state court detainees seeking to maintain a class action against all Indiana judicial officers who had denied or would deny release to individuals prior to conviction solely for inability to post bond. The court found that typicality is merely a facet of the adequate representation requirement, stating:

> In the case of nontypical claims or defenses generally, the Rule 23(a)(3) requirement shades over into the 23(a)(4) requirement of fair and adequate representation of the class. . . . Where there is indication that the representative may be particularly interested in a claim or defense unique to him or a subclass, the court is justified in denying class action certification on the grounds of inadequate representation.[71]

Under this approach, the typicality and adequate representation requirements are met in the same instance.

All three standards, however, appear to be variations of the "co-extensive" interest approach to satisfying the 23(a)(4) adequate representation requirement.[72] Under this approach, one may maintain a class action if his interests are "co-extensive" with those of the other class members and no antagonistic interests are present. The opinion in *Robertson v. National Basketball Association*[73] is representative of those in which courts have recognized the interrelationship between typicality and adequate representation and have resolved the two together. In *Robertson*, player representatives of

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64. 47 F.R.D. 283 (S.D.N.Y. 1969).
65. *Id.* at 290.
66. 15 U.S.C. § 77a (1976) (as amended).
67. 15 U.S.C. § 78a (1976) (as amended).
68. 47 F.R.D. 283, 290 (S.D.N.Y. 1969).
69. *See Class Actions*, *supra* note 32, at 132.
70. 68 F.R.D. 522 (N.D. Ind. 1975).
71. *Id.* at 529.
72. *See* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1764, at 612 (1972).
73. 389 F. Supp. 867 (S.D.N.Y. 1975).

National Basketball Association and American Basketball Association teams brought an antitrust action against the two basketball leagues. The plaintiffs sought to represent all NBA and ABA players, alleging that the reserve clause, uniform player contracts, and the college draft violated antitrust laws.[74] Holding that the action could proceed as a class action, the court found that the requirements of subsections (a)(3) and (a)(4) "are virtually the same, . . . to wit, the interests of the named plaintiffs must be co-extensive with the interests of the proposed class members, and the plaintiff's interests may not be antagonistic or adverse to the interests of the class."[75]

The "co-extensive" interest approach seems to suggest that to satisfy the typicality and adequate representation requirements, the plaintiff's claims must be "identical" to those of absent class members.[76] However, as one commentator noted, "To the extent that 'co-extensive' might suggest that the representatives' claims must be substantially identical to those of absent class members, it is too demanding a standard. Quite properly, a number of courts have taken a more permissive approach to Rule 23(a)(3)."[77] Several courts have found the "co-extensive" interest approach satisfied even though the facts relating to class members varied. In *Cannon v. Texas Gulf Sulphur Co.*,[78] for example, the plaintiff sought to represent all common stock shareholders who had sold their stock to defendant in reliance on a press release allegedly prepared with reckless disregard for the consequences. The court allowed the action to proceed as a class action, using the "co-extensive" interest approach to satisfy rule 23(a)(3) and (a)(4) requirements. It found that the plaintiff's interests were "co-extensive" with those of the other class members even though different fact patterns had led individual class members to sell their stock. Because the defendant's fraudulent motives were found to be pervasive, the variation in fact patterns was held irrelevant.[79]

Other courts have used the "co-extensive" interest approach to satisfy subsections (a)(3) and (a)(4), even where there would be a disparity in the damages the class members would receive. In *Vuyanich v. Republic National Bank of Dallas*,[80] persons allegedly aggrieved by the defendant's employment practices were allowed to represent other class members who suffered from different practices entitling them to a different measure of damages. The typicality and adequate representation requirements were met as the court found there was a sufficient nexus among the practices because each class member's suffering was a result of the same animus.[81]

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74. *Id.* at 873.
75. *Id.* at 898.
76. *See* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1764, at 612 (1972).
77. *Id.*
78. 47 F.R.D. 60 (S.D.N.Y. 1969).
79. *Id.* at 63.
80. 78 F.R.D. 352 (E.D. Tex. 1978).
81. *Id.* at 356.

Thus, in determining whether the "co-extensive" interest test has been satisfied in meeting the typicality and adequate representation requirements, the courts have looked at "(1) Whether the interests of the named plaintiff are 'co-extensive' with the interests of the proposed class; (2) whether his interests are in any way antagonistic to the interests of the proposed class; and (3) any other facts bearing on the ability of the named party to speak for the class."[82] The equation of typicality to adequate representation in the "co-extensive" approach is comprehensible. Both prerequisites place an overlapping requirement on a prospective class member to ensure that the rights of class members will be adequately protected.

