VOLUNTARILY UNLOCKING THE SCHOOLHOUSE DOOR: THE USE OF CLASS ACTION CONSENT DECREES IN SCHOOL DESEGREGATION

Twenty-eight years after the Supreme Court declared racially dual school systems unconstitutional,[1] many students still attend segregated public schools.[2] As a result of social, economic, and demographic forces,[3] urban school systems may in fact be more racially segregated today than in 1954. City school districts in metropolitan centers frequently have a high percentage of black students and a correspondingly low percentage of white students. In surrounding suburban schools, however, the converse is true.[4] Because school districts are generally coterminous with political boundaries, intradistrict desegregation alone cannot achieve racial balance in urban communities. The only effective remedy is to alter the boundary lines between city and suburban school systems by either transferring students among school districts or consolidating districts.

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1. Brown v. Board of Educ., 347 U.S. 483 (1954). The Court said:

> [I]n the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment . . . .

Id. at 495.

2. Data from the fall, 1976 Elementary and Secondary School Civil Rights Survey conducted by the Office of Civil Rights of the United States Department of Health, Education & Welfare showed that nearly 50% of all minority school children attended schools with moderate to high levels of segregation. U.S. COMMISSION ON CIVIL RIGHTS, DESEGREGATION OF THE NATION'S PUBLIC SCHOOLS: A STATUS REPORT 21 (1979) [hereinafter cited as DESEGREGATION STATUS REPORT]. The survey used an index of segregation ranging from 0.0, indicating no segregation within a school district, to 1.0, indicating complete segregation. Moderate segregation had an index of 0.20 to 0.49, and an index of 0.50 or greater indicated a high level of segregation. *Id.* at 19.

3. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 480 (1979) (Powell, J., dissenting).

4. The nonwhite student population in city schools in 1977 was over 60% in Cleveland; Dade County, Florida; Kansas City, Missouri; and Los Angeles; over 70% in Baltimore, Chicago, New York City, and St. Louis; and over 80% in Atlanta and Detroit. DESEGREGATION STATUS REPORT, *supra* note 2, at 28-66. By contrast, the nonwhite suburban population in 1970 was three percent in Baltimore and Chicago and four percent in Detroit. W. TAYLOR, STATEMENT ON METROPOLITAN SCHOOL DESEGREGATION 15 (1977).

One means of achieving racial balance is through court-ordered interdistrict desegregation.[5] The only United States Supreme Court pronouncement on this subject came in *Milliken v. Bradley*.[6] The Court held that, absent constitutional violations by surrounding school districts, a federal district court abused its remedial discretion by ordering a multi-district remedy for unconstitutional segregation by a single-district. *Milliken* did not, however, bar multi-district remedies in those cases in which the effects of the unconstitutional segregation extend beyond district limits.[7] Since that decision, both federal and state courts have found such remedies necessary to rectify multi-district segregation.[8]

Two recent Supreme Court decisions demonstrate the continued commitment of the Court to effectuate remediation of de jure segregation,[9] at least in the single-district context, and may allow plaintiffs in school desegregation cases to establish a need for interdistrict relief. In

5. Interdistrict and multi-district school desegregation cross the boundary lines of two or more districts. Intra-district and single-district desegregation are confined to one school district.

6. 418 U.S. 717 (1974).

7. *Id.* at 744-45. *See* Kanner, *Interdistrict Remedies for School Desegregation after* Milliken v. Bradley *and* Hills v. Gautreaux, 48 MISS. L.J. 33 (1977); Levin & Moise, *School Desegregation Litigation in the Seventies and the Use of Social Science Evidence: An Annotated Guide*, 39 LAW & CONTEMP. PROB. 50 (1975); Manley, *School Desegregation in the North: A Post-*Milliken *Strategy for Obtaining Metropolitan Relief*, 20 ST. LOUIS U.L.J. 585 (1976); Sedler, *Metropolitan Desegregation in the Wake of* Milliken*—On Losing Big Battles and Winning Small Wars: The View Largely From Within*, 1975 WASH. U.L.Q. 535; Taylor, *The Supreme Court and Urban Reality: A Tactical Analysis of* Milliken v. Bradley, 21 WAYNE L. REV. 751 (1975); Note, *Interdistrict Desegregation: The Remaining Options*, 28 STAN. L. REV. 521 (1976). *But cf.* Comment, Milliken v. Bradley *in Historical Perspective: The Supreme Court Comes Full Circle*, 69 NW. U.L. REV. 799 (1974) (*Milliken* ends possibility of remedying segregation and represents a departure from earlier law).

8. Morrillton School Dist. No. 32 v. United States, 606 F.2d 222 (8th Cir. 1979) (ordering interdistrict remedies), *cert. denied,* 444 U.S. 1050 (1980); United States v. Missouri, 515 F.2d 1365 (8th Cir.) (en banc) (ordering consolidation of three school districts), *cert. denied,* 423 U.S. 951 (1975); Newberg Area Council, Inc. v. Board of Educ., 510 F.2d 1358 (6th Cir. 1974) (ordering interdistrict remedies), *cert. denied,* 421 U.S. 931 (1975); Berry v. School Dist., 467 F. Supp. 721 (W.D. Mich. 1978) (ordering defendants to submit remedies for interdistrict violations); School Dist. v. Missouri, 460 F. Supp. 421 (W.D. Mo. 1978) (refusing to dismiss plaintiff's suit for interdistrict relief on defendant's motion made under Fed. R. Civ. P. 12(b)(6)), *appeal dismissed,* 592 F.2d 493 (8th Cir. 1979); United States v. Board of School Comm'rs, 456 F. Supp. 183 (S.D. Ind. 1978) (ordering interdistrict remedies); Evans v. Buchanan, 393 F. Supp. 428 (D. Del.) (ordering interdistrict remedies), *aff'd mem.,* 423 U.S. 963 (1975); Tinsley v. Palo Alto Unified School Dist., 91 Cal. App. 3d 871, 154 Cal. Rptr. 591 (1979) (upholding plaintiff's suit for interdistrict remedy on demurrer).

9. De jure segregation results from intentional state action. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 205 (1973). By contrast, de facto segregation exists as a matter of fact but does not result from any intentional state action. *See* Armstrong v. O'Connell, 451 F. Supp. 817, 824 (E.D. Wis. 1978).

Columbus Board of Education v. Penick[10] and *Dayton Board of Education v. Brinkman (Dayton II)*,[11] the Supreme Court reaffirmed the presumption, announced in earlier cases,[12] of a causal nexus between past segregative practices and current segregation, and it thereby lessened the burden of proving causation.[13] Plaintiffs who can demonstrate, therefore, that the effects of past constitutional violations extend over several school districts should be entitled to remedies for the present vestiges of segregation.[14]

Voluntary plans for interdistrict desegregation are viable alternatives to court-ordered plans for communities faced with litigation. As the use of court-ordered interdistrict remedies has increased, the federal government has urged school districts to develop areawide desegregation plans voluntarily.[15] To date, Wisconsin and Massachusetts have

10. 443 U.S. 449 (1979).

11. 443 U.S. 526 (1979).

12. In Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971), and Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), the Supreme Court first adopted presumptions as to causation in defining the scope of the duty to desegregate. In *Swann*, the Court held that a school board that operated, by law, a dual system for black and white students in 1954 had a duty to eliminate all vestiges of state-imposed segregation in 1970. The Court presumed a causal link between the past discrimination condemned by Brown v. Board of Educ., 374 U.S. 483 (1954), and the current segregation in the school district. 402 U.S. at 26. In *Keyes*, the Court held that past intentional segregation in a substantial portion of the school district established a presumption that the school board was operating an unconstitutional dual system. 413 U.S. at 201. Unless rebutted by the district, this presumption triggers the *Swann* presumption of a causal connection between the past discrimination and the current segregation. *Id.* at 210-11. By combining these two presumptions, the Court in *Keyes* established a broader presumption of a causal nexus between substantial past segregation and current segregation.

13. The presumption between past and current segregation is difficult to rebut. Defendants in desegregation cases must trace the chain of causation to establish that the former segregative practices did not contribute to the present conditions. *See* Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 PHILOSOPHY & PUB. AFF. 1, 19-26 (1974).

The Supreme Court appeared to retreat from this presumption in Dayton Bd. of Educ. v. Brinkman (Dayton I), 433 U.S. 406 (1977). In that case, the evidence proved only the existence of isolated instances of segregation. Because evidence did not justify systemwide measures, the Court limited the relief to correcting the incremental segregative effects shown. *Id.* at 420. The implication was that future plaintiffs would have to demonstrate a causal relationship between past discrimination and current segregation. Dayton Bd. of Educ. v. Brinkman (Dayton II), 443 U.S. 526 (1976), and Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979), however, reject this expansive reading of *Dayton I*, for in those cases the Court relied on the presumption that current segregation is attributable to past segregative acts.

14. *See* Dayton Bd. of Educ. v. Brinkman (Dayton II), 443 U.S. 526, 537-38 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 461 (1979).

15. *See* W. TAYLOR, *supra* note 4, at 116; DESEGREGATION STATUS REPORT, *supra* note 2, at 27.

There are indications, however, that this federal encouragement of school desegregation may be

responded with statutes designed to promote interdistrict desegregation.[16] Although no school system has implemented a voluntary multi-district plan,[17] many systems have developed and implemented voluntary single-district plans.[18] As the advantages of these plans gain

waning under the Reagan administration. In September 1981, the United States Department of Justice decided to reverse its position of support for voluntary desegregation by Seattle area school districts. In 1978, after the three Seattle area school boards voluntarily adopted busing programs, citizens opposing the programs passed a statewide ballot initiative. The law forbids school districts from requiring students to attend any school other than the one nearest or next nearest their residence except for reasons of health, safety, or special needs of the student. The three school boards and the Justice Department successfully challenged the initiative as unconstitutional because it created a suspect racial classification. Seattle School Dist. No. 1 v. Washington, 473 F. Supp. 996 (W.D. Wash. 1979), *aff'd,* 633 F.2d 1338 (9th Cir. 1980), *cert. granted,* 50 U.S.L.W. 3266 (U.S. Oct. 13, 1981) (No. 81-9). The Justice Department informed the Supreme Court prior to the granting of certiorari that it had changed its mind and now believed the ban on busing to be constitutional. N.Y. Times, October 14, 1981, at 11, col. 1. The Justice Department similarly decided not to appeal a district court order, United States v. Houston Independent School Dist., No. 10-444 (S.D. Tex. June 17, 1981), dismissing its suit seeking multi-district desegregation of the public schools in Houston and surrounding suburbs.

16. MASS. ANN. LAWS ch. 76, § 12A (Michie/Law. Co-op 1978) (promoting metropolitan remedies through a system of magnet schools); WIS. STAT. ANN. § 121.85 (West Supp. 1980) (promoting interdistrict transfers through provisions of incentives to the transferring student and the receiving school district).

17. Efforts to implement voluntary interdistrict plans are currently being explored in St. Louis. In Liddell v. Board of Educ., 491 F. Supp. 351 (E.D. Mo. 1980), *aff'd,* No. 80-1458 (8th Cir. Feb. 13, 1981), *cert. denied,* 50 U.S.L.W. 3436 (U.S. Dec. 1, 1981) (No. 80-2152), the court held that the St. Louis public schools unconstitutionally segregated students and ordered a systemwide plan for the integration of the schools. The court also ordered the school board to seek the cooperation of the suburban school districts of St. Louis County in developing a voluntary desegregation program. *Id.* at 353. Efforts to effectuate a voluntary plan between the city and suburban school districts began in September 1980. In January 1981, the St. Louis Board of Education and the NAACP filed amended complaints to include in the suit 40 suburban school districts in St. Louis, St. Charles, and Jefferson Counties. Cross-Claim for Defendant, Liddell v. Board of Educ., No. 72-100-C(4) (E.D. Mo., filed Jan. 9, 1981). After five school districts in St. Louis County agreed to participate in a voluntary plan, the court stayed the motions to include those districts in the suit but granted the motions to add the remaining 18 districts in St. Louis County as parties to the suit. The court stayed the motions to include the districts in Jefferson and St. Charles Counties pending an evidentiary hearing. Liddell v. Board of Educ., No. 72-100-C(4) (E.D. Mo. Aug. 24, 1981) (order granting in part and denying in part the addition of cross-claims and parties).

18. Anchorage, Alaska; Colorado Springs, Colorado; Portland, Oregon; Providence, Rhode Island; Seattle, Washington; and Tacoma, Washington are among the school systems in which public school authorities have developed voluntary plans. DESEGREGATION STATUS REPORT, *supra* note 2, at 26-71. In addition, several school districts have entered voluntary settlements of litigation. *See, e.g.,* Mendoza v. United States, 623 F.2d 1338 (9th Cir. 1980) (Tucson school system), *cert. denied,* 450 U.S. 912 (1981); United States v. Board of Educ., 560 F.2d 1103 (2d Cir. 1977) (Waterbury, Conn. school system); Armstrong v. Board of School Directors, 471 F. Supp. 800 (E.D. Wis. 1979), *aff'd,* 616 F.2d 305 (7th Cir. 1980) (Milwaukee school system).

recognition, the use of both single- and multi-district voluntary plans in desegregation cases will increase.

School districts can implement voluntary desegregation plans without any judicial involvement or legal determination of the merits of the plan. In practice, however, most school districts have little incentive to implement voluntary plans without either the threat of impending litigation or the assurance that implementation will preclude future suits. Judicial involvement is necessary to provide this assurance.

