INTRODUCTION

Rule 23(c)(2) of the Federal Rules of Civil Procedure pertaining to class actions requires that the class members receive "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The rule is silent as to which party must pay the costs of informing class members of the pending suit. Where individual notice is required these costs are separable into two distinct elements: (1) the cost of identification of class members, that is, the cost of searching records for the names and addresses of class members, and (2) the cost of sending notice. While the costs of notification were placed upon the representative plaintiff by the United States Supreme Court in Eisen v. Carlisle & Jacquelin. 2

1. 417 U.S. 156 (1974). Although a total of eight opinions had been written in the Eisen litigation prior to the Supreme Court decision in Eisen IV, the merits had never been reached. Note, Reflections on Eisen v. Carlisle & Jacquelin: Class Actions in the Federal Courts, 46 U. COLO. L. REV. 243, 243 n.4 (1974). The decisions of the lower courts in chronological order are reported as follows: 41 F.R.D. 147 (S.D.N.Y. 1966) (order by the district court dismissing the suit as a class action); 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967) (allowing the appeal of the district court's order) [Eisen I]; 391 F.2d 555 (2d Cir. 1968) (ordering the district court to reconsider the dismissal of the class action) [Eisen II]; 50 F.R.D. 471 (S.D.N.Y. 1970) (holding that the issues of manageability and notice required further consideration); 52 F.R.D. 253 (S.D.N.Y. 1971) (determining the class to be manageable and embracing the concept of a fluid class recovery); 54 F.R.D. 565 (S.D.N.Y. 1972) (ordering defendants to bear 90% of the costs of notice); 479 F.2d 1005 (2d Cir. 1973) (holding that the district court erred in imposing 90% of notice costs on defendants, rejecting fluid class recovery, declaring the class unmanageable, and dismissing the suit as a class action) [Eisen III]; and 479 F.2d 1020 (2d Cir. 1973) (denying petition for rehearing en banc).

In Eisen IV, the United States Supreme Court held that the petitioner (plaintiff) had to bear the cost of notice. 417 U.S. at 177. Petitioner declined to pay the initial cost of notice, estimated to be $21,720, since his individual recovery would be only $70. Id. at 167-68. Therefore, the Supreme Court remanded the case with instructions to dismiss the class action as defined and vacated the decision of the court of appeals. Id. at 179. The Supreme Court found that the notice requirements of Rule 23 were dispositive of the class action, and did not consider whether the court of appeals correctly decided the issues of manageability and fluid class recovery. Id. at 172 n.10. In Eisen II, Chief Judge Lumbard accurately described the Eisen litigation as a "Frankenstein monster posing as a class action." 391 F.2d at
sen IV), the Court did not address the issue of identification costs until the recent case of Oppenheimer Fund, Inc. v. Sanders. ³

The United States Supreme Court granted certiorari in Oppenheimer⁴ to resolve a conflict in the decisions of the Second and Fifth Circuits over the question of which party in a class action must bear the cost of identification of class members.⁵ In a unanimous decision written by Mr. Justice Powell, the Court held that although a district court has some discretion in allocating the cost of identification to the class action defendant, as a general rule the representative plaintiff should bear all costs relating to the sending of notice, including costs of identification, because it is he who seeks to maintain the suit as a class action.⁶

The Supreme Court considered three issues in Oppenheimer. The first issue was whether the discovery rules⁷ rather than Rule 23(d)⁸ of the Federal Rules of Civil Procedure are the appropriate source of authority for the district court’s order directing defend-
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The Supreme Court's resolution of these issues, and the deterrent effect thereof upon class actions, is the subject of this article.

FACTS AND HOLDING

The plaintiffs in Oppenheimer were individual purchasers of shares in a mutual investment fund, Oppenheimer Fund, Inc. ("Fund"). They filed suit in 1969 against the Fund, its management corporation, a brokerage firm, and various individuals for violations of the federal securities laws. The plaintiffs claimed that in 1968 and 1969, defendants issued or caused to be issued misleading Fund prospectuses and annual reports. Any step in the action . . . (and) (5) dealing with similar procedural matters.

Id. at 2385-86. The plaintiffs further alleged that the restricted securities had been overvalued on the Fund's books causing the Fund's net asset value and thus the price of its shares to be artificially inflated. Id. at 2386. The plaintiffs sought to recover from defendants, other than the Fund, the amount by which the price they paid for Fund shares exceeded their true value. Id. The plaintiffs' counsel estimated that the average recovery per class member would be about $15, and that the aggregate recovery might be $1.5 million. Id. at 2386 n.3.

