

# Note

## Limiting Coercive Speech in Class Actions

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## INTRODUCTION

As the class action lawsuit has emerged as a complex and important device of civil litigation, it has become a source of significant controversy for courts, the political branches, and scholars. Beyond disputes about their general efficacy,<sup>1</sup> class actions raise a number of difficult challenges related to the “unique responsibilities” they impose on courts.<sup>2</sup> Many of the managerial complexities facing judges stem from the fact that named plaintiffs and their counsel typically represent many unnamed plaintiffs not actively involved in the lawsuit. Concerns about protecting absent class members pervade class action law, whether in requirements that the class representative be adequate, that settlements be fair to all class members, that there be opportunities for class members to voice their concerns, or that class members be able to opt out.

This Note examines one such issue: the extent to which judges can and should issue prophylactic orders limiting communications between defendants and potential class members when defendants are involved in a structurally coercive relationship with potential class members.<sup>3</sup> By structures of coercion I mean those relationships where the speaker and potential class members have an ongoing business relationship in which potential class members depend financially on the speaker. Although one can imagine situations where named plaintiffs have coercive influence over potential class members,<sup>4</sup> coercion more commonly arises where potential class members are in ongoing business relationships with defendants. Therefore, this Note addresses defendant communications in the context of structurally coercive relationships, focusing on the paradigmatic employer-employee relationship.<sup>5</sup>

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1. *See, e.g.*, 1 ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS*, at ix (4th ed. 2002) (noting that class actions “have been called powerful tools to redress wrongdoing that advance vital public interests without cost to taxpayers as well as lawyer driven boondoggles benefiting only the attorneys who bring them”).

2. *MANUAL FOR COMPLEX LITIGATION (FOURTH)* § 21, at 243 (2004); *see also* 2 CONTE & NEWBERG, *supra* note 1, § 5:53, at 472 (noting various “[i]ncreased manageability problems” with class actions); DEBORAH R. HENSLER ET AL., *CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN* 445 (2000) (“Judges play a unique role in damage class actions . . .”).

3. When I discuss limitations on communications with potential class members, I am referring to the time between when a class is filed and when the opt-out period ends. Note that class members may choose to opt out only from class actions certified under Rule 23(b)(3), the “most comprehensive” of the three subdivisions of Rule 23(b). 2 CONTE & NEWBERG, *supra* note 1, § 4:1, at 4; *see also* *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 810 (1985) (“In most class actions an absent plaintiff is provided at least with an opportunity to ‘opt out’ of the class . . .”).

4. For example, union officials who are plaintiffs in a class action that includes the union’s members might have the power to coerce potential class members into participating.

5. At an early stage of the recent and widely publicized gender discrimination claim against Morgan Stanley, for example, the court limited the communications of the defendant company with potential class members. *See EEOC v. Morgan Stanley & Co.*, 206 F. Supp. 2d 559 (S.D.N.Y. 2002). Although this Note discusses cases where courts have analyzed other

The *Manual for Complex Litigation* recognizes that “[d]irect communications . . . , whether by plaintiffs or defendants, can lead to abuse,”<sup>6</sup> and courts have long agreed that it is their responsibility “to safeguard [class members] from unauthorized, misleading communications from the parties or their counsel.”<sup>7</sup> At the same time, courts have realized that restrictions on speech between litigants raise First Amendment concerns.<sup>8</sup>

In order to guard against possible abuses, previous editions of the *Manual* recommended sweeping restrictions on communications; as a result, for years courts routinely adopted local rules and issued protective orders that prohibited named parties and their counsel from communicating with potential class members. But in 1981, a unanimous Supreme Court in *Gulf Oil Co. v. Bernard* struck down a protective order that prevented the NAACP from communicating with potential class members in a case alleging racial discrimination.<sup>9</sup> Rejecting the broad prophylactic orders recommended by the *Manual*, the Court held that “an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.”<sup>10</sup> Today, because of *Bernard*, courts analyze limitations on both plaintiff and defendant communications on a case-by-case basis and usually require evidence that potentially abusive communications have occurred.

This Note argues that *Bernard* can and should, as a matter of policy, be interpreted to allow prophylactic orders limiting communications when a structurally coercive relationship exists between defendants and potential

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structurally coercive relationships, such as those between franchisors and franchisees or banks and future borrowers, *see infra* note 114 and accompanying text, the employer-employee context arises most often in the case law and presents the clearest example of a structurally coercive relationship.

6. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 2, § 21.12, at 248.

7. Erhardt v. Prudential Group, 629 F.2d 843, 846 (2d Cir. 1980); *see also* Gulf Oil Co. v. Bernard, 452 U.S. 89, 100 (1981) (“Because of the potential for abuse, a district court has both the duty and the broad authority . . . to enter appropriate orders governing the conduct of counsel and parties.”); Abdallah v. Coca-Cola Co., 186 F.R.D. 672, 675 (N.D. Ga. 1999) (“[It is] exceedingly clear that district courts may enter an order prohibiting class communications that will likely cause imminent and irreparable injury to one of the parties.”).

8. *See, e.g.*, Sch. Dist. v. Lake Asbestos of Que. (*In re* Sch. Asbestos Litig.), 842 F.2d 671, 680 (3d Cir. 1988) (“Orders regulating communications between litigants . . . pose a grave threat to first amendment freedom of speech.”); Belt v. EmCare, 299 F. Supp. 2d 664, 667 (E.D. Tex. 2003) (“[T]he First Amendment requires the Court to tailor any restrictions on a party’s ability to speak with absent class members.”); *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 2, § 21.12, at 247-48 (noting that regulating communications prior to class certification “could implicate the First Amendment”); MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.24, at 232-33 (1995) (“Because First Amendment principles are implicated, however, the court should not restrict communications between the parties or their counsel and actual or potential class members, except when justified to prevent serious misconduct.” (footnote omitted)).

9. 452 U.S. 89.

10. *Id.* at 101.

class members.<sup>11</sup> Communications in these contexts present distinctive problems.<sup>12</sup> First, speech can intimidate potential class members and pressure them to make decisions about participating in the class based on a fear of retaliation rather than on independent analysis. Second, because potential class members may generally rely on the defendant for information about issues affecting the company, they may mistakenly trust one-sided or misleading defendant communications.

Part I discusses the justifications for the routine imposition of broad restrictions prior to *Bernard* as well as emerging Supreme Court doctrine on attorney solicitation in the years preceding *Bernard*. It then examines *Bernard*, the only Supreme Court opinion on the subject of class communications. Finally, it explains how lower courts have applied *Bernard*, noting that only a few have issued prophylactic orders based on structurally coercive relationships without evidence that inappropriate communications have occurred.

Part II examines the ways in which limitations on communications may or may not advance the goals of class action litigation. The broad limitations at issue in *Bernard* frustrated the objectives of Rule 23. By contrast, when defendants hold a structurally coercive position over potential class members, there is particularly great potential for abusive communications, which justifies some limitations. Focusing on the employer-employee relationship, Part II surveys sexual harassment and union election cases and literature in order to identify the dynamics of coercion in the workplace.

Part III proposes that courts issue certain prophylactic limitations upon a finding that a structurally coercive relationship exists between defendants and potential class members. Specifically, I suggest that where such a relationship exists, courts should generally prohibit defendants from communicating orally about the litigation with potential class members and should require that written communications be filed with the court and opposing counsel. Finally, Part IV addresses possible First Amendment and other objections to the prophylactic limitations proposed in Part III.

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11. I focus on defendant communications because potential class members are engaged in structurally coercive relationships with defendants more often than with named plaintiffs. However, my argument for prophylactic limitations applies equally when named plaintiffs are in a structurally coercive relationship with potential class members.

12. The most recent *Manual*, unlike previous editions, seems to implicitly acknowledge the unique nature of structurally coercive relationships:

If defendants are in an ongoing business relationship with members of a putative class, the court might consider requiring production of communications relating to the case. In appropriate cases, courts have informed counsel that communications during an ongoing business relationship, including individual releases or waivers, must be accompanied by notification to the members of the proposed class that the litigation is pending.

MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 2, § 21.12, at 248.

This Note contributes to existing literature by focusing on the problem of structurally coercive relationships in class action lawsuits.<sup>13</sup> It explains and expands on a position staked out by just a few courts, and it provides specific suggestions to courts adjudicating class action lawsuits. In addition, although this Note deals with the particular problem of communications with potential class members, it may more broadly help illuminate the dynamics of workplace coercion and possible remedies to combat it.

## I. *GULF OIL V. BERNARD* AND ITS APPLICATION BY LOWER COURTS

### A. *Approaches to Class Communications Prior to Bernard*

Following the recommendations of previous editions of the *Manual for Complex Litigation*, courts once routinely imposed broad bans on communications with potential class members. As a result of “unfortunate experiences where parties and counsel have abused the class action process,”<sup>14</sup> the 1973 *Manual* “recommended that each court adopt a local rule forbidding *unapproved* direct or indirect written and oral communications by formal parties or their counsel with potential and actual class members.”<sup>15</sup> However, in addition to suggesting that courts should allow nonabusive communications proposed by the parties, the *Manual* also stated that client-initiated contact and regular business communications should be exempt from the ban.<sup>16</sup> Prior to *Bernard*, numerous courts heeded the *Manual*’s advice by adopting local rules that prevented unauthorized

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13. In the years immediately following *Bernard*, at least two student notes argued that *Bernard* should not apply to defendant communications and that courts should restrict the communications of all class action defendants. Donald D. Levenhagen, Note, *Class Actions: Judicial Control of Defense Communication with Absent Class Members*, 59 IND. L.J. 133 (1984); Robert C. Rice, Note, *Defendant Communications with Absent Class Members in Rule 23(b)(3) Class Action Litigation*, 42 WASH. & LEE L. REV. 145 (1985). More recent works have addressed issues surrounding attorney communications in class actions, e.g., Debra Lyn Bassett, *Pre-Certification Communication Ethics in Class Actions*, 36 GA. L. REV. 353 (2002), and communication problems in particular cases, e.g., Christopher Y. Miller, Comment, *Unfair Burdens: Restrictions on Ex Parte Contacts and the Mitsubishi Sexual Harassment Case*, 94 NW. U. L. REV. 697 (2000).

14. MANUAL FOR COMPLEX LITIGATION § 1.41, at 13 (1973) [hereinafter 1973 MANUAL FOR COMPLEX LITIGATION]. A later edition further explained that the recommended restrictions were made because of repeated instances, reported by federal judges, of actual ex parte communications with class members that impaired, frustrated, and adversely affected the administration of justice. These reports demonstrated that the improper and unethical communications were frequently difficult, and sometimes impossible, to detect in time to prevent harm; that they had a virtually unlimited variety in form and content; and that the opportunities for direct, great, and often irreparable injury were better prevented than attempts made to repair the injury after it had already occurred. MANUAL FOR COMPLEX LITIGATION § 1.41, at 30 n.43 (5th ed. 1982) [hereinafter 1982 MANUAL FOR COMPLEX LITIGATION].

15. 1973 MANUAL FOR COMPLEX LITIGATION, *supra* note 14, § 1.41, at 12.

16. *Id.*

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communications<sup>17</sup> or by issuing protective orders that had largely the same effect.<sup>18</sup> Some courts discussed First Amendment concerns,<sup>19</sup> but most did not, and the *Manual*'s recommendations for a time enjoyed "ubiquitous" application.<sup>20</sup>

The 1973 *Manual* specified four general areas of potential abuse that justified the default imposition of local rules or orders prohibiting communications with the class:

- (1) solicitation of direct legal representation of potential and actual class members who are not formal parties to the class action;
- (2) solicitation of funds and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action;
- (3) solicitation by formal parties of requests by class members to opt out . . . ; and
- (4) unauthorized direct or indirect communications from counsel or a party, which may misrepresent the status, purposes and effects of the action and of court orders therein and which may confuse actual and potential class members and create impressions which may reflect adversely on the court or the administration of justice.<sup>21</sup>

Although the third area specifically addressed a type of defendant communication and the fourth area encompassed defendant communications, courts and scholars in the years preceding *Bernard* largely focused on issues surrounding the communications of named plaintiffs and their counsel.<sup>22</sup>

Concerns about the effects of plaintiff communications largely stemmed from longstanding arguments about the harms of solicitation. As the Supreme Court noted in *Ohralik v. Ohio State Bar Ass'n*, the "substantive evils of solicitation have been stated over the years in sweeping terms: stirring up litigation, assertion of fraudulent claims,

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17. For a list of some districts that adopted and applied the *Manual*'s suggested rule, see *Zarate v. Younglove*, 86 F.R.D. 80, 87 n.5 (C.D. Cal. 1980).

18. See, e.g., *Am. Fin. Sys. v. Pickrel*, 18 Fed. R. Serv. 2d (West) 314, 315 (D. Md. Feb. 1, 1974) (oral opinion) (prohibiting communications without prior approval of the court); *Vance v. Fashion Two Twenty*, 16 Fed. R. Serv. 2d (West) 1513, 1513-14 (N.D. Ohio Mar. 2, 1973) (issuing a protective order similar to the *Manual*'s proposed rule); *Siegel v. Chicken Delight*, 271 F. Supp. 722, 728 (N.D. Cal. 1967) (prohibiting party or counsel communications with the class "in the absence of court approval").

19. See, e.g., *Rodgers v. U.S. Steel Corp.*, 508 F.2d 152, 162 (3d Cir. 1975) (stating that a rule modeled after the *Manual* "raises serious first amendment issues"); *Waldo v. Lakeshore Estates*, 433 F. Supp. 782, 791 (E.D. La. 1977) (upholding a local rule copied from the *Manual* but only after considering whether "freedoms protected under the First Amendment [were] needlessly restrained").

20. 5 CONTE & NEWBERG, *supra* note 1, § 15:7, at 34.

21. 1973 MANUAL FOR COMPLEX LITIGATION, *supra* note 14, § 1.41, at 11.

22. See, e.g., *Waldo*, 433 F. Supp. at 790; Pamela Mathy, *The Validity of Class Action No Comment Rules*, 13 RUTGERS L.J. 285, 305 (1982); Recent Case, *Rodgers v. United States Steel Corp.*, 508 F.2d 152 (3d Cir. 1975), 88 HARV. L. REV. 1911 (1975).

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debasement of the legal profession, and potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation, and misrepresentation.”<sup>23</sup> In upholding a local rule copied verbatim from the *Manual*, one court suggested that concerns about solicitation were “all the more compelling in the class action framework, given the heightened susceptibilities of nonparty class members to solicitation amounting to barratry as well as the increased opportunities of the parties or counsel to ‘drum up’ participation in the proceeding.”<sup>24</sup>

However, before *Bernard*, the Court increasingly signaled that sweeping restrictions on solicitation would no longer automatically withstand scrutiny. As early as 1963, the Court in *NAACP v. Button* prevented Virginia from applying an antisolicitation statute to prohibit NAACP activities.<sup>25</sup> In 1977 and 1978, the Court had occasion to reject other state prohibitions on attorney solicitation. *In re Primus* struck down the application of a South Carolina antisolicitation rule that had been targeted at the ACLU for advising a group of women about their legal rights and subsequently offering free legal services through letters.<sup>26</sup> Building on *Button*, the Court held,

Without denying the power of the State to take measures to correct the substantive evils of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, and lay interference that potentially are present in solicitation of prospective clients by lawyers, this Court has required that broad rules framed to protect the public and to preserve respect for the administration of justice must not work a significant impairment of the value of associational freedoms.<sup>27</sup>

In *Bates v. State Bar of Arizona*, the Court overturned disciplinary action taken against attorneys who had advertised routine legal services, holding that “advertising by attorneys may not be subjected to blanket suppression.”<sup>28</sup> Although in *Ohralik* the Court ultimately rejected the challenge of an attorney who had been disciplined for soliciting accident victims in person (including at a hospital), it did so only after scrutinizing the state interests at stake in preventing misconduct.<sup>29</sup>

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23. 436 U.S. 447, 461 (1978).