Voluntary desegregation plans, if negotiated and approved as class action consent decrees, offer several advantages to school systems faced with possible court-ordered desegregation, including avoidance of protracted litigation, implementation of a plan acceptable to many residents, and protection against future claims of segregation.[19] Voluntary resolution in school desegregation is preferable to full litigation because the cooperation inherent in a settlement ensures the long-range success of the desegregation plan.[20]

Because settlements necessarily involve extra-judicial negotiations and procedures, and because the Federal Rule of Civil Procedure governing class action settlements is broadly written,[21] few guidelines for implementing these decrees exist. Parties to settlement decrees must undertake the implementation carefully to assure maximum binding ef-

19. Current proposals for congressional enactment of antibusing legislation may reduce the incentive for suburban school districts to participate in voluntary interdistrict desegregation plans. The constitutionality of such legislation, however, is doubtful. Though Congress can enforce the provisions of the fourteenth amendment by appropriate legislation, U.S. CONST. amend. XIV, § 5, it cannot reduce the scope of rights conferred or the protection guaranteed by the amendment. Oregon v. Mitchell, 400 U.S. 112, 127 (1970); Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966). Moreover, although Congress is authorized to remove certain types of cases from the appellate jurisdiction of the Supreme Court, U.S. CONST. art. III, § 2, it cannot limit the remedies available to the courts. Once Congress has conferred jurisdiction, the separation of powers doctrine commands that the courts be free to determine the rights of, and relief due, the litigants without interference from the other branches of government. *See, e.g.,* Schneiderman v. United States, 320 U.S. 118, 168-69 (1943); Sterling v. Constantin, 287 U.S. 378, 403 (1932); Gordon v. United States, 117 U.S. 697, 702-03 (1864); Hayburn's Case, 2 U.S. (2 Dall.) 409, 409 (1792). Furthermore, even if Congress could limit the remedies available in school desegregation cases, prohibition of busing would be tantamount to an unconstitutional denial of equal protection if busing is the only means of effectively desegregating a school system. For an in-depth discussion of these issues, see Smedley, *Developments in the Law of School Desegregation*, 26 VAND. L. REV. 405, 437-50 (1973).

20. Armstrong v. Board of School Directors, 616 F.2d 305, 318 (7th Cir. 1980).

21. FED. R. CIV. P. 23(e) provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

fect and maximum accommodation of disparate community interests. This Note examines the legal procedure for implementing voluntary desegregation plans as class action consent decrees and both the binding effect and content of the decrees. The goal is to delineate a procedure that will both foster a cooperative desegregation spirit through settlement and adequately protect the interests of all class members.

I. PROCEDURE

A consent decree is a court-approved agreement between parties that possesses the same legal force and character as a judgment decreed by a court after a fully litigated trial.[22] Like a judgment, a consent decree is res judicata[23] as to the parties.[24] Moreover, collateral estoppel[25] may

22. *See, e.g.,* United States v. Swift & Co., 286 U.S. 106, 115 (1932); United States v. Homestake Mining Co., 595 F.2d 421, 425 (8th Cir. 1979); Siebring v. Hansen, 346 F.2d 474, 477 (8th Cir.), *cert. denied,* 382 U.S. 943 (1965); Inmates of Boys' Training School v. Southwood, 76 F.R.D. 115, 123 (D.R.I. 1977); Public Serv. Elec. & Gas Co. v. Waldroup, 38 N.J. Super. 419, 426, 119 A.2d 172, 175 (1955); *In re* Pennsylvania Stave Co., 225 Pa. 178, 180, 73 A. 1107, 1108 (1909). *See generally* James, *Consent Judgments as Collateral Estoppel*, 108 U. PA. L. REV. 173 (1959); Note, *The Consent Judgment as an Instrument of Compromise and Settlement*, 72 HARV. L. REV. 1314, 1316-17 (1959).

23. In Cromwell v. County of Sac, 94 U.S. 351 (1876), Justice Field defined the doctrine of res judicata as follows:

> [T]he judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . . Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

Id. at 352-53.

24. *See, e.g.,* United States v. Swift & Co., 286 U.S. 106 (1932); Burgess v. Seligman, 107 U.S. 20 (1882); Lone Ranger, Inc. v. Cox, 124 F.2d 650 (4th Cir. 1942); Reynolds v. International Harvester Co., 141 F. Supp. 371 (N.D. Ohio 1955), *aff'd,* 233 F.2d 959 (6th Cir. 1956); United States v. RCA, 46 F. Supp. 654 (D. Del. 1942), *appeal dismissed on motion of appellant,* 318 U.S. 796 (1943); Hinderlider v. Town of Berthoud, 77 Colo. 504, 238 P. 64 (1925); Louden Co. v. Town of Berthoud, 57 Colo. 374, 140 P. 802 (1914).

The reasons for according the effect of res judicata to consent decrees are the same as those with regard to judgments: economy of judicial resources, avoidance of harassment of the parties, and avoidance of inconsistent results. Furthermore, the objection that res judicata perpetuates erroneous judicial decisions is inapplicable to consent decrees. *See* Note, *supra* note 22, at 1320.

25. Collateral estoppel, a narrower form of res judicata, precludes relitigation of the same issue in a new cause of action. *See* Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1876). This doctrine once required mutual estoppel; that is, unless the judgment bound both parties in an earlier action, neither party could invoke collateral estoppel in a later one. *See, e.g.,* Buckeye Powder Co. v. E.I. du Pont de Nemours Powder Co., 248 U.S. 55, 63 (1918); Bigelow v. Old Dominion Copper Co., 235 U.S. 111, 127 (1912); RESTATEMENT OF JUDGMENTS § 93 (1942).

apply to both legal issues the parties intend to resolve and questions of fact determined by the court.[26] A consent decree, however, does not have legally binding effect beyond the immediate parties unless entered as a class action settlement.[27] Thus, for example, a desegregation consent decree among school boards, or among school boards and the federal government, if entered in a non-class action lawsuit,[28] does not

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Generally, however, mutuality of estoppel is no longer necessary. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

The use of collateral estoppel may be either defensive or offensive, depending upon which party invokes the doctrine. When a defendant seeks to estop a plaintiff from asserting a claim that the plaintiff previously had litigated unsuccessfully against another party, the use of the doctrine is defensive. *See* Blonder-Tongue Laboratories v. University of Ill. Foundation, 402 U.S. 313, 328-30 (1971). Conversely, when a plaintiff seeks to prevent a defendant from asserting a claim that the defendant had previously litigated unsuccessfully against another party, the use of collateral estoppel is offensive. *See* Parklane Hosiery Co. v. Shore, 439 U.S. at 329. Although a defendant may always invoke collateral estoppel, a plaintiff's use of the doctrine is subject to the trial court's discretion. *Id.* at 331. One important factor that the court will consider in exercising its discretion is whether the party against whom the offensive collateral estoppel is asserted had a fair opportunity in the prior action to be heard on the issue. *Id.* at 331-32.

26. Because collateral estoppel normally applies only to those issues that parties have litigated, application of collateral estoppel to consent decrees, which contemplate issue resolution without litigation, may constitute unfair surprise. Application of collateral estoppel in this situation, therefore, demands a substitute for litigation and judicial determination. One acceptable substitute is the intention of the parties to preclude subsequent claims. Kaspar Wire Works, Inc. v. Leco Eng'r & Mach. Inc., 575 F.2d 530 (5th Cir. 1978); Seaboard Air Line R.R. v. George F. McCourt Trucking, Inc., 277 F.2d 593 (5th Cir. 1960); Fruehauf Trailer Co. v. Gilmore, 167 F.2d 324 (10th Cir. 1948); 1B MOORE'S FEDERAL PRACTICE ¶ 0.444[1], at 4008, ¶ 0.444, at 4020 (2d ed. 1980); RESTATEMENT (SECOND) OF JUDGMENTS § 68, Comment e (Tent. Draft No. 1, 1973); James, *supra* note 22, at 193; Note, *supra* note 22, at 1320-21. *See also* Lawlor v. National Screen Serv. Corp., 349 U.S. 322 (1955). Thus, a well-drafted consent decree should contain a statement that the parties intend to create the effect of collateral estoppel.

27. *See, e.g.,* Hansberry v. Lee, 311 U.S. 32 (1940); Roman v. ESB, Inc., 550 F.2d 1343 (4th Cir. 1976); Jeter v. Kerr, 429 F. Supp. 435 (S.D.N.Y. 1977); Guy v. Abdulla, 57 F.R.D. 14 (N.D. Ohio 1972).

28. The United States Department of Justice and the Chicago Board of Education entered into a consent decree outlining general principles to guide the school board in developing a constitutionally acceptable desegregation plan. United States v. Board of Educ., No. 80-C-5124 (N.D. Ill., Sept. 24, 1980) (order entering consent decree). The decree averted a threatened suit by the Justice Department, but because Chicago students and their parents were not parties to the decree, they are not bound by it. United States v. Board of Educ., 88 F.R.D. 679 (N.D. Ill. 1981) (order denying motion for intervention). *Cf.* General Telephone Co. v. EEOC, 446 U.S. 318, 333 (1980) (relief obtained under EEOC judgment or settlement against employer is not binding on all employees with discrimination grievances); Ward v. Arkansas State Police, No. 80-1808 (8th Cir. July 10, 1981) (consent decree in a non-class action between the federal government and employer does not bar the potential beneficiaries of the decree from individually pursuing Title VII remedies); United States v. Louisiana, No. 80-3300 (E.D. La. May 21, 1981) (order denying motion to intervene) (entry of possible consent decree for school desegregation will not bind parties denied intervention on res judicata grounds).

afford the parties immunity against future suits by school children and their parents. Only by incorporating the consent decree into the settlement of a class action desegregation suit is such immunity from future suits possible.[29]

The law generally favors voluntary resolution of controversy.[30] This preference applies even to litigation involving fundamental constitutional rights.[31] Though the importance of the rights involved and of the various policies implicated requires that courts carefully evaluate settlements in such cases, these considerations need not override the policy favoring settlements.[32] Indeed, courts have often recognized

29. A court order resolving a desegregation class action is binding upon all of the members of a properly constituted and represented class named in the petition, including those who have neither appeared nor participated in the action. *See, e.g.,* Sam Fox Publishing Co. v. United States, 366 U.S. 683, 691 (1961); Hansberry v. Lee, 311 U.S. 32, 45 (1940); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 363 (1921); Reynolds v. NFL, 584 F.2d 280, 288 (8th Cir. 1978); EEOC v. Datapoint Corp., 570 F.2d 1264, 1268 (5th Cir. 1978). *See generally* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1789 (1972). This general rule applies equally to a class action settlement because Rule 23(e) of the Federal Rules of Civil Procedure requires court approval of any such settlement prior to compromise or dismissal of a class action. *See* notes 83-113 *infra* and accompanying text.

The major purpose of class litigation is the realization of substantive policies for large numbers of people. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1298-99 (1976). Negotiation and settlement seriously threaten this purpose unless privately controlled decisions are harmonized with public interests. Consistency between adjudicated and negotiated resolutions can be attained only if parties submit their settlements for judicial approval. This precaution is especially important if the settlement results in a decree that will modify the behavior of class members, for the policy that all affected interests be heard in shaping the relief exists whether the decree is the result of settlement or adjudication. *See* Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61, 63 (S.D. Tex. 1977); *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1336-37 (1976). *See also* Van Bronkhorst v. Safeco Co., 529 F.2d 943, 950 (9th Cir. 1976); MANUAL FOR COMPLEX LITIGATION § 1.21 (1977); Dole, *The Settlement of Class Actions for Damages*, 71 COLUM. L. REV. 971, 976 (1971).

30. Armstrong v. Board of School Directors, 616 F.2d 305, 312 (7th Cir. 1980); Airline Stewards Local 550 v. American Airlines, Inc., 573 F.2d 960, 963 (7th Cir.), *cert. denied,* 439 U.S. 876 (1978); United States v. McInnes, 556 F.2d 436, 441 (9th Cir. 1977); Patterson v. Stovall, 528 F.2d 108, 112 (7th Cir. 1976); Pearson v. Ecological Science Corp., 522 F.2d 171, 176 (5th Cir. 1975), *cert. denied,* 425 U.S. 912 (1976); DuPuy v. Director, Office of Worker's Compensation Programs, 519 F.2d 536, 541 (7th Cir. 1975), *cert. denied,* 424 U.S. 965 (1976); Florida Trailer & Equip. Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960).

31. *See* Armstrong v. Board of School Directors, 616 F.2d 305, 317 (7th Cir. 1980) (school desegregation case resolved by class action settlement); Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977) (Title VII employment discrimination case resolved by class action settlement); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 469 F. Supp. 836, 846 (N.D. Ill. 1979) (discriminatory zoning case resolved by consent decree), *aff'd,* 616 F.2d 1006 (7th Cir. 1980); Williamsburg Fair Hous. Comm. v. New York City Hous. Auth., 450 F. Supp. 602, 606 (S.D.N.Y. 1978) (Fair Housing Act housing discrimination case resolved by class action settlement).