The Fund was not named as a defendant in the class action portion of the suit. Id. at 2388 n.9. However, the Fund might ultimately have been liable, since the non-Fund defendants alleged that if they were liable to plaintiffs and their class for overvaluation of Fund shares, then the Fund would be liable to them for excess amounts received by the Fund as a result of the overvaluation. Id. at 2386 n.4.
In April, 1973, plaintiffs moved for an order allowing them to represent a class consisting of all persons who bought shares in the Fund between March 15, 1968, and April 24, 1970. Upon deposition of employees of the Fund’s transfer agent, the representatives of the class learned that the proposed class numbered about 121,000 persons. In order to identify the class members, manual and computer search operations, estimated to cost over $16,000, would have to have been performed on certain records kept by the Fund’s transfer agent. In an attempt to lower costs of identification and notification, plaintiffs proposed a redefinition of the class to exclude those who had sold their shares in the Fund. This proposal was rejected by the district court. More than six years after the litigation began, the district court held that the suit met the requirements for class action treatment under Rule 23(b)(3) and the defendants would have to pay the transfer agent to search its records to identify class members. The court also held that the plaintiffs were required at their own expense to prepare and mail notice of the pending suit to members of the class.

On defendants’ interlocutory appeal, a Second Circuit panel

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15. Id. at 2386.
16. Id. Of the 121,000 class members, about 103,000 still held shares in the Fund, while some 18,000 had sold their shares after the end of the class period. Since about 171,000 persons currently held shares in the Fund, approximately 68,000 current Fund shareholders were not members of the class. Id.
17. Id.
18. Id. The plaintiffs also proposed to insert notice in one of the Fund’s periodic mailings to its current shareholders. The two proposals would have made it unnecessary to compile a separate list of class members in order to notify them. Had the plaintiffs’ proposals been accepted, their cost in printing and inserting the notices would have been about $5000. Id. at 2386-87.
20. 20 Fed. R. Serv. 2d at 1221. FED. R. Civ. P. 23(b) provides in part:
   An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
   3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
   Id.
21. 20 Fed. R. Serv. at 1222.
22. The interlocutory appeal was allowed under 28 U.S.C. § 1291 (1964), which provides for appeal to federal courts of appeals “from all final decisions” in any federal district court, except where a direct review may be had in the Supreme Court. All three members of the Second Circuit panel held that the order allocating the expense of identification met the requirements of the collateral order doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). Sanders v. Levy, 558 F.2d 636, 638-39 (2d Cir. 1977) (panel opinion); Id. at 643 (Hays, J., dissenting in part to panel opinion). Upon rehearing en banc, the Second Circuit did not reconsider the question of appealability. Id. at 647-48 (en banc). The Supreme Court agreed
reversed the district court's order insofar as it required defendants to bear the costs required for the transfer agent to compile the list identifying class members.\(^{23}\) On rehearing en banc, the Second Circuit Court of Appeals reversed the panel's decision and affirmed the district court's order, holding that the discovery rules of the Federal Rules of Civil Procedure applied and that the district court acted correctly in requiring defendants to bear the cost of identifying class members.\(^{24}\)

On certiorari, the United States Supreme Court reversed and remanded\(^{25}\) with several specific rulings concerning the process of identification. First, Rule 23(d) and not the rules governing discovery, empowered the district court in its discretion to direct the defendants to help the representative plaintiffs compile a list of class members.\(^{26}\) Second, where a defendant in a class action can perform one of the tasks necessary to send notice, such as identification, more efficiently than the representative plaintiff, the district court has discretion to order him to perform the task under Rule 23(d), and also has some discretion in allocating the cost of complying with such an order.\(^{27}\) However, as a general rule the representative plaintiff should bear all costs relating to the sending of notice.\(^{28}\) Third, the district court had acted properly within its authority under Rule 23(d) in requiring the Oppenheimer defendants to direct their transfer agent to make available the computer tapes from which class members could be identified.\(^{29}\) Finally, it was held that the district court had abused its discretion by requiring the Oppenheimer defendants to bear the expense of the transfer agent's search where the plaintiffs could obtain information by paying the agent the same amount which defendants would have to pay.\(^{30}\)

THE CONFLICT IN THE CIRCUIT COURTS

Although the decision of the Supreme Court in Eisen IV placing the cost of notification upon the representative plaintiff is distinguishable from cases concerning the costs of identification,\(^{31}\) the

\(^{23}\) 558 F.2d at 643 (panel opinion).
\(^{24}\) 558 F.2d at 651 (en banc).
\(^{25}\) 98 S. Ct. at 2396.
\(^{26}\) Id. at 2389.
\(^{27}\) Id.
\(^{28}\) Id. at 2394.
\(^{29}\) Id.
\(^{30}\) Id. at 2394.
\(^{31}\) In Eisen IV, the defendants had offered to identify class members at their
Court in Eisen IV did note the general principle that a plaintiff should bear the "burden of financing his own suit." This general principle was relied upon by the Fifth Circuit in In re Nissan Motor Corp. Antitrust Litigation which considered the allocation of identification costs one month before the Second Circuit's en banc decision in Sanders v. Levy.