24. *Waldo*, 433 F. Supp. at 790. Another court suggested that “[f]orbidden solicitation may also help the court assure the proper and efficient conduct of the [class] action.” *Zarate v. Younglove*, 86 F.R.D. 80, 95 (C.D. Cal. 1980). *But see* Recent Case, *supra* note 22, at 1918 (“[T]here is little reason to believe that the dangers of solicitation are sufficiently greater in class actions than in individual suits to justify [additional] burdens . . .”).

25. 371 U.S. 415 (1963).

26. 436 U.S. 412 (1978).

27. *Id.* at 426 (internal quotation marks omitted).

28. 433 U.S. 350, 383 (1977).

29. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 464 (1978).

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B. Bernard: *The End of Pervasive Limitations on Communications in Class Actions*

In the years prior to *Bernard*, some scholars began to question the legality and benefits of broad local rules and orders limiting communications,<sup>30</sup> and a few lower courts invalidated orders and rules that were based on the *Manual's* proposal.<sup>31</sup> This increasing skepticism of the *Manual's* recommendations, coupled with the Supreme Court's growing hostility to sweeping restrictions on solicitation,<sup>32</sup> set the stage for the Court to consider the routine limitations on communication in class actions. In *Bernard*, the Court faced a startling set of facts, reminiscent of *Button*, which made clear the practical implications and dangers of these broad restrictions on communications.

The case involved a class action that alleged racial discrimination in the employment practices of Gulf Oil and one of its labor unions. Prior to the filing of the class action, Gulf Oil and the EEOC had entered a conciliation agreement in which Gulf Oil agreed to provide back pay to alleged victims of racial and gender discrimination and to implement an affirmative action program. Subsequently, the NAACP filed a class action on behalf of employees who believed that the conciliation agreement provided inadequate compensation. After one of the plaintiffs' lawyers met with potential class members and allegedly encouraged them to join the class action instead of signing releases in return for back pay, Gulf Oil sought an order limiting communications by parties and their counsel with class members.<sup>33</sup>

Adopting the *Manual's* recommendations, the district court issued an order banning all communications without prior court approval between

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30. See, e.g., Mathy, *supra* note 22 (arguing that rules banning communications frustrate Rule 23 and violate the First Amendment); Jeffrey R. Snyder, Comment, *Judicial Screening of Class Action Communications*, 55 N.Y.U. L. REV. 671 (1980); Recent Case, *supra* note 22.

31. For example, in *Rodgers v. United States Steel Corp.*, 508 F.2d 152 (3d Cir. 1975), the Third Circuit disallowed the application of a local rule that barred communications prior to class certification. The court claimed that the rule (which did not include some of the exceptions in the *Manual's* model rule) "raises serious first amendment issues," *id.* at 162, and faulted the *Manual* for not "proposing specific rules aimed at specific abuses," *id.* at 164. See also *Coles v. Marsh*, 560 F.2d 186, 189 (3d Cir. 1977) (holding that a district court may not restrict communications "without a specific record showing by the moving party of the particular abuses by which it is threatened"); *Zarate v. Younglove*, 86 F.R.D. 80 (C.D. Cal. 1980). Other courts, however, explicitly rejected this approach. See, e.g., *Waldo v. Lakeshore Estates*, 433 F. Supp. 782, 794 (E.D. La. 1977) ("[W]e categorically oppose the notion that a policy allowing unfettered communication to encourage participation in a class suit is consistent with the purpose of Federal Rule 23. The potential abuses attendant upon such unregulated communication clearly undermine the efficacy of the class action device.").

32. At least one district court, in *Zarate v. Younglove*, recognized that the Supreme Court's emerging doctrine on solicitation implicated the limitations on communications in the class action context. 86 F.R.D. at 85.

33. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 91-95 (1981).

parties or their counsel and actual or potential class members.<sup>34</sup> However, the order exempted Gulf Oil's communications about the conciliation agreement.<sup>35</sup> When the plaintiffs' lawyers submitted for court approval a leaflet encouraging employees to talk to a lawyer before signing a release, the court waited a month, then denied the request two days after a court-imposed deadline for employees to accept Gulf Oil's back-pay offer.

The Court concluded that the district court had abused its discretion. The Court recognized "the possibility of abuses in class-action litigation, and agree[d] . . . that such abuses may implicate communications with potential class members,"<sup>36</sup> and it admitted that district courts have "both the duty and the broad authority to exercise control over a class action."<sup>37</sup> Nevertheless, "faced with the unquestionable assertion by respondents that the order created at least potential difficulties for them as they sought to vindicate the legal rights of a class of employees,"<sup>38</sup> the Court enunciated a new standard: "[A]n order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties."<sup>39</sup>

Explicitly choosing not to reach the First Amendment question, the Court instead considered whether the order was "consistent with the general policies embodied in Rule 23."<sup>40</sup> It did, however, "observe that the order involved serious restraints on expression" and that courts should consider whether restraints are "justified by a likelihood of serious abuses."<sup>41</sup> Moreover, the Court rejected the approach of the *Manual*, declaring that "the mere possibility of abuses does not justify routine adoption of a communications ban."<sup>42</sup>

*Bernard* was a significant victory for litigants and attorneys pursuing class action claims. The commonplace orders and rules that, at least sometimes, significantly impeded the ability of lawyers to prosecute class actions and encourage participation were no longer permitted without some evidence of abuse or the potential for abuse. Courts applied *Bernard*'s principles to strike down limitations on plaintiff communications,<sup>43</sup> and apart from violations of general ethical guidelines, the communications of

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34. *Id.* at 94-95 & n.5.

35. *Id.* at 95.

36. *Id.* at 104.

37. *Id.* at 100.

38. *Id.* at 101.

39. *Id.*

40. *Id.* at 99; *see also id.* at 101 n.15.

41. *Id.* at 104.

42. *Id.*

43. *See, e.g.,* Domingo v. New Eng. Fish Co., 727 F.2d 1429, 1439 (9th Cir. 1984).

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named plaintiffs and their counsel with potential class members are now presumptively appropriate.<sup>44</sup>

### C. Lower Court Applications of *Bernard* to Defendant Communications

Courts often apply *Bernard* to the communications of defendants,<sup>45</sup> and many of these cases address situations where defendants hold a structurally coercive position over potential class members. Most opinions that consider limiting defendant communications address plaintiffs' claims that inappropriate communications have already occurred. Some of these explicitly reject the notion that a structurally coercive relationship can alone justify restrictions. Only a minority of courts have been willing to impose restrictions before any demonstration of abusive communications, by interpreting *Bernard*'s requirements to allow for prophylactic orders when there is a structure of coercion.

#### 1. Reading *Bernard* To Require Evidence That Inappropriate Communications Have Occurred

Although *Bernard* is unclear on the extent to which it applies to defendant communications, a significant majority of lower courts have read the opinion as enunciating broad principles that apply to any contacts between parties and potential class members.<sup>46</sup> *Bernard* presented a

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44. See 5 CONTE & NEWBERG, *supra* note 1, § 15:9.

45. See, e.g., Sch. Dist. v. Lake Asbestos of Que. (*In re* Sch. Asbestos Litig.), 842 F.2d 671, 681 (3d Cir. 1988); Ralph Oldsmobile, Inc. v. Gen. Motors Corp., No. 99 Civ. 4567(AGS), 2001 WL 1035132 (S.D.N.Y. Sept. 7, 2001). This increased freedom for defendants to discuss cases with potential class members has tempered the initial victory that *Bernard* gave plaintiffs and their counsel.