32. Armstrong v. Board of School Directors, 616 F.2d 305, 317 (7th Cir. 1980).

that the community support inherent in remedies reached by settlement may more effectively implement the constitutional guarantee of equal protection than will a court-ordered remedy that the community might view as imposed by outsiders.[33]

Settlements are both prevalent and acceptable in the class action context.[34] Class actions often involve complex disputes that present serious problems of management and expense.[35] Settlements minimize the litigation costs of both parties[36] and reduce the burden imposed by class action suits on judicial resources.[37] Moreover, in fully litigated actions seeking complex structural injunctions, courts frequently rely on a process of negotiation between the parties in drafting the final decree.[38] The school desegregation context requires such negotiation by the parties. In *Brown v. Board of Education (Brown II)*,[39] the United States Supreme Court held that school authorities, not the courts, bear the primary responsibility for clarifying, assessing, and resolving desegregation problems. The role of the courts is to determine whether school authorities are acting in good faith to implement constitutional principles.[40] To extend the public policy favoring class action settlements to the school desegregation context, therefore, is consistent with the judicial requirement for active party participation.

Racial discrimination is, by definition, class discrimination.[41] The claim in a desegregation suit is more than one of invidious discrimination against individuals. Rather, it is a claim of discrimination against a class as a whole.[42] To be effective, then, the remedy sought must provide for structural injunctive relief that will eliminate the unconsti-

33. *Id.* at 318; United States v. Board of Educ., 605 F.2d 573, 576 (2d Cir. 1979); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 469 F. Supp. 836, 845 (N.D. Ill. 1979), *aff'd*, 616 F.2d 1006 (7th Cir. 1980); Williamsburg Fair Hous. Comm. v. New York City Hous. Auth., 450 F. Supp. 602, 606 (S.D.N.Y. 1978).

34. Most class actions for damages are settled or dismissed before trial. *See Developments in the Law—Class Actions, supra* note 29, at 1373 n.5.

35. Armstrong v. Board of School Directors, 616 F.2d 305, 313 (7th Cir. 1980); Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977).

36. *See, e.g.*, Carson v. American Brands, Inc., 450 U.S. 79, 87 (1981) ("[s]ettlement agreements may . . . be predicated on an express or implied condition that the parties would, by their agreement, be able to avoid the costs and uncertainties of litigation").

37. *Id. See also* Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976).

38. *Developments in the Law—Class Actions, supra* note 29, at 1536.

39. 349 U.S. 294 (1955).

40. *Id.* at 299.

41. Dickerson v. United States Steel Corp., 64 F.R.D. 351, 357-59 (D. Pa. 1974).

42. Potts v. Flax, 313 F.2d 284, 289 n.5 (5th Cir. 1963); Bush v. Orleans Parish School Board,

tutional practices with respect to the entire class. In a school desegregation case, a consent decree entered in a class action lawsuit best accomplishes this goal. Parties may maintain a school desegregation suit as a class action by virtue of Rule 23(b)(2) of the Federal Rules of Civil Procedure. Rule 23(b)(2) authorizes a class action in appropriate cases[43] in which the party opposing the class has acted on grounds generally applicable to the class, thereby making final injunctive relief appropriate with respect to the class as a whole.[44] In proposing this Rule as part of the 1966 amendments to the Federal Rules of Civil Procedure,[45] the Advisory Committee specifically contemplated its use in desegregation cases.[46] Indeed, the Committee cited *Potts v. Flax*,[47] a school desegregation case, as illustrative of a situation in which Rule 23(b)(2) would apply.[48]

A. *Certification of the Class*

Judicial certification of the named class[49] under Rule 23(c)(1)[50] is the

308 F.2d 491, 499 (5th Cir.), *modified on rehearing*, 308 F.2d 491, 503 (5th Cir. 1962). *See also* Ross v. Dyer, 312 F.2d 191, 194 (5th Cir. 1962).

43. A Rule 23(b)(2) class action, to be maintained as such, first must meet the prerequisites of Rule 23(a), which states:

> 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.

FED. R. CIV. P. 23(a).

44. Rule 23(b)(2) provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) [*see* note 43 *supra*] are satisfied, and in addition: . . . (2) the party opposing the class has acted on grounds generally applicable to the class, thereby making appropriate final relief or corresponding declaratory relief with respect to the class as a whole.

FED. R. CIV. P. 23(b)(2).

45. *See* Advisory Comm. Notes, 39 F.R.D. 69, 102 (1966).

46. The Advisory Committee notes to Rule 23(b)(2) state: "Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." *Id.*

47. 313 F.2d 284 (5th Cir. 1963).

48. Advisory Comm. Notes, 39 F.R.D. 69, 102 (1966).

49. Composition of the class will vary from case to case, but the plaintiffs in school desegregation cases are generally either all black students and their parents, *see, e.g.*, Adams v. Baldwin County Bd. of Educ., 628 F.2d 895 (5th Cir. 1980); Mendoza v. United States, 623 F.2d 1338 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981), or all students (both black and white) and their parents, *see, e.g.*, Armstrong v. Board of School Directors, 616 F.2d 305 (7th Cir. 1980); Hines v. Rapides Parish School Bd., 479 F.2d 762 (5th Cir. 1972). The latter class is recommended in order to provide for maximum public participation.

first, and perhaps the most important, step in a class action lawsuit. Though desegregation cases are illustrative of Rule 23(b)(2) actions,[51] they do not qualify per se as class actions. Rather, they must meet the same requirements[52] as any other type of class action.[53]

The question of certification is difficult and may take years to resolve in a particular case.[54] Parties to a proposed class action, therefore, often will be tempted to begin, and even to conclude, settlement negotiations before certification is complete.[55] Although courts have authorized the formation of a "tentative" class for the purpose of settlement,[56] this procedure is not recommended in a suit intended to bring about voluntary school desegregation. A voluntary plan necessarily will affect a large number of people and must reflect the various interests in-

50. FED. R. CIV. P. 23(c)(1) provides that: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

51. *See* notes 41-48 *supra* and accompanying text.

52. *See* note 43 *supra*.

53. East Tex. Motor Freight v. Rodriguez, 431 U.S. 395, 405 (1977); Shelton v. Pargo, 582 F.2d 1298, 1312 (4th Cir. 1978); A. MILLER, AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT AND FUTURE 14 (1977).

54. A. MILLER, *supra* note 53, at 60.

55. This practice is particularly prevalent in the Title VII employment discrimination area, in which settlements are often filed simultaneously with the suit. *See, e.g.,* United States v. Allegheny-Ludlum Indus., Inc., 63 F.R.D. 1 (N.D. Ala. 1974), *aff'd,* 517 F.2d 826 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976); EEOC v. AT&T, 365 F. Supp. 1105 (E.D. Pa. 1973), *aff'd,* 506 F.2d 735 (3d Cir. 1974).

There are two justifications for this practice in the Title VII area. First, the statute itself, Title VII, §§ 701-718, of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 to -17 (1976 & Supp. III 1979), provides the mechanism for settlement. An individual or a member of the Equal Employment Opportunity Commission must first file a charge with the Commission. Through its investigatory powers, the Commission then determines whether reasonable cause exists to believe that a violation of the statute has occurred. If such cause is found, the Commission must attempt conciliation prior to either issuing a "right to sue" letter or filing suit itself. 42 U.S.C. § 2000e-5(b) (1976 & Supp. III 1979). If negotiations result in an agreement, the parties then apply for court approval of the settlement. *See* Note, *Consent Decrees: Can They Withstand the Charge of Reverse Discrimination?*, 19 SANTA CLARA L. REV. 115, 120 (1979).

The second justification for such settlements is that most Title VII class action suits are brought under Rule 23(b)(3). This Rule provides for potential class members to "opt out" of the suit and thus not be bound by the judgment. This option is not available to Rule 23(b)(2) class members.

56. *See, e.g.,* City of Detroit v. Grinnell Corp., 495 F.2d 448, 464-65 (2d Cir. 1974); Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 164 (3d Cir. 1974); Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 33 (3d Cir. 1971); Alaniz v. California Processors, Inc., 73 F.R.D. 269, 275 (N.D. Cal.), *modified on motion of the parties,* 73 F.R.D. 289 (N.D. Cal. 1976); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324, 327 (E.D. Pa. 1967).

volved to succeed. A tentative class, however, runs a high risk of inadequately representing the interests of its absent members because the parties may not have identified the range of interests involved prior to certification.[57] For this reason, settlement negotiations should remain fluid pending final certification of the proposed class.

Rule 23(c)(1) mandates that the court determine "[a]s soon as practicable" whether a proposed class action may be maintained as such.[58] Increasingly, appellate courts have interpreted the quoted language to mean "very quickly."[59] When parties seek to incorporate a voluntary school desegregation plan into a class action consent decree, however, the trial court should resist the pressure for rapid certification so as to assure maximum public participation in the process. Because the primary purpose of submitting a voluntary plan to class action settlement procedures is to foreclose the possibility of future litigation,[60] the final effect is to deny otherwise entitled individuals access to the courts. Consequently, adjudication of the suit must assure that the interests of absent members will in fact receive due consideration. A court can best provide this assurance by eliciting broad public response. This, in turn, may require restructuring of the traditional certification process.[61]

To guarantee that a proposed class adequately represents all concerned members, the certification process should focus on the information available regarding that class, particularly its absent members. The pleadings alone seldom reveal such information because the Federal Rules of Civil Procedure do not require highly specific pleadings.[62] Furthermore, at the pleading stage the parties may not know the range of interests. For example, all class members may agree that a defendant has violated their constitutional rights by failing to desegregate a school system effectively, yet the members may disagree on the appro-

57. The *Manual for Complex Litigation* concludes that tentative classes "should never be formed." MANUAL FOR COMPLEX LITIGATION, *supra* note 29, § 1.46, at 43.

58. FED. R. CIV. P. 23(c)(1).

59. *Developments in the Law—Class Actions, supra* note 29, at 1422.

60. *See* note 19 *supra* and accompanying text.

61. The traditional certification decision is based on the pleadings or on a limited amount of discovery information. *See Developments in the Law—Class Actions, supra* note 29, at 1422-23 nn. 175 & 176.

62. *See, e.g.,* Conley v. Gibson, 355 U.S. 41, 47 (1957) ("the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim"); Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) ("[u]nder the . . . rules of civil procedure, there is . . . only [the requirement] that there be a short and plain statement of the claim showing that the pleader is entitled to relief").

priate remedy.[63] A court, therefore, must thoroughly canvass the interests of a proposed class early in the proceedings, while the situation is still fluid and before the absentees must contend with an already negotiated agreement.[64]

Verification of desegregation suit pleadings through a form of discovery will generally accomplish these goals.[65] The trial court first schedules an initial hearing to determine the status of the suit and to begin the discovery process.[66] This process may include both ordinary discovery by the parties and a preliminary survey of the proposed class by the court. The court may conduct this survey by way of a questionnaire sent either to the class as a whole or to a random sample of members.[67]

After discovery, the court schedules a second hearing, or a series of hearings, in which it will hear the product of discovery and determine the proper class structure.[68] Notice of this hearing to proposed class members is appropriate[69] to ensure that an adequate cross section of absentees participates in the suit.[70] The publicity normally surrounding a school desegregation suit may provide such notice if it is supplemented by a publicized process by which interested parties may express their views to the court.[71]

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63. *See, e.g.,* East Tex. Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 405 (1977) (split over desirability of merging seniority lists in fully litigated Title VII case); Calhoun v. Cook, 522 F.2d 717, 718 (5th Cir. 1975) (split over appropriate remedy to correct past school segregation).

64. *See* notes 111-13 *infra* and accompanying text.

65. *Developments in the Law—Class Actions, supra* note 29, at 1429.

66. *Id.* at 1432.

67. *See, e.g., In re* Antibiotic Antitrust Actions, 333 F. Supp. 278, 288 (S.D.N.Y. 1971) (court supervised sampling of class members prior to discovery), *aff'd sub nom.* Pfitzer, Inc. v. Lord, 449 F.2d 119 (2d Cir. 1971) (per curiam); Knight v. Board of Educ., 48 F.R.D. 108, 112-14 (E.D.N.Y. 1969) (court used interrogatory to survey class members in order to assess need for preliminary relief).

68. Determining the class structure may include the use of subclassification and intervention. *See* notes 75-85 *infra* and accompanying text.

69. Under the Federal Rules of Civil Procedure, notice to absent class members is not required at this stage, nor is such notice constitutionally required. Nevertheless, due process may require certain procedural steps, such as subclassification. Notice may then be necessary to implement these steps. *See Developments in the Law—Class Actions, supra* note 29, at 1435.

70. *Id.*

71. *See, e.g.,* Mendoza v. United States, 623 F.2d 1338 (9th Cir. 1980) (press release in English and Spanish given to newspapers, broadcast media, merchants, churches, and community centers, *cert. denied,* 450 U.S. 912 (1981)); Armstrong v. Board of School Directors, 471 F. Supp. 800 (E.D. Wis. 1979) (notice published in five local newspapers), *aff'd,* 616 F.2d 305 (7th Cir. 1980).

Under the Federal Rules of Civil Procedure,[72] a trial court has flexibility in determining the structure of the class so as to provide for adequate representation of all class members' interests.[73] Two primary means of assuring an adequate class structure are subclassification and intervention.