In Nissan, the Fifth Circuit identified three possible rationale for allocating the tasks and costs of identification. First, the court noted that where prior decisions had treated the issue, a "rule of reason" approach appeared to have been adopted under which the responsibility for compiling information necessary for identification was placed on the party having the easier task in gathering the information sought. Under a second rationale it had been reasoned by at least one court that the issue of identification of class members pertains to discovery; thus, under the discovery rules, defendants may be ordered to furnish the necessary information when contained in records in their possession. The Nissan defendants urged a third rationale that under Eisen IV the plaintiffs

32. 417 U.S. at 178-79. The Court held:
The usual rule is that a plaintiff must initially bear the cost of notice to the class. The exceptions cited by the District Court related to situations where a fiduciary duty pre-existed between the plaintiff and defendant, as in a shareholder derivative suit. Where, as here, the relationship between the parties is truly adversary, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit.
Id. (emphasis added) (footnotes omitted).
33. 552 F.2d 1086 (5th Cir. 1977).
35. A fourth rationale, suggested by the plaintiffs, was that procedural due process required the defendants at their expense to furnish the plaintiffs with a list of absentee class members and their addresses. The court rejected this argument as frivolous. 552 F.2d at 1100.
had a fiduciary obligation as class representatives to gather at their own expense the absentee class members' names and addresses.\textsuperscript{38}

The Fifth Circuit held that the discovery rules did not control the identification of class members but rather Rule 23(d) vested the district court with authority to enter whatever orders were necessary for the conduct of a class action.\textsuperscript{39} The court characterized identification of class members as "part and parcel" of the requirement of sending individual notice because identification was a necessary prerequisite.\textsuperscript{40} Having rejected the discovery rules as controlling, the \textit{Nissan} court held that under either the rule of reason rationale or the defendant's rationale under \textit{Eisen IV}, the plaintiffs should bear the task and expense of identification.\textsuperscript{41} As a general rule, \textit{Eisen IV} required that "class representatives must be prepared to accept the concomitant responsibility of identifying absentee class members as well as paying the costs of their individual notice."\textsuperscript{42} Presumably with respect to the rule of reason approach, the court noted that no peculiar circumstances warranted a departure from the general rule since the records containing the identification information could be examined as readily by the class representatives as by the defendants.\textsuperscript{43}

In contrast to \textit{Nissan}, the Second Circuit en banc majority in \textit{Sanders} held that identification was within the scope of discovery under Rule 26 of the Federal Rules of Civil Procedure.\textsuperscript{44} Under Rule 26(b)(1), parties may obtain discovery of any matter, not privileged, which is "relevant to the subject matter" in the action.\textsuperscript{45} The Second Circuit decided that the identity of class members was relevant to the subject matter, since \textit{Eisen IV} raised as a "potential issue" the question whether notice was properly sent.\textsuperscript{46} The potential issue was relevant to the subject matter and that issue was adopted in \textit{Sanders}, it will be discussed more extensively in the subsequent text.

\textsuperscript{38} 552 F.2d at 1102.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Id. The court limited its decision to preliminary expense and examination considerations; identification costs as well as notification costs could be imposed as any other item of cost at the conclusion of the case. Id. at 1103.
\textsuperscript{44} 558 F.2d at 648 (en banc).
\textsuperscript{45} Fed. R. Civ. P. 26(b) provides in part: "Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter involved in the pending action . . . ."

Id.
\textsuperscript{46} 558 F.2d at 648 (en banc).
could not be resolved without a list of names of class members.47 The majority held that Rule 34(a) provided a basis for the district court to order the defendants to produce a computer print-out of names and addresses of class members.48 Under Rule 34(a), the plaintiffs could serve the defendants with a request to inspect data compilations translated into a reasonably usable form by the defendants.49

Rule 33(c), which would only have required the defendants to afford the plaintiffs with an opportunity to examine the records and make their own compilations,50 was held to be inapplicable because it was not especially tailored to discovery problems presented by computer technology.51 The court acknowledged that Rule 26(c) allows the district court to shift the expense of computer programming to the discovering party (plaintiff), in order to protect the responding party from “undue burden or expense.”52 However, the court held that the trial judge did not abuse his discretion in declining to shift the cost to the representative plaintiffs.53 The court suggested that defendants should suffer the consequences of storing the identity of class members on computer tapes since “complex electronic processes may be required to extract information which might have been obtainable through a minimum of effort had different systems been used.”54 The major-

47. Id.
48. Id. at 648-49.
49. “Any party may serve on any other party a request (1) . . . to inspect and copy, any designated documents (including . . . data compilations from which information can be obtained, if necessary, by the respondent through detection devices into reasonably usable form) . . . .” FED. R. CIV. P. 34(a). (emphasis added). See Note, Allocation of Identification Costs in Class Actions, 66 CALIF. L. REV. 105, 114-15 (1978) (suggesting that the analytical framework based on Rule 34 as applied in Sanders should have resulted in a contrary decision since the computer and data were in the possession of a third party rather than the defendant).
50. FED. R. CIV. P. 33(c) provides:
   Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served . . . or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for [both parties] . . . it is a sufficient answer . . . to afford the party serving the interrogatory reasonable opportunity to examine . . . such records and to make . . . compilations . . . or summaries.
   Id. (emphasis added).
51. 558 F.2d at 649 (en banc).
52. Id. FED. R. CIV. P. 26(c) provides in part: “Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from . . . undue burden or expense . . . .” Id.
53. 558 F.2d at 649 (en banc).
54. Id. The court further reasoned that “[i]f the information demanded is such as the respondent might reasonably have expected to be required to make available
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ity also argued that $16,000 was not an unreasonable burden in light of the Fund's vast business operations. Finally, the court indicated approval of the district court's suggestion that defendants should pay the cost because it was their opposition to plaintiffs' proposed redefinition of the class and method of sending notice that made it necessary to incur the cost.