46. Lending support to this position is language in the opinion that fails to distinguish between defendants and plaintiffs, referring instead to "parties" when announcing standards by which courts must evaluate potential communications orders. For example, the Court stated that "an order limiting communications between parties and potential class members should be based on a clear record and specific findings." *Bernard*, 452 U.S. at 101. One court explained its application of the *Bernard* principles to suggested limitations on defendant communications as follows: "[W]hile the Supreme Court dealt with limitations on communications between named plaintiffs and their counsel with prospective class members, it nonetheless set forth a broad principle that limitations on communication with potential class members must derive from evidence in the record and involve a weighing of competing factors." *Bublitz v. E.I. duPont de Nemours & Co.*, 196 F.R.D. 545, 547 (S.D. Iowa 2000); see also *Wiginton v. CB Richard Ellis, Inc.*, No. 02 C 6832, 2003 WL 22232907, at \*2 n.1 (N.D. Ill. Sept. 16, 2003) ("[T]he general language of [*Bernard*] lends support for the conclusion that the enunciated standards should apply equally to communications between a defendant and prospective class members."); *Abdallah v. Coca-Cola Co.*, 186 F.R.D. 672, 675 n.1 (N.D. Ga. 1999) (rejecting the interpretation that *Bernard* only applies to plaintiff communications and asserting that "the Supreme Court's opinion clearly addresses communications between all parties and potential class members, as it should").

A small minority of courts have taken the opposite position, asserting that *Bernard* applies only to plaintiff communications. See, e.g., *Bower v. Bunker Hill Co.*, 689 F. Supp. 1032, 1033 (E.D. Wash. 1985); *Resnick v. Am. Dental Ass'n*, 95 F.R.D. 372, 376 (N.D. Ill. 1982). This interpretation focuses on the fact that the communication ban in *Bernard* was applied to plaintiffs'

distressing set of facts, which compelled the Court to reject a regime that allowed judges to severely restrict communications without offering more than the most general of justifications. But the Court failed to provide much additional guidance; its call for “a clear record and specific findings” and for taking into account “the potential interference with the rights of the parties”<sup>47</sup> represents a relatively flexible standard that leaves much discretion in the hands of district court judges.<sup>48</sup> Courts agree that defendants are prohibited from disseminating misleading information or from attempting to intimidate potential class members<sup>49</sup> and that it is the responsibility of courts to ensure that class actions are adjudicated fairly.<sup>50</sup> Certainly, *Bernard*’s standards are satisfied when there have been clearly abusive communications—like explicit threats or lies about the lawsuit—but the record is rarely that clear, and *Bernard* gives little further guidance on how its standards and requirements should be applied. What is the burden of proof on the moving party? To what extent must a judge make specific findings establishing a clear record? Must the moving party always demonstrate that inappropriate communications have already occurred? Or may a court issue a prophylactic order based on findings of a structurally coercive relationship? What restrictions can and should courts place on communications?

As a result of these open questions and the significant discretion of trial judges in issuing limitations, the doctrine in this area is muddled. Most courts today read *Bernard* to require evidence that potentially abusive communications have already occurred before they impose limitations. They vary as to what they require plaintiffs to show and what they deem potentially abusive. Some courts have read *Bernard* as setting a high

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counsel. At least one court noted the NAACP’s role as a nonprofit entity involved in political expression. *See Kleiner v. First Nat’l Bank of Atlanta*, 751 F.2d 1193, 1204-05 (11th Cir. 1985). *Bernard*’s language at times suggests a narrow ruling on communications by plaintiffs and their counsel; for example, the Court stated that “the mere possibility of abuses does not justify routine adoption of a communications ban that interferes with the *formation* of a class or the *prosecution* of a class action in accordance with the Rules.” *Bernard*, 452 U.S. at 104 (emphasis added); *see also Rice*, *supra* note 13, at 152-53 (asserting that limitations on defendant communications do not conflict with *Bernard*).

47. *Bernard*, 452 U.S. at 101.

48. *See Levenhagen*, *supra* note 13, at 142-43.

49. *See, e.g., In re Winchell’s Donut Houses, L.P. Sec. Litig.*, No. CIV.A. 9478, 1988 WL 135503, at \*1 (Del. Ch. Dec. 12, 1988) (“Surely, a defendant may not, in its communications with class members . . . , deceive or mislead class members.”); MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 2, § 21.12, at 249 (“Defendants and their counsel . . . may not give false, misleading, or intimidating information, conceal material information, or attempt to influence the decision about whether to request exclusion . . .”).

50. *See, e.g., In re Winchell’s*, 1988 WL 135503, at \*1 (“[I]t is a part of the responsibility of a court administering a class action to assure, within the law, that a party to a class action does not act inappropriately to destroy the practical utility of the class action device.”); MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 2, § 21.33, at 300 (“The judge has ultimate control over communications among the parties, third parties, or their agents and class members on the subject matter of the litigation to ensure the integrity of the proceedings and the protection of the class.”).

standard and have denied relief despite evidence that inappropriate communications have occurred.<sup>51</sup> Many district courts, however, have imposed limitations or requirements when they have determined that potentially abusive communications occurred.<sup>52</sup> These limitations include prohibiting defendants from discussing the case with potential class members,<sup>53</sup> requiring defendants to notify potential class members of the lawsuit when communicating with them on issues relevant to the case,<sup>54</sup> and requiring corrective notices at defendants' expense when there has been an inappropriate communication.<sup>55</sup>

These opinions usually do not directly address the question of whether the court could issue a protective order without evidence of inappropriate communications. Some courts, however, have explicitly rejected the notion that evidence of a structurally coercive relationship is by itself enough to

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51. In *Great Rivers Cooperative of Southeastern Iowa v. Farmland Industries*, 59 F.3d 764 (8th Cir. 1995), for example, the Eighth Circuit concluded that a district judge had abused his discretion by issuing a protective order in a case alleging various fraud and racketeering claims against Farmland, an agricultural cooperative in which plaintiffs held capital credits. Farmland published a piece in its newsletter to members (who depended financially on Farmland) that "denounced the lawsuit" and described the charges as "a direct attack on your Association and on the cooperative system as a whole." *Id.* at 765 (internal quotation marks omitted). After determining that the article "appears to contain somewhat misleading representations . . . [and] appears to constitute an implied solicitation to potential class members to opt out," *id.* (internal quotation marks omitted), the district court issued an order requiring Farmland to publish a rebuttal article by plaintiffs in its newsletter and "to refrain from communicating anything in the future that could reasonably be taken as an invitation to opt out," *id.* at 766, 765-66. The Eighth Circuit struck down the protective order because the "district court made insufficient findings regarding misrepresentation and the likelihood of serious abuses" and failed to conduct "serious and careful weighing of [the defendant's] First Amendment rights." *Id.* at 766. As a result, the court concluded that Farmland "should [not] be restrained from further commentary on the litigation" and that the order was "beyond the discretion granted the district court under" Rule 23. *Id.*

As *Great Rivers* demonstrates, courts may choose, as many have, to impose a high threshold on plaintiffs seeking limitations of defendant communications. Several other courts have refused to issue limitations after defendants engaged in communications that plaintiffs believed to be coercive and misleading. In *Burrell v. Crown Central Petroleum*, before a class alleging gender and racial discrimination was certified, the defendant company sent an e-mail to employees claiming that it "was a target of a union 'corporate campaign'" and held two meetings at which the human resources director apparently suggested that employees not get involved in the suit. 176 F.R.D. 239, 241 (E.D. Tex. 1997). The court held that there was no evidence of a potential for abuse. *Id.* at 244-45.

52. See *Haffer v. Temple Univ.*, 115 F.R.D. 506, 512 (E.D. Pa. 1987) ("Courts often issue protective orders after parties initiate improper communications with class members.").

53. Typically, these orders specify that defendants may continue communicating in the "ordinary course of business." *Cobell v. Norton*, 212 F.R.D. 14, 20 (D.D.C. 2002); *accord* *Belt v. EmCare*, 299 F. Supp. 2d 664, 669 (E.D. Tex. 2003); *Rankin v. Bd. of Educ.*, 174 F.R.D. 695, 697 (D. Kan. 1997); *Hampton Hardware v. Cotter & Co.*, 156 F.R.D. 630, 634 (N.D. Tex. 1994).