Subclassification allows a court to accommodate a heterogeneous class by, in effect, adding to the lawsuit additional parties whose interests more accurately reflect the interests of discrete groups of absentees.[74] The presence of these additional representatives guarantees consideration of the interests of all class members during negotiations and court proceedings.[75]

A court may appropriately use subclassification whenever it appears that divergent views exist among class members.[76] To maximize its effectiveness, subclassification should take place before the interests of

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72. FED. R. CIV. P. 23(d)(1) authorizes the court to make appropriate orders determining the course of the proceedings in class actions.

73. Accommodation of the two goals of a class action consent decree, a broadly defined class for maximum binding effect and adequate representation of all interests, necessarily creates a tension. A broadly defined class, as recommended in note 49 *supra*, will contain various divergent interests. The court should anticipate potential conflicts between the class representatives and absentee members and be receptive to motions to organize subclasses and to intervene. Failure to recognize and accommodate the various interests should force the case to trial. *See* notes 79 & 135-58 *infra* and accompanying text.

74. *Developments in the Law—Class Actions, supra* note 29, at 1479. The composition of the subgroups will vary from case to case. *See, e.g.,* Mendoza v. United States, 623 F.2d 1338, 1341 (9th Cir. 1980) (plaintiff class consisted of two consolidated plaintiff classes: one composed of black students and one composed of Mexican-American students), *cert. denied,* 450 U.S. 912 (1981); Garcia v. Board of Educ., 573 F.2d 676, 678 (10th Cir. 1978) (plaintiff class consisted of a black and Hispanic subclass and an Anglo student subclass; the defendants included the school board and a class of parents and students who opposed any forced busing); Calhoun v. Cook, 522 F.2d 717, 718 (5th Cir. 1975) (plaintiff class consisted of three subclasses of black students); Amos v. Board of Directors, 408 F. Supp. 765, 775 (E.D. Wis. 1976) (division of plaintiff class into two subclasses, one composed of black students and one composed of white students).

75. Mendoza v. United States, 623 F.2d 1338, 1350 (9th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981). Subgroups are most likely to form during settlement negotiations, *see* note 79 *infra* and accompanying text, as attitudes about desired outcomes are differentiated. The recognition of separate subclasses and their representatives at that point will reduce the risk that the representative will not meet the standard imposed by Rule 23(a)(4) that the interests of the class be fairly and adequately protected. *See* East Tex. Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 405 (1977).

76. FED. R. CIV. P. 23(c)(4) provides: "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

absent members are jeopardized.[77] Thus, if evidence presented at a discovery hearing shows the existence of subgroups, the court may organize these subgroups at or prior to certification.[78] In the context of school desegregation, however, it is more likely that a class will be unified at the outset of the action, with subgroups emerging later during settlement negotiations.[79] A court, therefore, must be aware of the possibility of nonapparent subgroups throughout the proceedings.[80]

Intervention by absent class members complements subclassification. If class members with different interests and viewpoints do not coalesce into discrete subgroups, it is difficult to define subclasses clearly enough to obtain representatives with homogeneous constituencies. Furthermore, individuals may be present who have important differences of opinion and who cannot align with any existing subgroup. Intervention by individual members is one means of accommodating these interests and providing for representation of the full range of interests of absent class members.[81]

Under Rule 23(d)(2) and (3), a trial court has largely unfettered discretion with regard to intervention.[82] Because intervenors represent

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77. *See* notes 111-13 *infra* and accompanying text.

78. *Developments in the Law—Class Actions, supra* note 29, at 1480.

79. In Calhoun v. Cook, 362 F. Supp. 1249 (N.D. Ga.), *aff'd,* 522 F.2d 717 (5th Cir. 1975), the several associations claiming to speak for Atlanta's black parents agreed on the need to correct past segregation but dramatically disagreed on the proper remedy. Some of the associations insisted upon busing as a means to integrate the classrooms, but others contended that increasing the number of black school administrators would be more appropriate. The district court ultimately ordered a plan relying upon voluntary transfers, rather than widespread busing, to effectuate desegregation. *See* Calhoun v. Cook, 522 F.2d 717, 718-19 (5th Cir. 1975).

Because a subclass cannot effectively shield itself from the impact of a settlement in a school desegregation case, failure to appease the subclass should force the entire case to trial. *See* Calhoun v. Cook, 487 F.2d 680, 682-83 (5th Cir. 1973). *See also* notes 135-38 *infra* and accompanying text.

80. One method by which a court can remain aware of the various class interests is by the appointment of a "friend of the court." In the St. Louis school desegregation case, the court appointed a disinterested attorney to represent the public interest. Liddell v. Board of Educ., No. 72-100-C(4) (E.D. Mo. Aug. 24, 1981) (order appointing a "friend of the court"). She has the power to call witnesses, file pleadings, and "perform such other functions as necessary to ensure the adequate representation of the public interest." *Id. See also Developments in the Law—Class Actions, supra* note 29, at 1561-65, which suggests the creation of a new court officer, an "absentee advocate," whose task is to monitor negotiations on behalf of absent class members.

81. *See, e.g.,* 7A C. WRIGHT & A. MILLER, *supra* note 29, § 1799, at 252-53. *See generally* 3B MOORE'S FEDERAL PRACTICE, *supra* note 26, ¶ 23.90[2] (2d ed. 1980); Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721 (1968).

82. FED. R. CIV. P. 23(d) provides for appropriate court orders

(2) requiring, for the protection of the members of the class or otherwise for the fair

only their individual and possibly unique views, a class action lawsuit quickly may become unmanageable and distorted in the absence of judicial control.[83] Commentators have suggested, as one solution, that courts establish a presumption in favor of allowing intervention.[84] If necessary, the court may limit the role of an intervenor to witnessing court proceedings and receiving official filings and briefs.[85] So limited, an intervenor thus would serve in a "watchdog" capacity throughout the class action.

B. *Approval of the Settlement*

After the court has certified the class, the parties to a desegregation class action can begin settlement negotiations. Prior to negotiations, however, the defendant school districts may move for the issuance of a protective order covering the negotiation sessions.[86] Should the court grant the motion,[87] no litigant will be able to introduce the content of the negotiations into evidence at trial should the parties fail to reach a

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conduct of the action, that notice be given in such manner as the court may direct to some or all of the members . . . to intervene and present claims or defenses, or otherwise come into the action; [and] (3) imposing conditions on the representative parties or intervenors . . . .

83. Unmanageability and distortion of the suit may result even though, under the current doctrine, intervention by right is limited to those not already adequately represented in the suit. This doctrine only ensures that a court would rebuff an attempt to intervene by each individual. *See, e.g.,* Hines v. Rapides Parish School Bd., 479 F.2d 762, 765 (5th Cir. 1973); 3B MOORE'S FEDERAL PRACTICE, *supra* note 26, ¶ 23.90[2]; 7A C. WRIGHT & A. MILLER, *supra* note 29, § 1799; Note, *Intervention in Government Enforcement Actions*, 89 HARV. L. REV. 1174, 1175 (1976).

84. *See, e.g.,* 3B MOORE'S FEDERAL PRACTICE, *supra* note 26, ¶ 23.90[2], at 23-1627; 7A C. WRIGHT & A. MILLER, *supra* note 29, § 1799, at 254; Note, *supra* note 83, at 1186.

85. *Developments in the Law—Class Actions, supra* note 29, at 1485.

86. A court may issue a protective order under FED. R. CIV. P. 26(c), which provides: "Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarassment, oppression, or undue burden or expense . . . ." *See* Liddell v. Board of Educ., No. 72-100-C(4) (E.D. Mo. Aug. 24, 1981) (order granting in part and denying in part motions to add cross-claims and parties), in which the court in effect granted a protective order by ordering a stay to pending motions. The court stayed the St. Louis school board's motion to add five suburban school districts to the desegregation suit because those districts had agreed to participate in a voluntary desegregation plan. The court also stayed any related discovery. Both stays are effective as long as the school districts participate in good faith to achieve an acceptable level of integration. *Id.*

87. The party seeking the protective order has the burden of demonstrating an adequate reason for protection. United States v. Garrett, 571 F.2d 1323 (5th Cir. 1978); Kiblen v. Retail Credit Co., 76 F.R.D. 402 (D. Wash. 1977). The parties should demonstrate that free and unhampered negotiations will increase greatly the likelihood of settlement and that the policies favoring settlements, *see* notes 31-37 *supra*, outweigh the need to use the negotiations as evidence.

settlement. Thus, by eliminating defendants' fear of adverse consequences, a protective order would promote candid discussion during negotiations.

If negotiations result in a settlement proposal acceptable to the parties,[88] Rule 23(e) requires that all class members be informed of the proposed settlement in a manner determined by the court and that the court approve the settlement prior to discussion or compromise of the action. Generally, courts fulfill the requirements of Rule 23(e) with a four-stage process.

The first stage in the approval process is a preliminary, prenotification hearing by the court to determine whether any obvious impediments to approval of the proposed settlement exist.[89] The purpose of the hearing is to determine not the substantive fairness of the proposal but, rather, whether there are sufficient grounds to proceed with a formal review of the proposal.[90] If the court finds no immediate obstacles to approval of the proposed settlement, it schedules a "fairness" hearing.[91]

At this juncture, the court must notify[92] all class members of both the proposal and the fairness hearing. This notice requirement serves at least two purposes. First, notice to class members deters collusion among parties and restricts the use of the class action as a coercive device against absent members.[93] Second, adequate notice ensures pro-

88. This negotiation stage undoubtedly will be the most difficult stage of the proceedings. Examination of the requisite interpersonal interchanges and arbitration methods needed to bring the parties to an agreement is beyond the scope of this Note.

89. *See, e.g.,* Armstrong v. Board of School Directors, 616 F.2d 305, 314 (7th Cir. 1980); MANUAL FOR COMPLEX LITIGATION, *supra* note 29, § 1.46, at 53-55.

90. *See, e.g.,* Armstrong v. Board of School Directors, 616 F.2d 305, 314 (7th Cir. 1980); MANUAL FOR COMPLEX LITIGATION, *supra* note 29, § 1.46, at 53-55.

91. *See* notes 108-13 *infra* and accompanying text.

92. Some courts and commentators have interpreted the mandatory aspect of Rule 23(e) as applying to the approval requirement only, leaving the court free to omit notice in certain situations. *See, e.g.,* Shelton v. Pargo, 582 F.2d 1298, 1310 (4th Cir. 1978); Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61, 67 (S.D. Tex. 1977). *See also Developments in the Law—Class Actions*, *supra* note 29, at 1542 n.32. When the legal rights of class members may be compromised, as in the school desegregation context in which a class member cannot remove himself from the impact of the settlement, notice is constitutionally required. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172-77 (1974); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Grunin v. International House of Pancakes, 513 F.2d 114, 121 (8th Cir.), *cert. denied,* 423 U.S. 864 (1975); Greenfield v. Villager Indus., Inc., 483 F.2d 824, 834 (3d Cir. 1973).

93. Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61, 68 (S.D. Tex. 1977); Brookhaven Hous. Coalition v. Sampson, 65 F.R.D. 24, 25 (E.D.N.Y. 1974); Rothman v. Gould, 52 F.R.D. 494, 499-501 (S.D.N.Y. 1971); Yaffe v. Detroit Steel Corp., 50 F.R.D. 481, 483 (N.D. Ill. 1970).

tection of the interests of individual class members by giving those members an opportunity to object to the proposed settlement prior to its approval by the court.[94]

Rule 23(e) does not specify the particular form and content of the required notice. Constitutional requirements, however, necessitate notice that is reasonably calculated to apprise interested parties of the proposed settlement and to afford them an opportunity to object.[95] Furthermore, the form of the notice should not exclude any identifiable groups.[96] In the school desegregation context, courts have held that the normal publicity surrounding a pending suit, when supplemented with publication of notice through the local media serving class members, is sufficient.[97] The use of "lay English,"[98] or publication in different languages,[99] when appropriate, often may improve the adequacy of the notice.

The content of the notice must indicate both the subject matter of the action and the terms of the proposed settlement to ensure that the notice will adequately alert those class members with opposing viewpoints and enable them to voice their concerns.[100] Specifically, the notice should indicate the history of the case,[101] the members of the class,[102]

94. Mendoza v. United States, 623 F.2d 1338, 1348 (9th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981); Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1214-16 (5th Cir. 1978), *cert. denied,* 439 U.S. 1115 (1979); Norman v. McKee, 431 F.2d 769, 774 (9th Cir. 1970), *cert. denied,* 401 U.S. 912 (1971); Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61, 68 (S.D. Tex. 1977).

95. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

96. Mandujano v. Basic Vegetable Prods. Inc., 541 F.2d 832, 835 (9th Cir. 1976).

97. *See, e.g.,* Mendoza v. United States, 623 F.2d 1338, 1351 (9th Cir. 1980) (newspaper publication, local broadcasts, and postings in local churches, community centers, and stores), *cert. denied,* 450 U.S. 912 (1981); Armstrong v. Board of School Directors, 471 F. Supp. 800, 805 (E.D. Wis. 1979) (publication in five local newspapers), *aff'd,* 616 F.2d 305 (7th Cir. 1980). *Cf.* Alaniz v. California Processors, Inc., 73 F.R.D. 269, 274 (N.D. Cal.) (newspaper publication and plant postings held adequate in Title VII class settlement), *modified on motion of the parties,* 73 F.R.D. 289 (N.D. Cal. 1976).

98. *See, e.g.,* Blankenship v. UMW Welfare & Retirement Fund, No. 2186-69 (D.D.C. Jan. 2, 1973).

99. *See, e.g.,* Mendoza v. United States, 623 F.2d 1338, 1343 (9th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981).