### C. *Analogy to Rule 23(b)(3) Predominance of Common Questions Requirement.*

To maintain a class action under the Federal Rules of Civil Procedure, one must satisfy the conditions of one of the subsections of rule 23(b)[83] in addition to all the conditions of rule 23(a). The typicality requirement has also been associated with the rule 23(b)(3) condition that a class action is appropriate if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members. . . ."[84] Therefore, a court must compare and contrast the claims of the class representative with those of the class under both subsections (a)(3) and (b)(3). Examining a class representative's claim to determine whether it is "typical" would necessarily involve consideration of some of the same factors to determine whether class questions predominate over individual claims.

If one equates typicality with the rule 23(a)(2) commonality requirement,[85] for example, one must determine whether a proposed class representative's claims are typical or common of the class. If the representative's claims are found typical under this approach, then little will be required in meeting the requisites of subsection (b)(3);[86] one need only determine whether the questions common to the class outweigh any individual's claim. On the other hand, if one equates typicality with the adequate representation requirement[87] and uses the "co-extensive" interest approach, then more should be required to satisfy subsection (b)(3).[88] Satisfying the former will not necessarily involve deciding whether any common questions are present at all. Under subsection (b)(3), one still must ascertain whether there are common to all class members questions that predominate over any underlying interest. Finally, if typicality means that a representative's claims must be "identical" to those of the class, then the need for (b)(3) is obviated. For if a plaintiff's

82. *See* duPont v. Perot, 59 F.R.D. 404, 410 (S.D.N.Y. 1973).
83. *See* note 1 *supra*.
84. *Id.*
85. *See* text accompanying notes 34–48 *supra*.
86. *See Class Actions, supra* note 32, at 133.
87. *See* text accompanying notes 49–82 *supra*.
88. *See Class Actions, supra* note 32, at 133.

claim is identical to those of the class, then common questions do predominate over any other.

Since the typicality requirement must first be met before a proposed class action can be analyzed under subsection (b)(3), some courts[89] have equated the two to avoid displacing or heightening the "predominance of common questions" requirement.[90] In effect, however, they have displaced the typicality requirement. For example, in *Swanson v. American Consumer Industries*,[91] the plaintiff brought an action on behalf of himself and all other similarly situated stockholders to enjoin the sale of a dissolved corporation's assets to the defendant and to rescind a reorganization agreement between those companies. The district court held that the class action could not be maintained because the plaintiff's claims were not typical of the class.[92] The Seventh Circuit reversed, finding that the claim was typical since it involved the central question of alleged deceptive practices common to all stockholders.[93] The court went on to find that the common issues predominated, stating:

> [S]ome minority shareholders may have accepted the offer as a result of the deception alleged, and . . . others may have failed to vote as a result of the notice, thus losing their right to seek appraisal for the fair value of their shares. The central question common to all of the minority shareholders is that of deception, and in our opinion this issue outweighs the minor variations among the stockholders based on the degree of reliance upon the notice of meeting. . . . [T]he utility of Rule 23 would be destroyed if a class action were denied simply because all of the allegations of the class did not fit together like pieces of a jigsaw puzzle.[94]

Similarly, in *Feder v. Harrington*,[95] the court utilized a subsection (b)(3) approach in satisfying the typicality requirement. The case was brought by a stockholder against a corporation and its officers who had made a tender offer containing untrue statements and omissions of material facts upon which plaintiff had relied in tendering her shares. The court, for all practical purposes, ignored the typicality requirement in its examination of subsections (a)(3) and (b)(3), stating, "[T]he class issues will predominate if the complaint alleges a common course of conduct over a period of time, directed against the members of the class, generally relied upon, and violating common statutory provisions."[96] The fact that individual stockholders had tendered their stock for varying reasons was found to be overshadowed by defendant's fraudulent actions, which were common to all stockholders.

As these cases suggest, subsection (a)(3) retains little independent significance. As one commentator notes,

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89. *See, e.g.*, Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967).
90. *See Class Actions*, *supra* note 32, at 133.
91. 288 F. Supp. 60 (S.D. Ill. 1968), *rev'd*, 415 F.2d 1326 (7th Cir. 1969).
92. *Id.* at 60.
93. 415 F.2d 1326, 1333 (7th Cir. 1969).
94. *Id.*
95. 52 F.R.D. 178 (S.D.N.Y. 1970).
96. *Id.* at 183.