In his dissent to the en banc decision in Sanders Judge Mulligan noted that while Rule 34 authorizes discovery to determine whether class action requirements have been satisfied, "that was not the purpose of the plaintiffs here." Judge Mulligan argued that the only purpose of obtaining the required data was to notify the class members, and that under Eisen IV the cost of such notification should be borne initially, at least, by the plaintiffs. The dissent also stated that by opposing the redefinition of the plaintiff class, the defendants should not have become liable for the costs of notice, and imposition of the costs should not have been determined by deciding that the defendants were in a better financial position.

When the Supreme Court granted certiorari in Sanders, there were mainly two opposing approaches to the problem of allocating the tasks and costs of identification. Nissan had adopted the general rule of Eisen IV under Rule 23 that the class representatives must bear these burdens, at least in the absence of peculiar circumstances under which a rule of reason approach would allow imposition upon the opposing party. On the other hand, where computer records controlled by the defendant require processing to provide the necessary information, the Sanders rule required the defendant upon request under the discovery rules to assume the task and cost of identification and would shift the responsibility to the plaintiff only where there was undue burden or expense under Rule 26. Thus the basic question faced by the Supreme Court was under which of the Federal Rules of Civil Procedure the problems of identification fell, and, thus, on which party the initial

for public examination or for use in the judicial process, it seems not unfair to require production of the information albeit necessitating special programming." Id. 55. Id. at 650.

56. Id. at 650-51. See note 18 and accompanying text supra. See also notes 113-120 and accompany text infra.

57. 558 F. 2d at 653 (Mulligan, J., dissenting to en banc opinion).

58. Id. at 651-52 (Mulligan, J., dissenting to en banc opinion). Judge Mulligan also stated: "On the other hand, if the plaintiff class is successful there is no question that the prevailing parties will be entitled to costs." Id. at 655 (Mulligan, J., dissenting to en banc opinion).

59. Id. at 654 (Mulligan, J., dissenting to en banc opinion).

60. See text accompanying notes 39-43 supra.

61. See text accompanying notes 48-52 supra.
burdens of identification would be. The resolution to that question would also provide a basis for determining under what circumstances the burdens could be shifted to the other party.

THE OPPENHEIMER DECISION

With regard to which of the Federal Rules of Civil Procedure controlled the problems of identification, the Supreme Court rejected the argument that the discovery rules provided the authority for the district court's order directing defendants to help plaintiffs compile the list of class members.\textsuperscript{62} Quoting \textit{Hickman v. Taylor},\textsuperscript{63} the Court noted that " 'discovery, like all matters of procedure, has ultimate and necessary boundaries.' "\textsuperscript{64} In this case, the requirement in Rule 26(b)(1) that discovery must concern a matter relevant to the subject matter of the action was not met.\textsuperscript{65} The plaintiffs did not seek the information for any relevancy that it might have on issues in the case, but rather they desired this information to enable them to send class notice and "not for any other purpose."\textsuperscript{66}

It was noted that the court of appeals had hypothesized the existence of a " 'potential issue . . . whether the notice has properly been sent.' "\textsuperscript{67} "[T]he 'potential issue,' " pointed out the Court, "cannot arise until respondents [plaintiffs] already have obtained the very information they seek."\textsuperscript{68} Thus, the Supreme Court's decision reflected the criticism of the dissent to the en banc decision in \textit{Sanders} where Judge Mulligan characterized the majority's reasoning as "an exercise in sophistry and not syllogistic reasoning."\textsuperscript{69} Furthermore, Mr. Justice Powell noted that if the information sought was relevant to the issues and thus fit for discovery, the plaintiffs would not have been willing to abandon their request that defendants provide the names of class members if the district court would accept their redefinition of the class and

\textsuperscript{62} 98 S. Ct. at 2391.
\textsuperscript{63} 329 U.S. 495 (1947).
\textsuperscript{64} 98 S. Ct. at 2390 (quoting Hickman v. Taylor, 329 U.S. 495, 507 (1947)).
\textsuperscript{65} Id. at 2390-91.
\textsuperscript{66} See also Note, Allocation of Identification Costs in Class Actions: Sanders v. Levy, 91 HARP. L. REV. 703, 708-09 (1978) (distinguishing information sought solely to provide adequate notice from information subject to valid discovery).
\textsuperscript{67} Oppenheimer Fund, Inc. v. Sanders, 98 S. Ct. 2380, 2391 (1978) (quoting Sanders v. Levy, 558 F.2d 648 (2d Cir. 1977) (en banc)).
\textsuperscript{68} Id. While the Court did not hold that names of class members could never be obtained under the discovery rules, it doubted whether there would be any instances where the discovery rules would authorize compilation of the names of all members of a large class. Id. at 2329 n.20.
\textsuperscript{69} 558 F.2d at 653 (Mulligan, J., dissenting to en banc opinion).
method of sending notice. 70

The Supreme Court agreed with the Nissan decision that Rule 23(d) was the source of authority for orders requiring the defendant's cooperation in identifying class members. 71 As in Nissan, it was reasoned that identification is simply another task that must be performed in order to send notice, 72 and since Rule 23 deals comprehensively with class actions, it is the "natural place to look for authority for orders regulating the sending of notice." 73

The resolution of the issue concerning the source of authority was a logical consequence of the Supreme Court's earlier holding in Eisen IV. In Eisen IV, the Court focused upon Rule 23 in resolving issues concerning the burdens of notification. 74 If identification of class members is viewed as a prerequisite of notification, then it would reasonably follow that Rule 23 is the appropriate source of authority regarding the identification process.