100. *See, e.g.,* Grunin v. International House of Pancakes, Inc., 513 F.2d 114, 122 (8th Cir.), *cert. denied,* 423 U.S. 864 (1975); Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1177 (9th Cir. 1977).

101. *See, e.g.,* Mendoza v. United States, 623 F.2d 1338, 1351 (9th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981); Armstrong v. Board of School Directors, 471 F. Supp. 800, 805 (E.D. Wis. 1979), *aff'd,* 616 F.2d 305 (7th Cir. 1980).

102. *See, e.g.,* Mendoza v. United States, 623 F.2d 1338, 1351 (9th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981).

the terms of the proposed settlement,[103] the procedure for making objections,[104] the date and location of the fairness hearing,[105] and, finally, where an interested party may obtain a copy of the proposed settlement.[106]

The fairness hearing, though not mandatory,[107] provides absent class members with an opportunity to assist the court in determining whether the proposed settlement is fair, reasonable, and adequate.[108] Assuming adequate notice, the absence of objecting class members at the hearing will support a strong presumption that the settlement proposal is indeed fair,[109] although the court must still undertake an independent evaluation of the fairness of the proposal.[110] Objectors who appear at the hearing are entitled to develop a record in support of their contentions, including the opportunity to introduce evidence and cross-examine witnesses.[111] In deciding whether to allow discovery by the objecting members, the court must balance the need of the objectors for additional information against the possibility of unreasonable delay

103. *Id.*; Armstrong v. Board of School Directors, 471 F. Supp. 800, 805 (E.D. Wis. 1979), *aff'd,* 616 F.2d 305 (7th Cir. 1980).

104. *See, e.g.,* Mendoza v. United States, 623 F.2d 1338, 1351 (9th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981); Armstrong v. Board of School Directors, 471 F. Supp. 800, 805 (E.D. Wis. 1979), *aff'd,* 616 F.2d 305 (7th Cir. 1980).

105. *See, e.g.,* Mendoza v. United States, 623 F.2d 1338, 1351 (9th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981); Armstrong v. Board of School Directors, 471 F. Supp. 800, 805 (E.D. Wis. 1979); *aff'd,* 616 F.2d 305 (7th Cir. 1980).

106. *See, e.g.,* Mendoza v. United States, 623 F.2d 1338, 1352 (9th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981).

Because it is the party with the greatest interest in obtaining a broad res judicata effect for the settlement decree, the defendant normally must bear the costs of the required notice. Armstrong v. Board of School Directors, 471 F. Supp. 800, 815 (E.D. Wis. 1979), *aff'd,* 616 F.2d 305 (7th Cir. 1980); 3 H. NEWBERG, NEWBERG ON CLASS ACTION § 6030g, at 956 (1977).

107. There is no controlling Supreme Court case describing the manner in which a court shall receive objections or comments to a proposed settlement. In school desegregation cases, however, courts almost uniformly hold hearings on proposed remedies, and it may well be an abuse of discretion not to conduct one. *See* Mendoza v. United States, 623 F.2d 1338, 1348 n.8 (9th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981).

108. *See, e.g., id.* at 1348; Patterson v. Stovall, 528 F.2d 108, 114 (7th Cir. 1976); *Developments in the Law—Class Actions, supra* note 29, at 1566.

109. *See, e.g.,* Hartford Hosp. v. Chas. Pfizer & Co., 52 F.R.D. 131, 137 (S.D.N.Y. 1971).

110. *See* notes 122-48 *infra.*

111. *See, e.g.,* Calhoun v. Cook, 487 F.2d 680, 683 (5th Cir. 1973) (reversing approval of a desegregation plan because lower court failed to give objectors a "reasonable opportunity for discovery" and an opportunity "to present sworn testimony and to cross-examine witnesses who sponsor opposing views"). *See also* City of Detroit v. Grinnell Corp., 495 F.2d 448, 462 (2d Cir. 1974); Greenfield v. Villager Indus., 483 F.2d 824, 833 (3d Cir. 1973).

in approving a sound settlement.[112]

Objecting class members have, in some instances, succeeded in obtaining revisions of proposed settlements by way of amendments during the hearings.[113] Regardless of the impact of the hearing upon the settlement, the court must set forth, on the record, a reasoned response to any objections made.[114] Findings of fact and conclusions of law in support of the response must also appear in the record.[115]

In determining whether to approve a school desegregation class action settlement,[116] the court should bear in mind the policies encourag-

112. *See, e.g.,* Mendoza v. United States, 623 F.2d 1338, 1349 (9th Cir. 1980) (trial court did not abuse discretion in denying continuance of settlement hearing beyond one week), *cert. denied,* 450 U.S. 912 (1981). *See also* United States v. Board of Educ., 88 F.R.D. 679, 681 (N.D. Ill. 1981) (order denying motion to intervene), in which the court said that "in school desegregation cases, prompt resolution, through an equitable and constitutionally-acceptable settlement, allows for the speedy vindication of the rights of minority children who have been denied equal protection of the laws and equal educational opportunity. Where possible, these fundamental rights should be accorded sooner, rather than later."

By contrast, in non-class action desegregation cases objectors must seek intervention under Rule 24 to express their dissatisfaction. *See, e.g.,* Adams v. Baldwin County Bd. of Educ., 628 F.2d 895 (5th Cir. 1980); Jones v. Caddo Parish School Bd., 487 F.2d 1275 (5th Cir. 1973); Hines v. Rapides Parish School Bd., 479 F.2d 762 (5th Cir. 1973). Rule 24(a)(2) has a three-part test for intervention as of right. Courts must allow a party to intervene if he claims (1) an interest in the subject of the action; (2) that disposition of the lawsuit may impair his ability to protect that interest; and (3) that his interest is not adequately represented by existing parties. The first two requirements are virtually conceded, for "[a]ll students and parents, whatever their race, have an interest in a sound educational system and in the operation of that system in accordance with the law." Moore v. Tangipahoa Parish School Bd., 298 F. Supp. 288, 293 (E.D. La. 1969). Settlement likely will impair that interest. Representation, however, is adequate if there is no collusion between parties, if the representative's interest is not adverse to the intervenor, and if the representative has not failed in his duty. *See, e.g.,* United States v. Board of School Comm'rs, 466 F.2d 573, 575 (7th Cir. 1972), *cert. denied,* 410 U.S. 909 (1973); Martin v. Kalvar Corp., 411 F.2d 552, 553 (5th Cir. 1969); United States v. American Inst. of Real Estate Appraisers, 442 F. Supp. 1072, 1081 (N.D. Ill. 1977), *appeal dismissed,* 590 F.2d 242 (7th Cir. 1978). The fact that the parties decided to enter a consent decree instead of pursuing the suit does not, by itself, prove collusion and adverse interest. A consent decree does not imply that the representative failed to assert the intervenor's interests as vigorously and effectively as the intervenor would have. *See* United States v. Board of School Comm'rs, 466 F.2d at 575; United States v. American Inst. of Real Estate Appraisers, 442 F. Supp. at 1081.

113. *See, e.g.,* Alaniz v. California Processors, Inc., 73 F.R.D. 269, 274 (N.D. Cal.), *modified on motion of the parties,* 73 F.R.D. 289 (N.D. Cal. 1976); Fox v. Glickman Corp., 253 F. Supp. 1005 (S.D.N.Y. 1971).

114. Mandujano v. Basic Vegetable Prods., Inc., 541 F.2d 832, 836 (9th Cir. 1976).

115. *Id.*

116. The general equitable principles outlined in Milliken v. Bradley (Milliken I), 418 U.S. 717 (1974), and Milliken v. Bradley (Milliken II), 433 U.S. 267 (1977), indicate that a federal court cannot invoke its powers without admission or proof of some violation of the Constitution or a statute unless the parties have consented to the issuance of the decree. The parties' consent can-

ing voluntary resolution of civil rights disputes[117] as well as the immediate benefits offered by speedy vindication of constitutional rights.[118] The court should also review the adequacy of representation[119] and the substance of the settlement proposal. As one court has observed, this evaluation generally will require "an amalgam of delicate balancing, gross approximations and rough justice."[120]

A court's review of the remedy proposed in a class action settlement differs from remedial considerations in a litigated case.[121] The court must determine that the proposed settlement is fair, adequate, reasonable, and appropriate.[122] To reach this determination, the court may hold evidentiary hearings[123] and may even appoint a master to assist in its evaluation of the evidence.[124] In the course of its inquiry, however, the court must refrain from adjudging the actual legal rights of the parties or reaching the ultimate merits of the case.[125] To do otherwise would defeat the policies encouraging settlement of litigation.[126]

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not, however, allow the court to order relief that it would not otherwise have the power to order. Such a result would enable the parties to expand collusively the jurisdiction and power of the federal courts, in contravention of the rule that federal courts are courts of limited jurisdiction. *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 64-241, 309-417 (2d ed. 1973). Because a court has the power to order both single-district and multi-district desegregation plans in those cases in which the plaintiff prevails, *see* notes 7-8 *supra* and accompanying text, it has the power to enter such a decree upon the parties' consent.

117. *See* notes 31-33 *supra* and accompanying text.

118. *See, e.g.,* United States v. Board of Educ., 88 F.R.D. 679 (N.D. Ill. 1981) (order denying motion to intervene); Alaniz v. California Processors, Inc., 73 F.R.D. 269 (N.D. Cal.), *modified on motion of the parties,* 73 F.R.D. 289 (N.D. Cal. 1976).

119. *See* notes 59-85 *supra* and accompanying text.

120. *See, e.g.,* City of Detroit v. Grinnell Corp., 495 F.2d 448, 468 (2d Cir. 1974) (quoting Saylor v. Lindsley, 456 F.2d 896, 904 (2d Cir. 1972)).

121. *See, e.g.,* Armstrong v. Board of School Directors, 616 F.2d 305, 314-15 (7th Cir. 1980).

122. *See, e.g.,* Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 616 F.2d 1006, 1014 (7th Cir. 1980).

123. *See, e.g.,* Young v. Katz, 447 F.2d 431 (5th Cir. 1971); Alaniz v. California Processors, Inc., 73 F.R.D. 269, 274 (N.D. Cal.), *modified on motion of the parties,* 73 F.R.D. 289 (N.D. Cal. 1976); Zerkle v. Cleveland-Cliffs Iron Co., 52 F.R.D. 151 (S.D.N.Y. 1971).

124. *See, e.g.,* Alaniz v. California Processors, Inc., 73 F.R.D. 269, 274 (N.D. Cal.), *modified on motion of the parties,* 73 F.R.D. 289 (N.D. Cal. 1976).

125. *See, e.g.,* Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 616 F.2d 1006, 1014 (7th Cir. 1980); Flinn v. FMC Corp., 528 F.2d 1169, 1172 (4th Cir. 1975), *cert. denied,* 424 U.S. 967 (1976); City of Detroit v. Grinnell Corp., 495 F.2d 448, 456, 462-63 (2d Cir. 1974); West Va. v. Chas. Pfizer & Co. 440 F.2d 1079, 1086 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971); Florida Trailer & Equip. Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960).

126. In Levin v. Mississippi River Corp., 59 F.R.D. 353 (S.D.N.Y.), *aff'd sub nom.* Wesson v. Mississippi River Corp., 486 F.2d 1398 (2d Cir.), *cert. denied,* 414 U.S. 1112 (1973), the court said:

Several criteria guide the court's determination of the fairness, adequacy, reasonableness, and appropriateness of a class action settlement. They are: (1) the apparent strength of the plaintiff's case, balanced against the offered settlement; (2) the ability of the defendant to perform the agreement; (3) the complexity, duration, and expense of continued litigation; (4) the likelihood of collusion in reaching the settlement; (5) the reaction of class members to the settlement; (6) the opinion of competent counsel; and (7) the current stage of the proceedings and the amount of discovery completed.[127] Courts have applied these criteria widely in the employment context[128] and increasingly in civil rights cases.[129]

Courts uniformly have regarded the apparent strength of the plaintiff's case as the most important criterion in evaluating a proposed settlement.[130] When parties agree on a settlement prior to adjudication, however, the court can only estimate the probable outcome of a trial on the basis of the plaintiff's allegations, the defendant's asserted defenses, and the costs of continued litigation.[131] The court cannot finally deter-

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> [T]he Court is cautioned not to turn the settlement hearing into a trial or rehearsal of a trial. To do so would defeat the very purpose of the compromise to avoid a determination of the sharply contested issues and to dispense with expensive and wasteful litigation. The Court's role is a more "delicate one," which requires a balancing of likelihoods rather than an actual determination of the facts and law in passing upon whether the proposed settlement is fair, reasonable and adequate.

Id. at 361 (footnotes omitted).

127. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION, *supra* note 29, § 1.46, at 56; 3B MOORE'S FEDERAL PRACTICE, *supra* note 26, ¶ 23.80[4], at 23-521.

128. *See, e.g., In re* General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1131-32 (7th Cir.), *cert. denied,* 444 U.S. 870 (1979); Grunin v. International House of Pancakes, 513 F.2d 114, 121 (8th Cir.), *cert. denied,* 523 U.S. 864 (1975); City of Detroit v. Grinnell Corp., 495 F.2d 448, 462 (2d Cir. 1974).

129. *See, e.g.*, Armstrong v. Board of School Directors, 471 F. Supp. 800, 804 (E.D. Wis. 1979), *aff'd,* 616 F.2d 305 (7th Cir. 1980).