> Since most plaintiffs' claims have arisen from the same transaction or same type of transaction, the typicality requirement has generally been found satisfied. In fact, those cases which have found plaintiff's claim to be atypical have generally involved situations where all the claims were sufficiently different that common questions did not predominate as required by Rule 23(b)(3).[97]

The equation of typicality with rule 23(b)(3) once again supports the view that the typicality requirement has no independent significance.

## III. THE TYPICALITY REQUIREMENT: INDEPENDENT SIGNIFICANCE

Some courts have rejected the theory that the rule 23(a)(3) typicality requirement is dependent upon the other requirements of rule 23 and have sought to give it independent meaning. The first attempt to do so was in *White v. Cates Rubber Co.*,[98] an employment discrimination action. The *White* court rejected all previous approaches to the treatment of typicality and stated that the requirement "must" be given an independent meaning.[99] Although the court did not explain the necessity of finding independent significance, it did articulate its standard for meeting the typicality requirement: "A . . . reasonable reading of the requirement would seem to entail the necessity of demonstrating that there are other members of the class who have the same or similar grievances as the plaintiff."[100]

The Tenth Circuit subsequently adopted the *White* approach in *Taylor v. Safeway Stores, Inc.*,[101] another employment discrimination case. In its opinion, the court accepted "*White's* compelling reasoning that subsection (a)(3) must have a meaning independent of the other provisions of Rule 23(a),"[102] but, like the *White* court, failed to articulate its reasoning for the necessity of this interpretation. The *Taylor* court also ruled that a class member must comply with the typicality requirement by showing the existence of a class with actual grievances, stating, "[I]t is not unreasonable to require the plaintiff to establish the existence of a class as preliminary to the court's comparison of claims and defenses."[103] It would be unrealistic for a court to compare the claims and defenses of the plaintiff with the hypothetical claims of a hypothetical class. Under this ruling, the class representative was also required to show compliance with the typicality requirement before proceeding to discovery.

Very few other jurisdictions have followed the *White* and *Taylor* courts' interpretations of typicality,[104] most likely because there are several serious

97. Landers, *Of Legalized Blackmail And Legalized Theft: Consumer Class Actions And The Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 844 (1974).

98. 53 F.R.D. 412 (D. Colo. 1971).

99. *Id.* at 415.

100. *Id. See also* text accompanying notes 104–112 *infra*.

101. 524 F.2d 263 (10th Cir. 1975).

102. *Id.* at 270.

103. *Id.*

104. *See, e.g.*, Wright v. Stone Container Corp., 524 F.2d 1058 (8th Cir. 1975); Jamerson v. Board of Trustees of Univ. of Ala., 80 F.R.D. 744 (N.D. Ala. 1978).

flaws in those opinions. Both courts expressed the view that typicality "must" be accorded independent significance and equal status with the other requirements of rule 23, but neither cited any source to substantiate this assertion. As was noted, rule 23 originally contained only the numerosity, commonality, and adequate representation requirements.[105] The *White* and *Taylor* courts, however, offered *no* explanation of why the typicality requirement was added or what is entailed in meeting this prerequisite. However, as Professor Moore has observed:

> A reasonable meaning can be ascribed [to the typicality requirement] by observing that the Rule 23(a) prerequisites describe four analytical steps which focus upon sequential sets of concrete facts, relationships, and requirements. All these overlap but are essential preconditions to structuring the controversy for judicial resolution.[106]

Nevertheless, this writer contends that the *White* and *Taylor* courts should have examined the interrelationships between all the rule 23(a) prerequisites before according the typicality requirement independent status.[107] The rationale behind having prerequisites is to ensure that the rights of class members will be protected. Other requirements in rule 23 adequately protect those rights. Typicality merely duplicates those requirements.

At one level, requiring that a prospective class member demonstrate that he has grievances that are the same as or similar to those of other class members gives the rule no independent meaning. One must prove the same thing in complying with the (a)(2) commonality requirement. In this respect, the *White-Taylor* standard for meeting the typicality requirement is no different from the treatment accorded the requirement by those courts[108] that have failed to lend the requirement any independent meaning.

At a second level, though, the *White* and *Taylor* rationales have in fact added a new requirement to rule 23 in their attempts to show the independent significance of the typicality requirement: a prospective class representative must show the actual, not hypothetical, existence of a class having grievances in common with that of the representative.[109] Nowhere in rule 23 or its advisory committee notes is there a requirement that there be a showing of actual claims.[110] Furthermore, such a showing would be contrary to the primary purpose of the class action. The class action is a tool of convenience, and the requirements of rule 23(a) are present to protect the interests of class members. If the requirement of showing the actual existence of a class having

105. *See* text accompanying note 13 *supra*.