54. See, e.g., *Jenifer v. Del. Solid Waste Auth.*, Nos. CIV.A. 98-270 MMS & CIV.A. 98-565 MMS, 1999 WL 117762, at \*7-8 (D. Del. Feb. 25, 1999) (requiring the defendant "to notify putative class members of the pendency of [the class] action" when discussing agreements in which class members would sign a release forgoing "their right to participate in [the] litigation").

55. See, e.g., *Haffer*, 115 F.R.D. at 512 (ordering defendants to distribute a corrective notice and prohibiting "future improper communications").

justify limitations under *Bernard*.<sup>56</sup> In *Burrell v. Crown Central Petroleum*, the district court rejected the plaintiffs' motion for an order limiting the communications of an employer accused of racial and gender discrimination, stating that "[i]t is not enough that a *potentially* coercive relationship exists."<sup>57</sup> The court conceded that an ongoing business relationship was "inherently coercive," but held that "[w]ithout evidence of coercion, misleading statements, or efforts to undermine the purposes of Rule 23, the court cannot make the proper findings required by . . . *Bernard*."<sup>58</sup> In contexts other than the employer-employee one, courts have similarly rejected the argument that an ongoing business relationship susceptible to coercion can alone justify limitations.<sup>59</sup>

## 2. Reading *Bernard* To Allow for Prophylactic Restrictions on Defendant Communications

Whether by denying that *Bernard* applies to all protective orders or simply by interpreting its requirements differently, courts that have issued prophylactic orders without evidence of inappropriate communications have generally focused on structurally coercive relationships between defendants and potential class members.<sup>60</sup> In *Kleiner v. First National Bank of Atlanta*, the Eleventh Circuit upheld a protective order that prevented defendants from communicating with potential plaintiffs about the case.<sup>61</sup> Plaintiffs, on

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56. We can also presume that courts that refuse to impose limitations on defendant employers after plaintiffs have argued that inappropriate communications have occurred do not believe that an employer-employee relationship is alone sufficient to justify restrictions. *See, e.g.*, *Pruitt v. City of Chicago*, No. 03 C 2877, 2004 U.S. Dist. LEXIS 9103, at \*5-7 (N.D. Ill. May 19, 2004); *O'Brien v. Morse*, 146 Lab. Cas. (CCH) ¶ 34,564, at 54,484 (N.D. Ill. June 11, 2002).

57. 176 F.R.D. 239, 244 (E.D. Tex. 1997); *see also* *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 295, 298 (D. Mass. 2004) (rejecting plaintiffs' assertion that "the employer-employee relationship is all that is required to warrant preclusion of communications because that relationship is inherently coercive"); *Basco v. Wal-Mart Stores*, No. CIV.A. 00-3184, 2002 WL 272384, at \*3-4 (E.D. La. Feb. 25, 2002) (citing *Burrell* in rejecting limitations after stating that "plaintiffs here have not provided the Court with evidence to show that Wal-Mart has abused the process or attempted to undermine the purposes of Rule 23").

58. *Burrell*, 176 F.R.D. at 244-45.

59. *See, e.g.*, *Keystone Tobacco Co. v. U.S. Tobacco Co.*, 238 F. Supp. 2d 151, 158-59 (D.D.C. 2002) ("While an ongoing business relationship obviously increases the possibility that communications between defendants and putative class members are coercive, the existence of such a relationship is not enough by itself to justify precluding the communication of settlement offers to putative class members." (citation omitted)); *Jenifer*, 1999 WL 117762, at \*4 (concluding that although "an ongoing business relationship" may be "inherently coercive," courts "must still require a clear record of threatened abuses").

60. One exception is *Hodges v. Board of Education*, in which a class of "students identified as speech-language impaired" claimed that the school district had failed to provide certain services. No. 97-1195-WEB, 1997 U.S. Dist. LEXIS 13701, at \*3 (D. Kan. July 25, 1997). Without discussing any particular potential for coercion, the court simply determined that "[t]here is no legitimate purpose for defendants[] to communicate with prospective members of the class concerning the lawsuit" and prevented defendants from making "any contact or communication with [potential class members] which expressly refers to the litigation." *Id.* at \*5.

61. 751 F.2d 1193 (11th Cir. 1985).

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behalf of a class of borrowers, alleged that the bank had reneged on a promise to peg interest rates. After the class was certified, plaintiffs' counsel argued that "unilateral contacts by the Bank before the close of the exclusion period would intimidate eligible members,"<sup>62</sup> and the judge issued a protective order temporarily prohibiting defense contacts while she took the issue under advisement.

The defendants then engaged in a clearly abusive communications scheme that successfully convinced the vast majority of potential class members to opt out,<sup>63</sup> and, on appeal, argued that the protective order itself was invalid.<sup>64</sup> The appellate court decided that communications from defendants might frustrate the goals of Rule 23 in two ways. First, the litigation was "illustrative" of the fact that when "the class and the class opponent are involved in an ongoing business relationship"—here, borrowers and their bank—"communications from the class opponent to the class may be coercive."<sup>65</sup> A second and related concern was the effect of misleading information on the ability of potential class members to make informed decisions about whether to participate in the class action. The court here appeared concerned with the dissemination not only of false factual information but also of biased opinions, leading to a "one-sided presentation of the facts, without opportunity for rebuttal," and potentially to "irreparable" damage.<sup>66</sup>

The Eleventh Circuit also rejected arguments that the protective order violated the First Amendment, distinguishing the case from *Bernard* by

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62. *Id.* at 1196.

63. While the judge was considering whether to extend the temporary protective order, and before the opt-out period had expired, the bank decided to solicit exclusions in hopes of "reducing its potential liability and quelling the adverse publicity the lawsuit had spawned." *Id.* at 1197. The bank's marketing director developed a phone communications scheme (which coincided with the judge's vacation) in which loan officers called customers with the goal of persuading them to opt out of the class. Of the 3000 customers reached, many of whom had not yet received official notice of the class action, nearly 2800 agreed to opt out. *Id.* at 1198. The appellate court reached "the almost inescapable conclusion that the point of the communications campaign was . . . to solicit as many exclusions as possible before the court was alerted to the operation," *id.* at 1201 n.16, and bluntly declared that "[t]he Bank's subterfuge and subversion constituted an intolerable affront to the authority of the district court to police class member contacts," *id.* at 1203.

64. The appellate court in *Kleiner* had the benefit of hindsight. Though it ostensibly analyzed the limit on communications ex ante, surely the district court's order seemed more than reasonable in light of the tactics later employed by the bank. Indeed, some district court opinions have misinterpreted and misapplied *Kleiner* as a case involving a protective order imposed as a result of abusive conduct. *See, e.g.,* *Basco v. Wal-Mart Stores*, No. CIV.A. 00-3184, 2002 WL 272384, at \*4 (E.D. La. Feb. 25, 2002) (pointing to *Kleiner*'s facts as presenting clearer evidence of actual or potential abuse than in the instant case); *Cohen v. Apache Corp.*, No. 89 Civ. 0076 (PNL), 1991 WL 1017, at \*2 (S.D.N.Y. Jan. 2, 1991).

65. *Kleiner*, 751 F.2d at 1202 (internal quotation marks omitted). Further, the court frowned on the tactics used by the bank, noting that "the loan officers who made the telephone calls were the ones who controlled the customer's line of credit, and their on-the-spot entreaties pressured the listener to reach an immediate decision to comply before hearing the opposite point of view." *Id.* at 1206 n.27.

66. *Id.* at 1203.