The second issue in Oppenheimer was under what circumstances the district court may exercise its discretion to order the defendant to perform one of the tasks necessary to send notice, such as identification, and how the cost of the defendant's compliance with such an order should be allocated. 75 Mr. Justice Powell outlined the principles the district court should follow in allocating the tasks and costs incident to sending notice. He began by stating:

The first question that a district court must consider under Rule 23(d) is which party should perform particular tasks necessary to send the class notice. The general rule must be that the representative plaintiff should perform the tasks, for it is he who seeks to maintain the suit as a class action and to represent other members of his class. 76

Given this general rule that the representative plaintiff must bear the burden of performing the task of identification, Eisen IV further required the plaintiff to bear the cost of his performance as well. Because Eisen IV noted the general principle that a party must bear the "burden of financing his own suit," 77 the Supreme Court in Oppenheimer held that where the plaintiff performs the tasks necessary to send notice, ordinarily there is no warrant for

70. 98 S. Ct. at 2390-91.
71. Id. at 2392.
72. Id.
73. Id. at 2391.
75. See 98 S. Ct. at 2392.
76. Id.
77. 417 U.S. at 179. See note 32 and accompanying text supra.
shifting the cost of the plaintiff's performance to the defendant. 78

Having established these general rules, Mr. Justice Powell explained that where the defendant can perform one of the tasks necessary to send notice, such as identification, with less difficulty or expense than the plaintiff, the district court may order the defendant under Rule 23(d) to perform the particular task. 79 At this point Mr. Justice Powell followed the suggestion of the Nissan court, 80 and drew an analogy between Rule 33(c) of the discovery rules and Rule 23(d) pertaining to class actions. 81 Under Rule 33(c), if the burden of answering an interrogatory would be "substantially the same" for either party, the party served with the interrogatory may shift the burden of deriving the answer to the party making the request. 82 The task is imposed on the party who is likely to benefit from its performance. On the other hand, where the burden of answering an interrogatory is not substantially the same and can be performed more efficiently by the party served, the discovery rules require the party served to derive the answer. 83 The same principle was found applicable to identification of class members. This

78. 98 S. Ct. at 2392. See, e.g., Hitt v. Nissan Motor Co. (In re Nissan Motor Corp. Antitrust Litigation), 552 F.2d 1088 (5th Cir. 1977) where the Fifth Circuit required the representative plaintiffs to perform the task of deriving the names and addresses of the class members from the defendants' records and the court also required the plaintiffs to bear the cost of performing that task. Id. at 1102-03. The Nissan court found it unnecessary to decide whether Eisen IV requires a representative plaintiff always to bear the cost of identifying class members. Id. at 1102. Since the representative plaintiffs could perform the required search through the defendant's records as readily as the defendants themselves, and since the search had to be performed in order to advance the representative plaintiffs' case, they were required to perform it and thus to bear its cost. Id. at 1102-03.

79. 98 S. Ct. at 2392.

80. While the Fifth Circuit in Nissan held that the discovery rules were not the source of authority for allocating the tasks or costs of identification, the court suggested that principles in the discovery rules relating to the allocation of tasks and costs of discovery may offer guidance to a district court in allocating burdens of identification. 552 F.2d at 1102.

81. 98 S. Ct. at 2392. See Fed. R. Civ. P. 33(c), set out in part in note 50 supra, and Fed. R. Civ. P. 23(d), set out in part in note 8 supra. While the Supreme Court drew an analogy to Rule 33(c), the en banc majority in Sanders found it inapplicable since it did not deal with discovery of computerized information. 558 F.2d at 649 (en banc). Mr. Justice Powell pointed out that the analogy to the discovery rules is not perfect. The discovery rules call for little judicial intervention unless a party moves for a protective order under Rule 26(c) or an order compelling discovery under Rule 37(a). On the other hand, Rule 23 contemplates frequent intervention, since the district court routinely must approve the form of the class notice and order how it should be sent and who should perform the necessary tasks. 98 S. Ct. at 2392 n.24.

82. See note 50 supra.

was demonstrated in *Nissan* where the Fifth Circuit required the plaintiffs to identify the class members when it concluded that the plaintiffs could search the necessary records as readily as the defendants.  

Where a district court decides that the defendant rather than the plaintiff should perform a task necessary to send notice, the next question that arises is which party should bear the expense. "*Eisen IV* strongly suggests that the representative plaintiff should bear this expense because it is he who seeks to maintain the suit as a class action."  