130. *See, e.g.*, Armstrong v. Board of School Directors, 616 F.2d 305, 322 (7th Cir. 1980); Flinn v. FMC Corp., 528 F.2d 1169, 1172 (4th Cir. 1975), *cert. denied,* 424 U.S. 967 (1976); Grunin v. International House of Pancakes, 513 F.2d 114, 124 (8th Cir.), *cert. denied,* 423 U.S. 864 (1975); Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 801 (3d Cir.), *cert. denied,* 419 U.S. 900 (1974); Fox v. United States Dep't of HUD, 468 F. Supp. 907, 912 (E.D. Pa. 1979).

131. *See, e.g.*, Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14 (1981); Protective Comm. for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25 (1968); Armstrong v. Board of School Directors, 616 F.2d 305, 322 (7th Cir. 1980); Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 801 (3d Cir.), *cert. denied,* 419 U.S. 900 (1974); Fox v. United States Dep't of HUD, 468 F. Supp. 907, 912 (E.D. Pa. 1979).

The court in *Armstrong v. Board of School Directors* recognized that even though the court found defendants guilty of operating segregated schools, the outcome of the plaintiffs' case on the remedial issue was by no means certain. Three school desegregation cases that were pending

mine the merits of the case without deterring settlement altogether.[132] Furthermore, insofar as the court, under this criterion, must compare the probable remedy it would decree after full litigation with that proposed by the parties, it should recognize that the remedial aspect of a school desegregation case is far more complex than the liability aspect.[133] In these cases, therefore, the strength of the plaintiff's case on the issue of liability cannot be the sole criterion for evaluation of the proposed settlement.

The second criterion, that of the defendant's ability to perform a negotiated agreement, induces the court to compare the practical effects of a remedy that it would impose after trial with those of a settlement. The spirit of cooperation inherent in a good faith settlement will promote the long-range success of the desegregation remedy better than would a court-ordered remedy.[134] Moreover, one may expect the defendants in a school desegregation case to agree only to a settlement that is within their means. A remedy imposed by the court, on the other hand, may severely tax the defendants' limited resources.

The objections of various members are also relevant to a court's approval of a proposed settlement. The objections, however, are rarely dispositive,[135] even when raised by many class members. By definition, subgroups pursue diverse goals, and although they generally will have

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before the United States Supreme Court posed difficult questions concerning remedial plans: Dayton Bd. of Educ. v. Brinkman (Dayton II), 443 U.S. 526 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Tasby v. Estes, 572 F.2d 1010 (5th Cir. 1978), *cert. dismissed sub nom.* Estes v. Metropolitan Branches of Dallas NAACP, 444 U.S. 437 (1980). Rather than await the outcome of these cases, the parties decided to adjust the risk and uncertainty through negotiation and settlement. In light of this, the court found the settlement fair, reasonable, and adequate. Armstrong v. Board of School Directors, 616 F.2d at 325.

132. *See* note 125 *supra* and accompanying text.

133. The Second Circuit noted in United States v. Board of Educ., 605 F.2d 573 (2d Cir. 1979), that

> [e]stablishment of liability is but the first step. The precise remedy does not follow logically from the determination of liability, but rather reflects a careful reconciliation of the interests of the many affected members of the community and a choice among a wide range of possibilities. "The nature of the litigation does not lend itself to complete success by one side or the other." Keyes v. School Dist. No. 1, 439 F. Supp. 393, 400 (D. Colo. 1977).

Id. at 576.

134. *See* notes 32-33 *supra* and accompanying text.

135. *See, e.g.,* Mendoza v. United States, 623 F.2d 1338, 1358 (9th Cir. 1980) (objectors had misconception of the law), *cert. denied*, 450 U.S. 912 (1981); Armstrong v. Board of School Directors, 616 F.2d 305, 306 (7th Cir. 1980) (same); Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 803 (3d Cir. 1974) (objection by 20% of the class should not block approval), *cert. denied,* 419 U.S. 900 (1974); 7A C. WRIGHT & A. MILLER, *supra* note 29, § 1797.

some common interests, more often their interests will conflict.[136] Therefore, though the court should give some weight to objections, it must also consider the probable effect of the proposed settlement upon the interests of the class as a whole.[137] If the proposal will adequately correct segregative practices without infringing upon other rights, the court should approve the settlement even if it believes the parties could develop a more desirable plan.[138]

A school desegregation settlement must attain a minimum level of compliance with the Constitution.[139] Clearly, the court cannot approve a settlement proposal that initiates or continues conduct illegal or unconstitutional on its face.[140] Therefore, the court must carefully scrutinize the proposal and reject it if the proposal merely perpetuates the segregative status quo.[141]

The court may either approve or reject the settlement proposal, but cannot modify it without the consent of all parties.[142] Whatever its decision, the court must state its reasoning with sufficient detail to facilitate meaningful appellate review; mere boilerplate language will not

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136. *See, e.g.,* Fox v. United States Dep't of HUD, 468 F. Supp. 907, 912 (E.D. Pa. 1979). *See also* notes 67-71 *supra* and accompanying text.

137. *See, e.g.,* Armstrong v. Board of School Directors, 616 F.2d 305, 326 (7th Cir. 1980).

138. *See, e.g.,* Mendoza v. United States, 623 F.2d 1338, 1345 (9th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981). *See also* Dayton Bd. of Educ. v. Brinkman (Dayton I), 433 U.S. 406 (1977); Milliken v. Bradley (Milliken I), 418 U.S. 717 (1974).

139. Mendoza v. United States, 623 F.2d 1338, 1345 n.5 (9th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981); Armstrong v. Board of School Directors, 616 F.2d 305, 319 (7th Cir. 1980); Liddell v. Caldwell, 546 F.2d 768, 773-74 (8th Cir. 1976), *cert. denied,* 433 U.S. 914 (1977); United States v. Board of Educ., 88 F.R.D. 679 (N.D. Ill. 1981) (order denying motion to intervene).

The Court in *United States v. Board of Educ.* described its role:

> This Court does not view itself as a passive receptacle for the Board's desegregation plan, to respond in a Pavlovian way only if the bell is rung by a stated disagreement between the Board and the United States. It has not abdicated its constitutional responsibilities, and if the litigants were to agree on a plan that did not conform to the constitution this Court would reject that plan and send the parties back to the drawing board.

Id. at 687.

140. Armstrong v. Board of School Directors, 616 F.2d 305, 319-20 (7th Cir. 1980).

141. *See, e.g.,* Monroe v. Board of Comm'rs, 391 U.S. 450 (1968) (the minimum requirement of a remedial decree is that it include "whatever steps might be necessary" to eliminate totally all vestiges of a segregated school system); Green v. County School Bd., 391 U.S. 430, 437-38 (1968) (same).

The court in Armstrong v. Board of School Directors, 616 F.2d 305 (7th Cir. 1980), held that the desegregation settlement proposal met the standard of constitutional compliance. Although the plan did not require statistically perfect desegregation, it did require substantial desegregation and, in so doing, went to the heart of the constitutional violations found by the district court. *Id.* at 326.

142. *See, e.g.,* Burr v. Pryor, 468 F. Supp. 1314, 1316-17 (E.D. Ark. 1979).

suffice.[143] In fulfilling this requirement, however, the court should guard against any tendency to turn its statement of approval of the settlement into a determination of the merits of the case.[144]

The trial court's decision to approve or reject a settlement is subject to appellate review[145] if dissatisfied subgroups desire to contest the compromise. The scope of review, however, is narrow. An appellate court generally will overturn approval of a settlement only upon a clear showing that the trial court abused its discretion.[146] Such deference to the trial court reinforces the policies in favor of settlement[147] and recognizes the trial court's familiarity with the litigants and the

143. *See, e.g.,* Protective Comm. for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 434 (1968); Flinn v. FMC Corp., 528 F.2d 1169, 1173 (4th Cir. 1975), *cert. denied,* 424 U.S. 967 (1976); City of Detroit v. Grinnell Corp., 495 F.2d 448, 462 (2d Cir. 1974); Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 804 (3d Cir.), *cert. denied,* 419 U.S. 900 (1974); Newman v. Stein, 464 F.2d 689, 692 (2d Cir.), *cert. denied,* 409 U.S. 1039 (1972).

144. *See* notes 125-26 *supra* and accompanying text.

145. In Carson v. American Brands, Inc., 450 U.S. 79 (1981), the Supreme Court held that a district court's disapproval of a settlement is an appealable order, thus resolving a split among the circuits. *Compare* United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980) (refusal to enter consent decree is appealable order); Norman v. McKee, 431 F.2d 769 (9th Cir. 1970) (same), *cert. denied,* 401 U.S. 912 (1971), *and In re* International House of Pancakes Franchise Litigation, 487 F.2d 303 (8th Cir. 1973) (deciding appeal of disapproval of consent decree without comment on appealability issue) *with* Carson v. American Brands, Inc., 606 F.2d 420 (4th Cir. 1979) (refusal to enter consent decree is interlocutory and not appealable), *rev'd,* 450 U.S. 79 (1981), *and* Seigal v. Merrick, 590 F.2d 35 (2d Cir. 1978) (same). The Court recognized that the denial of an affirmative action consent decree between employer and employees had the practical effect of refusing an injunction and could result in "serious, perhaps irreparable consequences." 450 U.S. at 86. Therefore, the refusal to enter the decree is appealable as an interlocutory order under 28 U.S.C. § 1292(a)(1) (1976).

146. *See, e.g.,* Mendoza v. United States, 623 F.2d 1338, 1347 (9th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 616 F.2d 1006, 1015 (7th Cir. 1980); Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977); Flinn v. FMC Corp., 528 F.2d 1169, 1172 (4th Cir. 1975), *cert. denied,* 424 U.S. 967 (1976); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 850 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976); Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir.), *cert. denied,* 423 U.S. 864 (1975); West Va. v. Chas. Pfizer & Co., 440 F.2d 1079, 1085 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971).

Other grounds for reversal include plain error, Mendoza v. United States, 623 F.2d at 1347; Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 616 F.2d at 1015; failure to find the settlement equitable and in the public interest, *id.*; acting without knowledge of sufficient facts, City of Detroit v. Grinnell Corp., 495 F.2d 448, 462 (2d Cir. 1974); Newman v. Stein, 464 F.2d 689, 692 (2d Cir.), *cert. denied,* 409 U.S. 1039 (1972); and failure to allow objectors to develop on the record facts going to the propriety of the settlement, *id.*

147. *See* Newman v. Stein, 464 F.2d 689, 692 (2d Cir.), *cert. denied,* 409 U.S. 1039 (1972). It is arguable, however, that this rationale is not compelling in the class action context. The importance of protecting absentee interests tempers the usual pro-settlement policy of traditional litigation. *Id.* at 692 n.7. *See also* MANUAL FOR COMPLEX LITIGATION, *supra* note 29, § 1.21.

proceedings.[148]

II. BINDING EFFECT

The primary purpose of submitting a voluntary school desegregation plan to a court in the form of a class action consent decree is to bind all members of the class to the settlement and thereby avoid future litigation.[149] This procedure allows the parties to avoid the expense of protracted litigation and to prevent subsequent collateral attack. More importantly, the binding effect of the consent decree ensures the vitality of the remedy by eliminating the uncertainty of relitigation and modification of the settlement.[150] Furthermore, the negotiations shaping the decree are more likely to result in a settlement when the parties know that the product of the negotiations will have binding effect.[151]

The policies underlying the finality of class action settlements are consonant with the goals of the drafters of the Federal Rules of Civil Procedure, who sought the broadest possible binding effect for such settlements.[152] In a Rule 23(b)(2) class action, the conduct of the defendants, by definition, affects the named class as a whole.[153] The parties, therefore, may settle the legality of this conduct with respect to the entire class in one final action.[154] As a result, in school desegregation cases courts have consistently held that intervention in the class suit, rather than collateral attack, is the appropriate course of action for those who object to the remedy decreed.[155]

The broad res judicata effect of class action settlements comports with due process requirements only if the procedure employed fairly protects the interests of absent class members.[156] Thus, if a party attacking the decree shows that the class was inadequately represented,

148. *See, e.g.,* Armstrong v. Board of School Directors, 616 F.2d 305, 318 (7th Cir. 1980); Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 34 (3d Cir. 1971).

149. *See* note 19 *supra* and accompanying text.

150. *See Developments in the Law—Class Actions, supra* note 29, at 1400.

151. *Id.*

152. *See* Advisory Comm. Note, 39 F.R.D. 69, 105-06 (1966).

153. *See* notes 43-44 *supra* and accompanying text.

154. *See* Advisory Comm. Note, 39 F.R.D. 69, 102 (1966).

155. *See, e.g.,* Adams v. Baldwin County Bd. of Educ., 628 F.2d 895 (5th Cir. 1980); Hines v. Rapides Parish School Bd., 479 F.2d 762 (5th Cir. 1973); Black & White Children of the Pontiac School Sys. v. School Dist., 464 F.2d 1030 (6th Cir. 1972).