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defining the bank's speech as commercial and, more convincingly, by focusing on the relationship between the bank and potential class members.<sup>67</sup> "Given the inherent coercion conveyed by the Bank's covert campaign, we agree that the district court possessed the authority to regulate such contacts without the predicate record and findings required in *Bernard*."<sup>68</sup> Defining the relationship between defendants and potential class members as one of "inherent coercion" is the strongest ground on which the court justified its order. Indeed, *Kleiner* is important and frequently cited not for its reading of *Bernard*<sup>69</sup> but for its analysis of the effect of communications when there is a potentially coercive relationship.<sup>70</sup>

By somewhat different reasoning, other courts have reached the same conclusion: that defendant communications may sometimes be limited without any evidence that potentially abusive communications have yet occurred. These courts have understood *Bernard* to apply to any limitation on communications with potential class members but have also determined that a structurally coercive relationship justifies limitations. In *Bublitz v. E.I. duPont de Nemours & Co.*, the district court issued limitations after stating that "the at-will employer-employee relationship between Defendants and the putative class members produces a strong potential for coercion and thus justifies minimal protections."<sup>71</sup> Seeking "to protect the putative class members' right to a fair trial, the interests of the class action and the principles of Rule 23, and the First Amendment rights of the Defendants," the court required defendants to communicate with potential class members in writing, provide copies of communications to the court and plaintiffs, and give potential class members at least ten days to respond to settlement offers that entailed a waiver of rights.<sup>72</sup>

In *Abdallah v. Coca-Cola Co.*, a case alleging racial discrimination, the court imposed limitations after acknowledging that "Coca-Cola has not

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67. The circuit court vacillated between these two theories in refusing to recognize the bank's contacts with potential class members as ordinary speech protected by the First Amendment. At first, the court defined the bank's communications scheme as commercial speech, explaining that "the thrust of the Bank's campaign was to defend its business dealings; its motivation, to shore up Bank earnings." *Id.* at 1203 n.22. For the court, this distinguished the case from *Bernard*, because there "counsel for plaintiffs had no direct financial stake in the case and because the case was a vehicle for expressing the political beliefs of the NAACP." *Id.* at 1205 n.24. As a result, the court announced that it would judge the bank's "prior restraint argument under a relaxed standard of scrutiny." *Id.* at 1205. At other points in the opinion, however, what seemed important to the court was not whether the speech was commercial or not, but rather the inherently coercive relationship between the bank and potential class members. *See id.* at 1206.

68. *Id.* at 1206.

69. In fact, as noted above, few courts have agreed with the premise that *Bernard's* standards do not apply to defendant communications.

70. *See, e.g.*, *Belt v. EmCare*, 299 F. Supp. 2d 664, 668 (E.D. Tex. 2003); *Bublitz v. E.I. duPont de Nemours & Co.*, 196 F.R.D. 545, 547 (S.D. Iowa 2000); *Jenifer v. Del. Solid Waste Auth.*, Nos. CIV.A. 98-270 MMS & CIV.A. 98-565 MMS, 1999 WL 117762, at \*4 (D. Del. Feb. 25, 1999).

71. *Bublitz*, 196 F.R.D. at 547.

72. *Id.* at 550.

given the Court any reason to suspect that it will attempt to mislead its employees and coerce them into non-participation in this case. But simple reality suggests that the danger of coercion is real and justifies the imposition of limitations on Coca-Cola's communications with class members."<sup>73</sup> Discussing e-mails that Coca-Cola had sent to employees regarding the case, the court noted that "there is an inherent danger that these types of internal communication could deter potential class members from participating in the suit out of concern for the effect it could have on their jobs."<sup>74</sup> As a result, the court ordered that future communications of this sort include language explaining that Coca-Cola could not retaliate against employees participating in the case.<sup>75</sup> The court further prohibited the company from directly discussing the case with individual potential class members, except to speak to managers about acts that might have exposed Coca-Cola to liability.<sup>76</sup>

Although reaching what I believe to be the correct conclusion—that prophylactic limitations may be imposed on defendants when a structurally coercive relationship exists—the analyses in cases like *Kleiner*, *Bublitz*, and *Abdallah* are flawed and incomplete. The *Kleiner* court suggested that *Bernard* only applies to plaintiff communications.<sup>77</sup> Even though the *Bublitz* and *Abdallah* courts accepted the need to apply *Bernard*'s standards, their analyses remain unsatisfactory. The *Bublitz* court inexplicably departed from circuit precedent<sup>78</sup> and asserted that its restrictions were not a prior restraint, with scant First Amendment analysis.<sup>79</sup> The *Abdallah* court asserted that *Bernard* applies to defendant communications but then failed to mention the Constitution when analyzing

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73. 186 F.R.D. 672, 678 (N.D. Ga. 1999).

74. *Id.* at 679.

75. *Id.* The court in *EEOC v. Morgan Stanley & Co.* issued a similar remedy after stating that "[c]oercion of potential class members by the class opponent may exist if both parties are involved in an ongoing business relationship" and that "the danger of such coercion . . . [was] sufficient to warrant the imposition of restrictions regarding communication between defendants and potential class members." 206 F. Supp. 2d 559, 562 (S.D.N.Y. 2002) (internal quotation marks omitted). The court allowed Morgan Stanley to communicate with potential class members but required the company to tell employees about the pending lawsuit, inform them that it could not retaliate against those who participated in the lawsuit, and provide them with a short summary of the EEOC claims. *Id.* at 563. The court also required that employees be notified that "they are not required to join the EEOC action and that they have a private right of action." *Id.*

76. *Abdallah*, 186 F.R.D. at 679.

77. The court quoted *Bernard*'s requirements as applying to "orders barring plaintiff contacts with members of the plaintiff class." *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1205 (11th Cir. 1985).

78. The court acknowledged that it was guided by *Great Rivers Cooperative of Southeastern Iowa v. Farmland Industries*, 59 F.3d 764 (8th Cir. 1995), and that the evidence of abuse was stronger in that case. *Bublitz v. E.I. duPont de Nemours & Co.*, 196 F.R.D. 545, 547-48 (S.D. Iowa 2000). The *Bublitz* court relied on the coercive nature of the employer-employee relationship, but it did not reconcile its position with the analysis in *Great Rivers*. *Id.* at 548.

79. *Bublitz*, 196 F.R.D. at 550.

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whether and how it would limit them.<sup>80</sup> These opinions do not cite contrary precedent or provide sufficient explanation for their departure from the majority approach.

## II. LIMITATIONS ON COMMUNICATIONS AND THE GOALS OF RULE 23 CLASS ACTION LITIGATION

The cases discussed above demonstrate the varying interpretations of *Bernard* with regard to limitations on defendant communications. The balance of this Note seeks to resolve this dispute and determine whether prophylactic orders can and should be imposed after a finding that a structurally coercive relationship exists, even when there is no evidence that abusive communications have occurred. This Part examines the goals of class action litigation, the policies behind Rule 23, and the ways that defendant communications may impede those goals and policies when a structurally coercive relationship exists.

### A. *Restricting Speech To Advance the Ends of Justice and the Goals of Rule 23*

When courts limit speech, they must do so to advance efficiency or the fair administration of justice. This straightforward idea is at the heart of the *Bernard* opinion. In the years before *Bernard*, the Supreme Court increasingly rejected broad and automatic restrictions on attorney solicitation, insisting that limitations could only be justified by important state interests and after taking into account countervailing interests in expression. In both the commercial speech cases (*Ohralik* and *Bates*) and the public discourse cases (*Primus* and *Button*), the Court determined that preventing solicitation per se was not an important state interest and that limitations required a more careful analysis.

In order to determine if speech limitations were advancing the goals of justice, the Court in *Bernard* explained that “the question for decision is whether the limiting order entered in this case is consistent with the general policies embodied in Rule 23.”<sup>81</sup> But with the exception of two sentences in a footnote,<sup>82</sup> the Court failed to explain what these policies are and why “[c]lass actions serve an important function in our system of civil justice.”<sup>83</sup> It is helpful to think about the “policies embodied in Rule 23” on two

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80. Strangely, the court incorrectly concluded that it could issue a protective order without consideration of the First Amendment: “Based on the foregoing cases and Federal Rule of Civil Procedure 23(d), the court is authorized to enter this Order. Therefore, the Court will not address the constitutionality of Local Rule 23.1(C).” *Abdallah*, 186 F.R.D. at 676.

81. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981).

82. *Id.* at 99 n.11.

83. *Id.* at 99.

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levels: the general justifications for the class action device and the particular importance of protecting absent class members.

Courts, legislatures, and scholars have advanced three primary justifications for class actions.<sup>84</sup> First, class actions improve “the efficiency and economy of litigation.”<sup>85</sup> They allow courts to achieve greater administrative efficiency by disposing of identical or similar claims and avoiding a “multiplicity of actions.”<sup>86</sup> As a result, the class action device also promotes fairness and *res judicata* by reducing the possibility of inconsistent rulings.<sup>87</sup>

Second, class actions allow individuals to bring claims that might otherwise be economically infeasible. As the Supreme Court has stated, “A significant benefit to claimants who choose to litigate their individual claims in a class-action context is the prospect of reducing their costs of litigation, particularly attorney’s fees, by allocating such costs among all members of the class who benefit from any recovery.”<sup>88</sup> Class actions thus address situations where individuals would not bring suits alone because their potential damages would be too low.<sup>89</sup>

Third, the plaintiff class functions as a “private attorney general” that responds to “injuries unremedied by the regulatory action of government.”<sup>90</sup> In this sense, class actions advance two related goals. Individuals bringing class actions may recover for injuries that the legal system might otherwise fail to prevent or redress. And companies or institutions that would not be sufficiently deterred from misconduct by government regulation might take precautions or change their behavior under the threat of substantial damages from a class action lawsuit.<sup>91</sup>

In addition to advancing these goals, class action rules seek to facilitate a just process for the participants. Many of Rule 23’s provisions are specifically aimed at protecting potential and absent class members. For example, named plaintiffs must be adequate representatives of the class, and settlements must be fair to all class members. It is commonly accepted that

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84. Another justification for the class action device not discussed here is the “the protection of the defendant from inconsistent obligations.” *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 402-03 (1980).

85. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974); *see also Geraghty*, 445 U.S. at 403; 1 CONTE & NEWBERG, *supra* note 1, § 1:1.

86. 2 CONTE & NEWBERG, *supra* note 1, § 5:46, at 463.

87. 2 *id.* § 5:47.

88. *Deposit Guar. Nat’l Bank of Jackson, Miss. v. Roper*, 445 U.S. 326, 338 n.9 (1980); *see also Geraghty*, 445 U.S. at 403 (stating that class actions permit “the spreading of litigation costs among numerous litigants with similar claims”).

89. *See Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 809 (1985); *Roper*, 445 U.S. at 339.

90. *Roper*, 445 U.S. at 338-39 (internal quotation marks omitted).

91. *See, e.g.*, 2 CONTE & NEWBERG, *supra* note 1, § 5:49; HENSLER ET AL., *supra* note 2, at 4 (“[S]ome state and federal regulators say they look to class action lawsuits filed by private attorneys to provide additional incentives for businesses to comply with regulations.”); Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 24 (1996) (“[T]he class action could be viewed as a device to fund the private attorney general . . .”).

when the class action allows potential class members to opt out, those members should make informed and independent decisions about their participation.<sup>92</sup>

Although recognizing that there were opportunities for abuse, the *Bernard* Court did not believe that the district court's limitations in that case advanced any of Rule 23's goals. Preventing attorney solicitation per se was no longer an important state interest, and any "concerns about 'stirring up' litigation . . . were particularly misplaced" because the attorneys were from "a nonprofit organization dedicated to the vindication of the legal rights of blacks and other citizens."<sup>93</sup> In fact, far from protecting potential class members and the integrity of the lawsuit, the protective order prevented plaintiffs from pursuing their claim and made it difficult for potential class members to make informed decisions about participating.

It was clear to the Court that the order prohibiting communications from plaintiffs' counsel had created an uneven playing field: Defendants were allowed to communicate under the auspices of the conciliation agreement, while plaintiffs were prevented both from informing potential class members about the case and from gathering information from them about the merits of the claim. As a concurring opinion at the circuit court level noted, "communications like those enjoined in the present case might actually benefit the judicial process through serving the rule 23 policy of encouraging common participation in a lawsuit."<sup>94</sup> In addition, by severely inhibiting plaintiffs and their counsel from pursuing their claim, the protective order also prevented the suit from serving as a private attorney general or as a means for claimants to pool their claims.

Furthermore, because of the protective order, potential class members did not have enough information to make informed decisions about participation. Quoting from the lower court opinion, the *Bernard* Court noted that "[t]he choice between the lawsuit and accepting Gulf's back pay offer . . . was for each black employee to make. The court could not make it for him, nor should it have freighted his choice with an across-the-board ban that restricted his access to information and advice concerning the choice."<sup>95</sup>

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92. See, e.g., *Impervious Paint Indus. v. Ashland Oil*, 508 F. Supp. 720, 723 (W.D. Ky. 1981) ("It is essential that the class members' decision to participate or to withdraw be made on the basis of independent analysis . . .").

93. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 n.11 (1981). This point was not crucial to the Court's view of solicitation or the protective order at issue, but the NAACP's involvement made even clearer to the Court the arbitrary and unjustified nature of the limitation. Others have argued that solicitation of potential class members does not raise traditional barratry concerns. See, e.g., Recent Case, *supra* note 22, at 1919 ("Requesting potential class members to remain in the class is solicitation of legal business only in an attenuated sense: since the suit has already been filed such communication does not stir up litigation.")

94. *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 481 n.2 (5th Cir. 1980) (Tjoflat, J., concurring), *aff'd*, 452 U.S. 89.

95. *Bernard*, 452 U.S. at 101 n.14 (quoting *Bernard*, 619 F.2d at 477).

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In all these respects, the protective order in *Bernard* failed to advance the objectives of Rule 23. As the Court recognized, a prophylactic ban on all plaintiff communications is probably more likely to impede the policies of Rule 23 than to advance them.<sup>96</sup> This does not mean, however, that all prophylactic bans fail to advance Rule 23's goals and should be precluded by *Bernard*. I contend in Part III that some prophylactic restrictions on communications are desirable when a structurally coercive relationship exists. But before explaining why this is the case, it is necessary to flesh out the dynamics of structurally coercive relationships and show how limiting defendant communications within such relationships can further the policies of Rule 23.

### B. *Structurally Coercive Relationships*

Any defendant, as well as any plaintiff, might engage in abusive speech that misinforms or coerces potential class members. But as the courts in *Kleiner*, *Bublitz*, and *Abdallah* understood, the abusive potential of such speech is much greater when the speaker is in a structurally coercive relationship with potential class members. This is most apparent in the workplace, where at-will employment affords employers almost unbridled power to regulate the terms of employment,<sup>97</sup> including the power to terminate employees for any reason outside of a few specific statutory and common law exceptions.<sup>98</sup> The authority that at-will employment bestows

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96. Although today the communications of named plaintiffs and their counsel with potential class members are presumptively proper, courts have appropriately continued to limit plaintiff communications when there is evidence of abuse. Named plaintiffs or plaintiffs' counsel might still engage in abusive communications that improperly pressure potential class members to participate in the lawsuit or that mislead them about the benefits of joining the class. Named plaintiffs and their counsel might, for example, communicate with potential class members about the benefits of a settlement that serves the interests of the named plaintiffs and counsel but not absent class members. *See, e.g.*, 5 CONTE & NEWBERG, *supra* note 1, § 15:2, at 8 (noting that class counsel abuses include "improper use of the class action [device] to increase litigation and settlement bargaining power for individual gain in disregard of or at the expense of claims of absent class members, and to compromise adequate representation of the class for individual purposes"). Some courts in recent years have imposed restrictions when plaintiffs' counsel misled potential class members. *See, e.g.*, EEOC v. Mitsubishi Motor Mfg. of Am., 960 F. Supp. 164 (C.D. Ill. 1997); *Babbitt v. Albertson's*, No. C-92-1883 SBA (PJH), 1993 WL 150300 (N.D. Cal. Mar. 31, 1993). In addition, at least one court, in a case alleging discrimination at several Motel 6 locations, held that some restrictions were warranted to protect the "goodwill and employee relations" of defendants. *Jackson v. Motel 6 Multipurposes*, 172 F.R.D. 462, 467 (M.D. Fla. 1997). The court worried that "[u]nfettered and unsupervised nationwide communications prior to class certification could pose a very real and immediate threat to Motel 6's business integrity." *Id.*

97. *See, e.g.*, Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 407 (1995) ("Unless a statutory exception has been created . . . , the employer is able to make a wide range of threats to his or her employees . . ."); Kate E. Andrias, Note, *A Robust Public Debate: Realizing Free Speech in Workplace Representation Elections*, 112 YALE L.J. 2415, 2433 (2003) (noting that in nonunion workplaces "the employer structures and controls every aspect of the employment relationship").