In *Oppenheimer*, the defendants argued that *Eisen IV* always requires a representative plaintiff to pay all costs incident to sending notice, whether the plaintiff or the defendant performs the required tasks. The Supreme Court rejected this argument, noting that in *Eisen IV* the defendant was not ordered to perform any of the tasks necessary to sending notice.  

In drawing another analogy to the discovery rules, Mr. Justice Powell noted that under those rules the presumption is that the responding party must bear the expense of complying with discovery requests, but he may request the district court under Rule 26(c) to grant orders protecting him from "undue burden or expense." However, Mr. Justice Powell stated that the analogy was imperfect. In the discovery situation, the defendant will often advance his own interests by performing the tasks since he may have to perform them in any event in order to prepare his own case. On the other hand, in the class action, the defendant will seldom advance his own case by performing the tasks. Therefore, the Court indicated that the district court, in exercising its discretion under Rule 23(d), "should be considerably more ready to place the
cost of the defendant's performing an ordered task on the representative plaintiff, who derives the benefit, than under Rule 26(c). While the test for shifting the cost under Rule 26(c) is whether the expense is undue, the test under Rule 23(d), in the usual case, was held to be whether the expense is substantial.

Under the substantial expense rule, the Court explained that in some cases the expense incurred by the defendant may be so insignificant as not to warrant the effort required to shift it to the plaintiff. In other cases, the cost should be paid by the defendant because he must perform the task in the ordinary course of business as, for example, where the defendant encloses the notice in its own periodic mailings. Nevertheless, Mr. Justice Powell gave the following warning:

Although we do not attempt to catalogue the instances in which a district court might be justified in placing the expense on the defendant, we caution that courts must not stray too far from the principle underlying Eisen IV that the representative plaintiff should bear all costs relating to the sending of notice because it is he who seeks to maintain the suit as a class action.

Application of the principles governing discovery in determining when the burdens of identification may be imposed on the defendant may seem to make it academic whether Rule 23(d) or the discovery rules are the source of authority for orders governing the allocations of the tasks and costs of identification. However, the resolution of the latter issue was necessary to decide which party must bear the initial burdens of the tasks and costs of identification.

Because the Supreme Court held that Rule 23(d) controls, the representative plaintiff was saddled with these burdens under the principle underlying Eisen IV. Although discovery principles were employed in explaining the standards for shifting the burdens to the defendant, the principle underlying Eisen IV clearly affected the standards established. Had the Court held the discovery rules to be controlling, the defendant would have borne the initial burdens of identification. Furthermore, the discovery standards for shifting the burden to the plaintiff would have re-
quired proof by the defendant that the task was an undue burden rather than a burden substantially the same for both parties, and the cost would have to have been shown to be undue rather than substantial.101

The third issue considered in Oppenheimer was whether, under the facts of the case, the district court abused its discretion in requiring the defendants to bear the expense of identification of class members. The Supreme Court noted that while the records containing the names of class members were kept by the transfer agent, not the defendants,102 the defendants had the right to control the records.103 Thus, the Supreme Court held that the district court had acted properly in ordering the defendants to direct the transfer agent to make the records available to the plaintiffs.104

Although the plaintiffs thereby had access to the records, the list of class members could only be complied by hiring the transfer agent to do so at a cost of over $16,000.105 This cost had been imposed on the defendants by the district court.106 Citing Nissan, the Supreme Court noted that since the expense of hiring the transfer agent would be no higher for the plaintiffs than for the defendants, the plaintiffs should bear the expense.107 Since the Court's opinion had established that the applicable test was whether the cost was substantial,108 it held that $16,000 was not an insubstantial burden and "[a]s the expenditure would benefit only respondents [plaintiffs], we think that the amount of money involved here would cut strongly against the District Court's holding, even if the principle of Nissan did not control."109

One reason offered by the district court for imposing the cost on the defendants was that $16,000 was a "relatively modest" sum,110 presumably in comparison to the Fund's total assets, which exceeded $500 million.111 The Supreme Court held that although ability to pay may sometimes be a consideration, normally the test should be whether the cost is substantial, rather than whether it is "modest" in relation to ability to pay.112

101. Id.
102. 98 S. Ct. at 2394.
103. Id.
104. Id.
105. Id.
107. 98 S. Ct. at 2394. The Nissan court applied this test in deciding which party should bear the expense of identification. 552 F.2d at 1102.
108. See text at note 94 supra.
109. 98 S. Ct. at 2395.
110. 20 Fed. R. Serv. 2d at 1221.
111. See 98 S. Ct. at 2395.
112. Id.
Another reason offered by the district court for imposing the cost of identification on the defendants was that the defendants’ opposition to plaintiffs’ proposed redefinition of the class and the method of sending notice made it necessary to incur the cost. In an effort to make it unnecessary to compile a separate list of the class members in order to notify them, the plaintiffs had proposed (1) to redefine the class to exclude persons who had sold their shares, and (2) to send the notice in one of the Fund’s regular mailings. The defendants opposed the redefinition as an arbitrary exclusion of about 18,000 former Fund shareholders who had bought shares during the relevant period, possibly to their prejudice. Defendants opposed mailing notice in one of the Fund’s regular mailings because it would reach many current shareholders who were not members of the class, and such notice might set off a wave of selling that would harm the Fund.