106. 3B MOORE'S FEDERAL PRACTICE § 23.06-2, at 23-191 (2d ed. 1980).

107. *See* Note, *Procedure—Federal Rule of Civil Procedure 23(a)—Typicality Requirement for Class Actions Reviewed.* Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975), 80 DICK. L. REV. 835, 839 (1975).

108. *See* text accompanying notes 32-97 *supra*.

109. *See* Note, *Procedure—Federal Rule of Civil Procedure 23(a)—Typicality Requirement for Class Actions Reviewed.* Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975), 80 DICK. L. REV. 835, 839 (1975).

110. *See* FED. R. CIV. P. 23, Advisory Committee Note.

grievances common to those of the proposed class representative had been made a part of rule 23, many actions under Title VII of the Civil Rights Act of 1964 could never have been successfully litigated.[111] This additional requirement also places a heavier burden upon a class representative because it would require that he spend considerable time, effort, and money locating class members. Furthermore, the requirement that this be accomplished prior to beginning discovery is contrary to the weight of authority; discovery, an essential part of establishing class claims, would be severely limited by the *White-Taylor* requirement.[112]

In sum, the attempts by the *White* and *Taylor* courts to give the typicality requirement an independent meaning are dismal failures. The only plausible independent significance of the requirement is that it acts as a double safeguard to ensure that the rights of class members will be adequately protected. Typicality, however, is unnecessarily duplicative of the other requirements of rule 23.

## IV. Rule 23 Should Be Amended

To avoid future confusion, rule 23 should be amended either to eliminate or to define precisely the typicality requirement. The National Conference of Commissioners on Uniform State Laws has drafted a proposed rule which would eliminate the typicality requirement. Section 1 of its Uniform Class Action Act[113] provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all in a class action if:
>
> (1) the class is so numerous or so constituted that joinder of all members, whether or not otherwise required or permitted, is impracticable; and
>
> (2) there is a question of law or fact common to the class.[114]

The adequate representation requirement appears in section 2(b) of the Act: "The court may certify an action as a class action, if it finds that . . . the representative parties fairly and adequately will protect the interests of the class."[115]

The proposal would protect absent class members and sustain the viability of the class action without imposing a typicality requirement. It would not pose any substantial problems since most courts have treated the typicality requirement along with one of the other requirements of rule 23.[116] Thus, the typicality requirement is unnecessary. Further, the other three prerequisites of rule 23 are adequate safeguards to protect class members.

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111. *See, e.g.*, Satterwhite v. City of Greenville, 395 F. Supp. 698 (N.D. Tex. 1975). *See also* text accompanying notes 35–36 *supra*.

112. *See Class Actions*, *supra* note 32, at 139.

113. Handbook of The National Conference of Commissioners on Uniform State Laws 135 (1976).

114. *Id.*

115. *Id.*

116. *See* text accompanying notes 32–97 *supra*.

An alternative to eliminating the typicality requirement would be to give the requirement a precise meaning, one that is independent of the other requirements for bringing a class action. However, this writer has no suggestions as to what that definition of typicality would be. All reasonable attempts to give the typicality requirement independent meaning have resulted in duplication of the other requirements. Therefore, the more reasonable alternative would be to eliminate the typicality requirement from rule 23.

## V. CONCLUSION

The class action has been plagued with problems since its inception. While some of the problems, such as the binding effect of a class action on class members and other procedural difficulties, have been resolved over time, the addition of the typicality requirement by the 1966 revision of rule 23 has posed only problems. There has been considerable difficulty in ascertaining what typicality means. It has been equated with the rule 23(a)(2) commonality requirement, the rule 23(a)(4) adequate representation requirement, and the rule 23(b)(3) "predominance of common questions" requirement. Attempts to give the typicality requirement independent meaning have presented no unique definitions to help alleviate the confusion, but instead have only further complicated existing difficulties.

Therefore, rule 23(a) should be amended to eliminate the typicality requirement. The goal of ensuring that the rights of class members are adequately protected would be no less well served because other provisions of the rule already overlap it and are sufficiently broad enough to protect all class members. Unless some precise meaning can be ascribed to the typicality requirement, its elimination is the most practical and reasonable alternative.

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