156. *See, e.g.,* Hansberry v. Lee, 311 U.S. 32, 42 (1940). *See also* notes 60-61 *supra* and accompanying text.

the decree will not be binding.[157] This exception to the res judicata effect of class action settlements reinforces the importance of the class certification process.[158]

A class action consent decree in a school desegregation case should be immune from most changes in the law after its approval by the court.[159] To permit re-evaluation of a settlement because of court decisions rendered after the approval would undercut a significant motive for settlement: the avoidance of risks created by uncertainty of relevant legal standards.[160] Thus, a consent decree should remain in force even if, after its entry, the Supreme Court either disallowed the use of causal presumptions to prove segregation[161] or determined that a desegregation plan permitting the continued existence of some one-race schools is unconstitutional.[162] There are, nevertheless, limits to the effect of res judicata. A fundamental change in the law—for example, a judicial determination that school districts no longer have a duty to desegregate—would allow defendants to argue successfully for rescission of the consent decree on the basis of hardship. In this situation, res judicata

157. *See, e.g.,* Sam Fox Publishing Co. v. United States, 366 U.S. 683, 691 (1961); Hansberry v. Lee, 311 U.S. 32, 42 (1942); Gonzales v. Cassidy, 474 F.2d 67, 74 (5th Cir. 1973).

158. *See* notes 49-61 *supra* and accompanying text.

159. Normally, consent decrees are modifiable only upon the consent of the parties, *see, e.g.,* Alaniz v. California Processors, Inc., 73 F.R.D. 269 (N.D. Cal.), *modified on motion of the parties,* 73 F.R.D. 289 (N.D. Cal. 1976), or by the court if the decree has become oppressive. *See* Note, *supra* note 22, at 1318. A different situation exists, however, when the government and a school district enter a non-class consent decree that admits unconstitutional segregation. Because the school district, by its admission of segregation, has the duty to desegregate the schools, these decrees are modifiable by the court upon a showing of ineffectiveness. *See, e.g.,* United States v. Columbus Mun. Separate School Dist., 558 F.2d 228 (5th Cir. 1977), *cert. denied,* 434 U.S. 1013 (1978); United States v. Seminole County School Dist., 553 F.2d 992 (5th Cir. 1977).

The desegregation decree should also be immune from changed factual circumstances. *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976), in which the Supreme Court held that once a school board has initially complied with a court desegregation order specifying the proportion of minority students in each of its schools, the court cannot require it to alter attendance zones annually in response to demographic changes.

160. *See, e.g.,* Armstrong v. Board of School Directors, 616 F.2d 305, 322 n.25 (7th Cir. 1980). *See also* Bronson v. Board of Educ., 525 F.2d 344 (6th Cir. 1975) (absent a substantial change in the law, desegregation plaintiffs may not relitigate issues settled by a former judgment), *cert. denied,* 425 U.S. 934 (1976).

161. *See* notes 10-14 *supra* and accompanying text.

162. *See* Tasby v. Estes, 572 F.2d 1010 (5th Cir. 1978), *cert. dismissed sub nom.* Estes v. Metropolitan Branches of Dallas NAACP, 444 U.S. 437 (1980), in which the court of appeals reversed a lower court desegregation decree and remanded the case with instructions to justify, with specific findings, the maintenance of one-race schools.

would not provide any greater effect than would the doctrine of stare decisis.[163]

III. CONTENT

The appropriate content of a school desegregation plan will vary in each case, for a plan must respond to the problems and interests of the community for which it is intended.[164] Relevant to the content of the plan are the demographic, social, political, legal, and economic characteristics of the community involved. Despite the uniqueness of each desegregation plan, however, it is nevertheless instructive to examine existing plans and formulate a basic structure for the content of a voluntary plan.

Three cities, Milwaukee, Chicago, and St. Louis, have formulated voluntary school desegregation plans. In *Armstrong v. Board of School Directors*,[165] defendant Milwaukee school board, previously found guilty of unconstitutional segregation,[166] entered into a voluntary settlement with plaintiff class members to desegregate the school system.[167] The single-district settlement agreement is currently in effect. The Chicago Board of Education, without any litigation of liability, entered a non-class action consent decree with the United States

163. *See Developments in the Law—Class Actions, supra* note 29, at 1398.

164. *See, e.g.*, United States v. Board of Educ., 605 F.2d 573, 576-77 (2d Cir. 1979).

165. 471 F. Supp. 800 (E.D. Wis. 1979), *aff'd*, 616 F.2d 305 (7th Cir. 1980).

166. Armstrong v. O'Connell, 451 F. Supp. 817 (E.D. Wis. 1978).

167. 471 F. Supp. at 813-20.

It is instructive to note that both sides engaged in considerable compromise of their original positions in reaching agreement on a settlement plan. The parties entered the following exhibit, *id.* at 826, summarizing the settlement negotiations as proof that no collusion existed between their counsel:

SUMMARY OF SETTLEMENT NEGOTIATION

Issue	Plaintiffs' Original Negotiating Position	Defendants' Original Negotiating Position	Settlement Terms
STUDENT DESEGREGATION	All students are to be in schools which are 25-50% black except for "X" with "X" being determined year-by-year by grade level by applying this formula: $\frac{B-X}{T-X} = .4$ If "X" is positive, it is the maximum number of black students who may be assigned to schools outside the range. If "X" is negative, it is the maximum number of white students who may be assigned to schools outside the range.	Status quo maintained. Two-thirds of the schools to be 25-50% black.	75% of the students (excluding kindergarten, ex ed schools and students in four bilingual schools) are to be in either high schools which are 20-60% black or junior high schools which are 25-60% black. Minimum black enrollments of 250 black students in high schools and either (1) 25% black or (2) 12.5% black and other minorities and a bilingual program, in elementary and junior high schools, is required.
DURATION OF ORDER	12 years	3 years	5 years
MONITORING	Nine-member monitoring board with very broad jurisdiction. Once a semester submission of statistics required. School visitation and data requesting authority.	No monitoring board required. Magistrate to review statistics for compliance once a year.	Five-member monitoring board with jurisdiction to review complaints relating to the order. Magistrate to review decisions if appealed by one of the parties. Once a semester submission of statistics required. Visitation and data requesting authority.

Department of Justice[168] to develop a constitutionally acceptable desegregation plan. The school board has now formulated and proposed a single-district desegregation plan.[169] The St. Louis Board of Education, found guilty of unconstitutional segregation in *Liddell v. Board of Education*,[170] subsequently moved to add the suburban school districts as defendants to the suit[171] and proposed a voluntary, multi-district

SUMMARY (*continued*)

FEES	$825,000 + for Attorney Barbee plus costs and expenses. $340,000 + for Attorney Charne, plus costs and expenses.	Substantial downward adjustments required, because of duplication of efforts, loss of appeal, risk of further litigation, etc.	$550,000 plus costs and expenses for Attorney Barbee. $300,000 plus costs and expenses for Attorney Charne.
MISCELLANEOUS	Racial balance transfer plan shall stay in effect.	Racial balance transfer plan shall stay in effect.	Racial balance transfer plan shall stay in effect.
	Nondiscriminatory criteria are to be established for closing and locations of specialities.	No need to mention in order as covered by general injunction.	School openings and closings and locations of specialties will not be determined in a discriminatory manner.
	Prohibitory and mandatory injunction will be issued.	Prohibitory and mandatory injunction will be issued.	Prohibitory and mandatory injunction will be issued.
	All students have the right to attend desegregated schools.	All students have the right to attend desegregated schools.	All students have the right to attend desegregated schools.

168. United States v. Board of Educ., No. 80-C-5124 (N.D. Ill. Sept. 24, 1980) (order entering consent decree).

169. *See* Student Desegregation Plan for the Chicago Public Schools, pts. 1 & 2, United States v. Board of Educ., No. 80-C-5124 (N.D. Ill., filed April 15, 1981) [hereinafter cited as Chicago Desegregation Plan].

170. 491 F. Supp. 351 (E.D. Mo. 1980), *aff'd,* No. 80-1458 (8th Cir. Feb. 13, 1981), *cert. denied,* 50 U.S.L.W. 3436 (U.S. Dec. 1, 1981) (No. 80-2152).

171. Cross-Claim for Defendant, Liddell v. Board of Educ., No. 72-100-C(4) (E.D. Mo., filed Jan. 9, 1981). *See* note 17 *supra*.

desegregation plan.[172] Five suburban school districts have agreed to participate in the voluntary plan.[173] The court joined eighteen nonparticipating districts as parties to the suit.[174]

These three plans have similar structures despite their differences in scope and predicating liability. The plans have three substantive components: an injunction provision,[175] an affirmative obligations provision,[176] and a compliance provision.[177] Additionally, the plans have implementing provisions[178] and limited durations.[179]

A. *Substantive Provisions*

Both the St. Louis plan and the Milwaukee agreement contain injunctive provisions. The St. Louis plan requires participating districts to "acknowledge a responsibility not to engage in any purposely and intentional segregative activities"[180] and to adopt procedures to prohibit transfers, other than those occurring under the plan, that increase segregation.[181] Similarly, the Milwaukee agreement embodies two permanent injunctions. The first injunction prohibits the school board and its successors, officers, and agents from discriminating on the basis of race in the operation of the Milwaukee public schools.[182] The second injunction requires racially nondiscriminatory decisions regarding school openings and closings and the location of specialty programs.[183]

The affirmative obligation provision in the Milwaukee settlement mandates that defendant school board actively desegregate the public schools. This provision obligates the school board annually to provide all students with written notice of their right to attend a desegregated

172. *See* An Educational Plan for Voluntary, Cooperative Desegregation of Schools in the St. Louis, Missouri Metropolitan Area, Liddell v. Board of Educ., No. 72-100-C(4) (E.D. Mo., filed Mar. 27, 1981) [hereinafter cited as St. Louis Desegregation Plan].

173. Liddell v. Board of Educ., No. 72-100-C(4) (E.D. Mo. Aug. 24, 1981) (order granting in part and denying in part motions to add cross-claims and parties).

174. *Id.*

175. *See* notes 180-83 *infra* and accompanying text.

176. *See* notes 184-204 *infra* and accompanying text.

177. *See* notes 205-15 *infra* and accompanying text.

178. *See* notes 216-23 *infra* and accompanying text.

179. *See* notes 224-29 *infra* and accompanying text.

180. St. Louis Desegregation Plan, *supra* note 172, at 7.

181. *Id.*

182. Armstrong v. Board of School Directors, 471 F. Supp. 800, 815 (E.D. Wis. 1979), *aff'd*, 616 F.2d 305 (7th Cir. 1980).

183. *Id.* at 818.

school[184] upon request.[185] The school board must also assign students within the system in such a manner that a minimum number of white students, determined by a formula varying with the system's total and minority enrollments, are enrolled in desegregated schools.[186] In addition, the school board is required to continue a pre-existing system that permits students to transfer only when such transfers will enhance the racial balance of the district.[187] Finally, the school board must implement a human relations program for students to aid in the achievement of quality education and desegregation and thereby ensure the success of the plan as an educational, social, and legal venture.[188]

The St. Louis plan implements its formal commitment to desegregation by three methods. First, permissive interdistrict transfers allow students from any participating school district to transfer voluntarily to existing programs with available space when the transfer would decrease segregation.[189] The plan prohibits interdistrict transfers that cause the white population of any school to exceed eighty-five percent.[190] Second, "magnet" schools with specialized formats attempt to decrease segregation by attracting students by interest rather than by

184. The agreement defines a "desegregated school" as follows:

(1) Each elementary or junior high school which has a student population composed of not less than 25% and not more than 60% black students and

(2) Each senior high school which has a student population of not less than 20% black students and not more than 60% black students.

Id. at 815.

185. *Id.*

186. *Id.* Application of the agreement precludes the existence of any all-white schools in Milwaukee; however, the formula does leave open the possibility that some all-black schools will persist. The formula does not mandate the existence of any one-race schools, and the parties are free to go beyond the minimum requirements of the order to eliminate all one-race schools in the system. *Id.* at 816.

187. *Id.* at 815, 819-20.

188. *Id.* at 816.

189. St. Louis Desegregation Plan, *supra* note 172, at 10. Three principal conditions govern the exercise of interdistrict transfer rights: (1) the right may be exercised only when there is available space in the host school, so that no student already in the school is displaced; (2) the participating district is required only to accept transfers that do not cause the black student population percentage to exceed 15%; and (3) the host district does not bear incremental costs of educating the transfer students. *Id.* at 11. Transferring students must meet the same criteria for admission and responsibilities that apply to host district students. *Id.* at 23.

190. *Id.* at 14. Each participating district is required to accept as many black transfer students as necessary to constitute 15% of the total student population in the district. The plan does not require any school to accept more students than necessary to raise the overall percentage of blacks in the student population higher than 25%, although a participating district could accept more transfers than these ratios require. *Id.* at 13-14.

geography.[191] Third, the plan contemplates establishment of educational and quasi-educational programs to bring together students for constructive experiences outside traditional academic settings.[192]

The Chicago desegregation plan affirmatively obligates the board of education to establish "stably integrated schools";[193] that is, schools whose enrollments of one race or minority do not exceed seventy percent.[194] The board initially will use voluntary transfers of students,[195] magnet schools,[196] and adjustments of attendance areas[197] to effectuate desegregation. In the second phase, it will make mandatory student assignments not involving transportation.[198] As a last resort, the board will institute mandatory assignments through busing.[199] The school board also will revise its bilingual[200] and special education[201] programs, magnet schools,[202] and general curricula[203] to coordinate with student reassignment and to remove bias.[204]

All three desegregation plans create monitoring committees to supervise the implementation of the programs. The committees' authority

191. *Id.* at 10. The magnet schools have a different transfer policy than the permissive interdistrict transfers. Students are chosen from applications for the schools on a first-come, first-served basis subject to two priorities. Black students who live in the City of St. Louis have the highest priority; black students in predominately black districts have the second priority. *Id.* at 18-19.