Initially, the district court ruled against inserting notice in one of the Fund’s regular mailings. Later, the court modified this order and allowed notice to current shareholders to be sent in a periodic Fund mailing, provided notice would be inserted only in the envelopes of class members and further, that plaintiffs would pay the “extra costs of mailing.” While the district court rejected the redefinition of the class as being arbitrary, it imposed the cost of identification on the defendants.

The Supreme Court rejected the district court’s reasoning and explained that it is neither fair nor good policy to penalize a defendant for prevailing on an argument against a representative plaintiff’s proposals. Such a penalty might have the undesirable effect of discouraging the defendant from advancing arguments appropriate to the protection of his rights or the rights of absent class members.

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113. 20 Fed. R. Serv. 2d at 1221.
114. Id. at 1221, 1222; 98 S. Ct. at 2386-87. The newly defined class would have consisted of individuals already on the regular mailing list as current shareholders. The district court suggested that the defendants opposed the redefinition because it would reduce the res judicata effect of the judgment. 20 Fed. R. Serv. 2d at 1221. However, the Supreme Court noted that the defendants themselves had never made this argument. 98 S. Ct. at 2394 n.30.
115. 116. 98 S. Ct. at 2387.
117. 20 Fed. R. Serv. 2d at 1222.
118. 98 S. Ct. at 2387 n.7.
119. The district court held that the “plaintiffs’ proposal would involve an arbitrary reduction in the class. If the shareholders who purchased during the relevant period were misled into purchasing at inflated prices, as far as the present record shows, this problem affects those shareholders who have sold out just as much as those who happened to have retained their shares.” 20 Fed. R. Serv. 2d at 1221.
120. Id.
121. 98 S. Ct. at 2394.
members. Thus, the district court had erred in linking the question of class definition and method of notice to the question of cost allocation.

The dissent to the Second Circuit panel opinion, and later the Second Circuit en banc majority, suggested that defendants should bear identification costs because they kept their records on computer tapes rather than in another form. It was reasoned that the use of computer tapes required complex procedures and special programming to compile the list of class members. Mr. Justice Powell's opinion pointed out that there was no indication or contention that the defendants acted in bad faith to conceal information from the plaintiffs. He noted that the cost of retrieving computer data is probably not higher, and might even be lower, than the cost of retrieving information from records kept in less modern forms. In any event, a defendant should not be penalized “for not maintaining his records in the form most convenient to some potential future litigants whose identity and perceived needs could not have been anticipated.”

The last contention of the plaintiffs was that the defendants should pay the identification expense because they were alleged to have breached a fiduciary duty to plaintiffs and their class. This contention was precipitated by language in Eisen IV in which the Supreme Court declined to foreclose the possibility that a defendant may be required to defray the cost of notice in “situations where a fiduciary duty pre-existed between the plaintiff and defendant, as in a shareholder derivative suit.” The Supreme Court also rejected this contention and held that a “bare allegation of wrongdoing, whether by breach of fiduciary duty or otherwise, is not a fair reason for requiring a defendant to undertake financial burdens and risks to further a plaintiff's case.” Mr. Justice Powell concluded that the district court abused its discretion in not requiring plaintiffs to pay the transfer agent to identify the members of their own class.

122. Id.
123. Id. at 2395.
124. 558 F.2d at 645 n.1 (panel dissent); Id. at 649 (en banc).
125. Id. at 649 (en banc).
126. 98 S. Ct. at 2395.
127. Id.
128. Id.
129. Id.
131. 98 S. Ct. at 2396.
132. Id.
The initial reaction to Oppenheimer might be that it will discourage potential plaintiffs from bringing class actions. Although a federal district court has some discretion to allocate identification tasks and costs to the defendant, the general rule is that the representative plaintiff must perform the tasks and bear the costs of bringing his own suit, and even where the defendant is assigned the task, the plaintiff must bear the cost if it is substantial. As the plaintiff in Oppenheimer discovered, so also other plaintiffs may find that the cost of identification alone will require a substantial outlay. However, the cost of identification in Oppenheimer was probably much higher than the cost of identification that would be incurred in most class actions. In Nissan, the Fifth Circuit reviewed several past decisions dealing with identification and in only one of those was the expense of identification more than minimal.

In 1974, a class action study was commissioned by the Senate Commerce Committee. The first part of the study extensively...

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133. See text accompanying notes 76-78 supra.
134. See text at note 94 supra.
135. In Oppenheimer, the cost of identification alone was estimated at $16,000. 98 S. Ct. at 2386.
136. Id. at 1101-02 & nn.15 & 16. The cases reviewed are cited in note 36 supra.
138. The total expense amounted to $14,500. Id. at 148.
141. The study was composed of two parts. The first part comprised a profile of all class actions filed in the United States District Court for the District of Columbia between July 1, 1966, and December 31, 1972. The District of Columbia is one of the most active federal jurisdictions in terms of class action litigation. Empirical Study, supra note 140, at 1129. Of the 434 class actions so identified, 120 actions seeking some form of damages for individual class members were extensively reviewed. The study noted that in suits for equitable relief no damages are distributed and individual notice is not required. Id. at 1131. Of the remaining actions filed, 26 were transferred to other jurisdictions; 233 sought only injunctions, mandamus, or declaratory relief; and 5 sought damages from a common fund rather than for individual class members. While 170 actions sought class damages, when consolidated cases were counted as one action, the number of such actions was reduced to 120. Id. at 1131-32. Of these 120 actions, 50 had available figures as class size. Of those 50, only 14% had classes over 100,000 members while 22% had classes under 10,000. Id. at 1134.

The second part of the study involved a national survey and did not present a profile of class actions but rather focused upon notice and damage distribution, two stages which only a limited number of the District of Columbia cases reached. The study noted that the national sample was not typical in that it contained a disproportionate percentage of large classes. Id. at 1128 n.36, 1157. Of the 79 actions for which statistics were available, class membership was 10,000 or less in 58% of the...
reviewed 120 class actions seeking some form of class damages filed in the United States District Court for the District of Columbia between July 1, 1966 and Dec. 31, 1972. Although the study did not report on the costs of identification, it did reveal that individual notice was used in sixteen of the nineteen cases where notice was given. Class members were usually identified from records within the defendant's possession, and in several cases they were easily ascertained from computer print-outs. The second part of the study consisted of a national survey. Of the thirty-three cases for which pertinent information was available, all class members were identified in eighty-three percent of the twenty-four actions involving classes of 10,000 members or less; while in the nine actions with classes exceeding 10,000 members, all members were identified in only fifty-six percent of the cases. The obvious conclusion was that identification problems increase with the size of the class. Nevertheless, since identification of all class members occurred in twenty-five of the thirty-three cases, the study suggested that identification was possible in most cases.

A prediction might be made of the consequences of generally imposing identification costs on the representative plaintiff by examining the effect of the imposition on plaintiffs of notice costs as a result of *Eisen IV*. In his dissent to the en banc decision in *Sanders*, Judge Mulligan noted that the "imposition of the cost of giving notice upon the plaintiff has apparently not proved any great hindrance to class actions." The Senate Commerce Committee study suggested that notice costs may not present a substantial burden to most class suits.

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143. In only 19 of the 120 class actions extensively reviewed was some form of notice given. *Id.* at 1145.
144. *Id.* at 1145-46. This was noted as a significant factor in explaining the frequent use of individual notice in the cases in which notice was given. It should be noted that the largest class of the 16 actions involving individual notice consisted of 5,800 members. *Id.* at 1145-46.
145. *Id.* at 1157. See note 141 *supra*.
147. *Id.*
148. *Id.*
149. 558 F.2d at 655 n.6.

The District of Columbia study found that the majority of cases in which notice was given in the District of Columbia survey involved small classes, and, conse-
From 1974 to 1976, the number of class actions filed in United States courts increased dramatically.\textsuperscript{151} As \textit{Eisen IV} has had little evident deterrent effect on the filing of class actions, \textit{Oppenheimer}, in the final analysis, may not discourage the majority of potential litigants from bringing suit.

CONCLUSION

In \textit{Oppenheimer}, the Supreme Court outlined the rules for allocating the tasks and costs of sending notice in class actions where individual notice is required.\textsuperscript{152} When a court is faced with the problem of allocating the tasks and costs necessary to send notice, it must first consider which party should perform particular tasks. In most instances the representative plaintiff should perform the tasks, for it is he who is likely to benefit from their performance. However, when the defendant can perform one of the tasks, such as identification, with less difficulty or expense than the plaintiff, the district court may order the defendant under Rule 23(d) to perform the task.

If the plaintiff performs a task necessary to send notice, he must bear the cost of doing so. Where a defendant is assigned the task, the next question that arises is which party should bear the expense. In the usual case, if the expense is substantial, the plaintiff should pay the cost. However, in some cases, the expense incurred by the defendant may be so insignificant as not to warrant the effort required to shift it to the plaintiff. In other cases, the defendant should pay the cost because he must perform the tasks in the ordinary course of business. The Supreme Court in \textit{Oppenheimer} did not list all the situations where the defendant should bear the cost. However, Mr. Justice Powell warned that

\textsuperscript{151}Total filings of class actions in United States courts increased from 2,717 in 1974 to 3,484 in 1976 with 5,987 pending at the end of fiscal 1976. 558 F.2d at 654 n.5 (en banc) (quoting \textit{ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1976 ANNUAL REPORT OF THE DIRECTOR} 117-24).

\textsuperscript{152} As the Fifth Circuit noted in \textit{Nissan}, the decision as to the allocation of the cost of identification concerns only the preliminary expense. At the conclusion of a case, the district court should be able to impose the costs of identification and notification as it would any other item of costs. Hitt v. Nissan Motor Co. (\textit{In re Nissan Motor Corp. Antitrust Litigation}), 552 F.2d 1088, 1103 (5th Cir. 1977).
generally courts should follow the underlying principle of Eisen IV that the representative plaintiff should bear all costs relating to the sending of notice because it is he who seeks to maintain the suit as a class action. Just as Eisen IV has not proven to be a substantial deterrent to the filing of class actions, so, too, may most potential litigants find Oppenheimer to be no insurmountable barrier.

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