192. *Id.* at 10. The educational and quasi-educational programs include programs at cultural institutions and libraries. *Id.* at 21-22.

193. A school is considered stably integrated under the plan if its enrollment is 30 to 70% white or 30 to 70% minority and has some history of stability. Chicago Desegregation Plan, *supra* note 169, pt. 2, at 3.

194. *Id.* pt. 2, at 3.

195. *Id.* pt. 2, at 4-5. The plan encourages voluntary transfers if the transfer will enhance desegregation at the receiving school and not adversely affect it at the sending school. *Id.* pt. 2, at 3.

196. *Id.* pt. 2, at 5-6. Magnet schools have ethnic and racial goals of 15 to 35% white and 65 to 85% minority students. *Id.*

197. *Id.* pt. 2, at 6.

198. *Id.* pt. 2, at 7. Mandatory assignments not involving busing include the pairing of two contiguous schools. *Id.*

199. *Id.* pt. 2, at 8. The consent decree from which the desegregation plan was developed, *see* notes 168-69 *supra* and accompanying text, provides that "[m]andatory reassignment and transportation, at Board expense, will be included to ensure success of the plan to the extent that other techniques are insufficient." Chicago Desegregation Plan, *supra* note 169, pt. 2, at 8.

200. *Id.* pt. 1, at 51-58.

201. *Id.* pt. 1, at 39-50.

202. *Id.* pt. 1, at 29-34.

203. *Id.* pt. 1, at 9-28.

204. *Id.* pt. 1, at 26.

ranges from adjudicative to advisory and reflects the degree of the school districts' prior liability for segregation.[205]

The compliance provision of the Milwaukee settlement agreement establishes a monitoring panel consisting of lay members and a United States magistrate.[206] The school board must submit to the panel reports of the racial composition of the schools.[207] In addition, individual class members may file noncompliance reports with the panel, which will investigate and correct any deficiency. Finally, the magistrate alone may review any school board decisions affecting desegregation. The board, however, retains a right of appeal to the district court.[208]

The St. Louis plan creates a coordinating council, composed of representatives from each participating district and the state,[209] to oversee and coordinate the plan.[210] Specifically, the council will adopt procedures to disseminate information about the plan; to report regularly to the participating districts, the parties, and the court; and to resolve any disputes among the participating districts or the parties.[211]

The Chicago plan establishes a desegregation monitoring commission with a racial and ethnic composition proportionate to that of the student population.[212] The commission will monitor the activities of the desegregation project and evaluate and provide recommendations concerning the progress of desegregation to the Board of Education.[213] Additionally, the plan establishes advisory panels of parents and

205. The Milwaukee plan is predicated on a judicial determination of liability for segregation. Armstrong v. Board of School Directors, 471 F. Supp. 800 (E.D. Wis. 1979), *aff'd,* 616 F.2d 305 (7th Cir. 1980). The monitoring committee has both an advisory function and an adjudicative, or dispute resolving, function. *See* notes 206-08 *infra* and accompanying text. The court found the St. Louis school board guilty of segregation, Liddell v. Board of Educ., 491 F. Supp. 351 (E.D. Mo. 1980), *aff'd,* No. 80-1458 (8th Cir. Feb. 13, 1981), *cert. denied,* 50 U.S.L.W. 3436 (U.S. Dec. 1, 1981) (No. 80-2152), but none of the suburban districts has litigated the issue of segregation. The St. Louis monitoring committee has an advisory function and a limited dispute resolution function. *See* notes 209-11 *infra* and accompanying text. The Chicago Board of Education has not litigated the issue of segregation, and its monitoring committee has no dispute resolution function. *See* notes 212-15 *infra* and accompanying text.

206. Armstrong v. Board of School Directors, 471 F. Supp. 800, 813, 816-18 (E.D. Wis. 1979), *aff'd,* 616 F.2d 305 (7th Cir. 1980).

207. *Id.*

208. *Id.*

209. St. Louis Desegregation Plan, *supra* note 172, at 27.

210. *Id.*

211. *Id.* at 28.

212. Chicago Desegregation Plan, *supra* note 169, pt. 1, at 105.

213. *Id.* pt. 1, at 103.

students and of community organization representatives[214] to facilitate public participation in the planning and implementation of the desegregation program.[215]

B. *Implementing Provisions*

Because the parties negotiated the Chicago and St. Louis plans before judicial determination of unconstitutional practices,[216] both include disclaimers of any liability by the school districts.[217] The possibility of including such a disclaimer gives plaintiffs significant leverage in negotiations, for the ability to avoid litigation of liability is a major incentive for a school district to enter a voluntary desegregation plan.[218] The presence of a disclaimer of liability in a consent decree, however, should neither preclude the court from imposing continuing obligations on a defendant as part of the settlement[219] nor affect the

214. *Id.* pt. 1, at 86.

215. *Id.* pt. 1, at 83.

216. The St. Louis multi-district plan is not predicated on liability because the five participating suburban school districts have never litigated the issue. *See* note 205 *supra*.

217. *See* Chicago Desegregation Plan, *supra* note 169, pt. 2, at 22 ("[n]othing in the Consent Decree, the Resolution adopting the plan, or the Plan, or in the public discussion draft of the Plan, constitutes any acknowledgement of any constitutional or statutory violation by the Board [of Education]"); St. Louis Desegregation Plan, *supra* note 172, at 35 ("[i]f during any phase of implementation of the plan . . . the parties to the case or any participating districts were to withdraw for any reason, they would have and be deemed to have maintained, and not in any way waived by participation in this plan, all legal rights, legal arguments or defenses to be made in their behalf that they now have").

For cases involving consent decrees with disclaimers of liability outside the school desegregation context, see Swift & Co. v. United States, 276 U.S. 311, 327 (1928) (antitrust); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 469 F. Supp. 836, 851 (N.D. Ill. 1979) (housing discrimination), *aff'd,* 616 F.2d 1006 (7th Cir. 1980); EEOC v. AT&T, 419 F. Supp. 1022, 1038 (E.D. Pa. 1976) (employment discrimination), *aff'd,* 556 F.2d 167 (3d Cir. 1977), *cert. denied,* 438 U.S. 915 (1978).

218. *See, e.g.,* EEOC v. AT&T, 419 F. Supp. 1022 (E.D. Pa. 1976), *aff'd,* 556 F.2d 167 (3d Cir. 1977), *cert. denied,* 438 U.S. 915 (1978), in which the court said:

> [A] disclaimer of liability is, of course, a standard feature in consent decrees. The defendant denies that it has done anything wrong, then promises not to do it again. Nevertheless, it is clear that the failure of a party to a consent decree to admit liability for alleged misconduct does not affect the validity of the consent decree itself. . . . The instant defendants candidly admit that the absence of proof of actual discrimination and their denial of such discrimination are immaterial. They rightly point out that very few consent decrees would be negotiated if an admission of liability by the defendants was a *sine qua non*.

Id. at 1038 n.16.

219. *See, e.g.,* Swift & Co. v. United States, 276 U.S. 311, 327 (1928); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 469 F. Supp. 836, 850-51 (N.D. Ill. 1979), *aff'd,* 616 F.2d 1006 (7th Cir. 1980).

court's jurisdiction over the action.[220]

Both the St. Louis plan[221] and the Milwaukee settlement agreement[222] are expressly conditioned upon the approval of the consent decrees as proposed. The plans are void if the courts decline to adopt the proposed consent decrees.[223] The purpose of these contingency clauses is to assure the parties of judicial approval and protection before they make any binding commitments.

The duration of the desegregation plans is limited in all three cities. In Milwaukee, the settlement agreement is to remain in effect for five years.[224] The Chicago Board of Education intends complete implementation of its plan within two years.[225] By contrast, the St. Louis plan has two three-year phases. The first phase is designed to decrease emphasis on litigation by gradual withdrawal from the lawsuit,[226] with a concurrent increase in emphasis on education and on cooperation among participating districts.[227] At the end of the first phase, the participants will review the experience of the previous three years and prepare a second three-year program.[228] The parties will present the program to the court and, upon approval, will implement it as the final phase.[229] Until that time, school districts may withdraw from participation at any time.

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220. *See, e.g.,* Swift & Co. v. United States, 276 U.S. 311, 327 (1928), Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 469 F. Supp. 836, 850-51 (N.D. Ill. 1979), *aff'd,* 616 F.2d 1006 (7th Cir. 1980).

221. St. Louis Desegregation Plan, *supra* note 172, at 34.

222. Armstrong v. Board of School Directors, 471 F. Supp. 800, 815 (E.D. Wis. 1979), *aff'd,* 616 F.2d 305 (7th Cir. 1980).

223. *Id.*; St. Louis Desegregation Plan, *supra* note 172, at 34.

224. Armstrong v. Board of School Directors, 471 F. Supp. 800, 818 (E.D. Wis. 1979), *aff'd,* 616 F.2d 305 (7th Cir. 1980).

225. Chicago Desegregation Plan, *supra* note 169, pt. 2, at 21.

226. St. Louis Desegregation Plan, *supra* note 172, at 34. During the first phase, the parties to the case would refrain from any discovery connected with the interdistrict aspect of the desegregation lawsuit except for appeals already pending. *Id.* at 36. During the first year, the St. Louis Board of Education would withdraw its motions to add suburban school districts as parties to the case. During the second year, the Board would drop its motions entirely. *Id.* at 36-37.

227. *Id.* at 36-38. The participating districts would accept the affirmative obligations provisions of the plan during the first year, *see* notes 189-92 *supra* and accompanying text, seek available space for at least half the students desiring to transfer to other districts, and establish two magnet programs. The next year, the districts would try to place all the remaining students who wish to transfer and would create additional magnet programs. During the third year, the districts would establish any additional magnet schools and review the experience of the first phase of the program. St. Louis Desegregation Plan, *supra* note 172, at 36-38.

228. *Id.* at 39.

229. *Id.*

School districts planning to enter into a class action consent decree for desegregation may wish to model their plans after the Milwaukee, Chicago, and St. Louis plans. The injunctive provision provides a basis for protection against future claims of segregation because the school district must refrain from further segregative acts. The compliance provision monitors school district actions and also provides a method for arbitration of any disputes concerning desegregation.

Parties should tailor the affirmative obligations provision in a consent decree to address community needs. The district court approved the Milwaukee agreement, finding it fair, adequate, reasonable, and appropriate,[230] even though the plan does not require "statistically perfect" desegregation.[231] Expert witnesses predicted, however, that the plan would achieve substantial desegregation.[232] Under the plan, not only does every student in the district have the right to attend a desegregated school, but no white student is insulated from attending school with substantial black enrollments.[233] In the absence of a prior determination of liability, a school district may obtain judicial approval of a plan without ensuring that no white student is insulated from attending a desegregated school. Such assurance would depend, rather, on the present racial composition of the schools, residential patterns, and community desires.

Limiting the duration of a desegregation consent decree is both reasonable and attractive. The res judicata effect of a class action settlement provides certainty and assurance to the parties during negotiations and avoids unwanted modification of the settlement after court approval. On the other hand, this binding effect could be counter-productive if it commits the parties to a plan that subsequently becomes obsolete in light of future changes in the legal, demographic, or political climate of the community. A limitation on the duration of the agreement may be the most acceptable compromise, because it would allow for reassessment of the otherwise binding plan at the end of a specified period of time. After negotiating one plan, the parties'

230. Armstrong v. Board of School Directors, 471 F. Supp. 800, 809 (E.D. Wis. 1979), *aff'd,* 616 F.2d 305 (7th Cir. 1980).

231. Armstrong v. Board of School Directors, 616 F.2d 305, 323 (7th Cir. 1980).

232. The court heard various experts testify as to the projected minimum and maximum effect of the desegregation plan. The court noted that attainment of the maximum effect was unlikely without implementation of a voluntary metropolitan area remedy. Armstrong v. Board of School Directors, 471 F. Supp. 800, 808, 825 (E.D. Wis. 1979), *aff'd,* 616 F.2d 305 (7th Cir. 1980).

233. *See* note 186 *supra*.

experience and familiarity with relevant procedures should enable them to negotiate a subsequent plan with little difficulty in the event segregation persists.

IV. CONCLUSION

Voluntary school desegregation through class action consent decrees is a viable and effective means of desegregation for many communities. The class action procedure has inherently adequate safeguards to allow maximum community participation and to protect individual constitutional rights.[234] Because of this community participation, the plan finally adopted will be generally compatible with the needs and desires of the entire school district. In addition, the plan ultimately will be more successful than a court-ordered remedy because of the community support and confidence implicit in its adoption.[235] Finally, several incentives, including the avoidance of protracted litigation, assurance against future lawsuits, and the possibility of prompt and peaceful integration,[236] motivate school districts to participate in voluntary desegregation plans. School districts faced with desegregation litigation should consider class action consent decrees for voluntary desegregation as an alternative to defending interminable, and often bitter, lawsuits.

Kathleen Snyder Schoene

234. *See* notes 74-85 *supra* and accompanying text.
235. *See* note 33 *supra* and accompanying text.
236. *See* note 118 *supra* and accompanying text.