98. *See* Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 116 (1995) ("[N]ormally employers have the right to fire their employees at will, for good reason,

on employers, along with their ability to speak to employees who may be compelled to listen, means that employer communications may carry the implicit threat of adverse consequences for employees taking actions contrary to the expressed view of the company or organization. Several studies have shown that employees believe there are consequences for not complying with their employer's will.<sup>99</sup>

While it is often difficult to identify when particular statements or actions have a coercive effect, because "coercion works by camouflaging itself as choice,"<sup>100</sup> scholars and courts have nevertheless increasingly come to recognize how statements by employers or supervisors can coerce employees. Social scientists have studied how power and coercion function in the workplace,<sup>101</sup> and legal scholars and judicial opinions have examined workplace coercion in contexts like sexual harassment and union organizing campaigns.<sup>102</sup>

Insights about the nature of the workplace and the potentially coercive effects of employer communications in these other contexts can inform our understanding of why structurally coercive relationships pose special concerns. These other areas demonstrate the unique effect of communications or actions by employers (or others who have authority in the workplace) on employees. Indeed, it is impossible to understand these areas without recognizing how structures of authority in the workplace shape employer communications and employee responses to communications.

In the context of sexual harassment, for example, the Supreme Court in *Faragher v. City of Boca Raton* noted that "a harassing supervisor is always assisted in his misconduct by the supervisory relationship" and that the harassing actions of a supervisor "necessarily draw upon his superior position over the people who report to him, or those under them."<sup>103</sup> The opinion explains that employees may have difficulty walking away from

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bad reason, or no reason at all."). Exceptions include common law whistleblower rules and statutory protections like Title VII.

99. For a survey of studies in a variety of contexts, see *id.* at 119-23; and Andrias, *supra* note 97, at 2438.

100. Lea VanderVelde, *Coercion in At-Will Termination of Employment and Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 496, 498 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

101. For cites to and a brief summary of some of these studies, see Story, *supra* note 97, at 412-13. Story concludes that the studies "expose the myth of workplace relationships as voluntary and consensual and, instead, reveal the workplace to be a focal point of power and coercion in society." *Id.* at 413.

102. See *infra* notes 103-112 and accompanying text.

103. 524 U.S. 775, 802-03 (1998). *Faragher* addressed the liability of employers for the sexual harassment of supervisors. See also *Burlington Indus. v. Ellerth*, 524 U.S. 742, 763 (1998) ("[A] supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation.").

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supervisor harassment when a supervisor has the power “to hire and fire, and to set work schedules and pay rates.”<sup>104</sup>

Legal scholars have more generally analyzed how the coercive nature of the workplace not only can contribute to sexual harassment but is fundamental to our understanding of the dynamics of harassment. Jack Balkin has stressed that the workplace environment is key to understanding limits on sexually harassing speech:

Sexually harassing speech that would be protected outside of the workplace becomes unprotected within it because it occurs in a particular relationship of economic and social dependence . . . . [S]peech used to create a hostile working environment is unprotected not because of its content, but because in the social context in which it occurs, it is used as a method of employment discrimination.<sup>105</sup>

Lea VanderVelde has further explained that “sexual harassment law focuses almost exclusively on the *sexual* aspect of the conduct,”<sup>106</sup> but that “it is not gender alone that has rendered employees vulnerable to unwelcome sexual approaches. It is also coercive circumstances of the at-will doctrine under which employers and managers enjoy virtually unlimited prerogatives to dismiss employees.”<sup>107</sup>

Courts and labor law scholars have similarly recognized the coercive effects of employer speech when employees campaign for unionization. In *NLRB v. Gissel Packing Co.*, the leading case on employer speech during union campaigns, the Court held that the balancing of an employer’s right to speech and of employees’ right to organize “must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.”<sup>108</sup> But the decision, which permitted employer predictions about the effects of unionization, has been criticized as opening the door to a host of abusive communications, including predictions that unionization will damage the company financially, cause layoffs, or force relocation.<sup>109</sup> Labor law scholars have correctly pointed out that the

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104. *Faragher*, 524 U.S. at 803 (internal quotation marks omitted).

105. J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2307 (1999).

106. VanderVelde, *supra* note 100, at 508.

107. *Id.* at 501; *see also* CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 208 (1979) (asserting that sexual harassment is employment discrimination because it “places the woman in the position of having to choose between tolerating or complying with sexual demands on the one hand and suffering employment deprivation on the other”).

108. 395 U.S. 575, 617 (1969).

109. *See* Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, in *RESTORING THE PROMISE OF*

distinction between predictions and threats is often a “fiction detached from the employment relationship and modern economic reality.”<sup>110</sup>

In addition to highlighting the authority structures in the at-will workplace, several scholars have pointed out that employees are a captive audience compelled to hear employer views on issues.<sup>111</sup> As a result, employees receive one-sided views on issues of concern to the employer and are often unable to engage in self-help by choosing simply to avoid the employer’s communications.<sup>112</sup>

Finally, I should note that, although the employer-employee relationship is the clearest and most developed example in the literature, other relationships between defendants and potential class members may also be structurally coercive. Identifying other relationships that constitute structural coercion requires case-by-case analysis. The touchstone of such a determination should be whether defendants have the power to impose adverse (usually financial) consequences on potential class members.<sup>113</sup> For example, if minority members of a union alleged discriminatory union practices, union leaders would hold a structurally coercive position over the potential class members. Similarly, *Kleiner* involved a structurally coercive relationship where the defendant was a bank and potential class members were borrowers dependent on the bank for financing.<sup>114</sup>

### C. Defendant Communications in Structurally Coercive Relationships

The question of whether a structurally coercive relationship exists would be irrelevant if defendants had no reason to communicate with

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AMERICAN LABOR LAW 75, 82 (Sheldon Friedman et al. eds., 1994) (“[E]mployers have virtually unlimited opportunities to communicate aggressively with their employees during union campaigns . . . . [T]hese employer communications can and often do include distortion, misinformation, threats, and intimidation . . . .”); Andrias, *supra* note 97, at 2434-35 (noting the various comments that employers are able to make during union campaigns).

110. Story, *supra* note 97, at 423.

111. See, e.g., J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE. L.J. 375, 423 (“Few audiences are more captive than the average worker.”); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn’t Bark*, 1994 SUP. CT. REV. 1, 43; Story, *supra* note 97, at 417.

112. See, e.g., Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 13 (1990) (“[E]mployees sometimes may be forced to endure unwanted messages by virtue of being unable to leave the workplace.”).

113. Relationships may involve varying degrees of structural coercion. For example, franchisors may have economic power over franchisees but lack opportunity to communicate on a daily basis as employers do with their employees.

114. See *supra* note 65 and accompanying text. Case law offers some other examples. See, e.g., *Ralph Oldsmobile, Inc. v. Gen. Motors Corp.*, No. 99 Civ. 4567(AGS), 2001 WL 1035132, at \*4 (S.D.N.Y. Sept. 7, 2001) (noting the “potential for abuse” where potential class members were franchisees that depended on defendant franchisor for “[t]heir continued success and, indeed, existence”); *Hampton Hardware v. Cotter & Co.*, 156 F.R.D. 630 (N.D. Tex. 1994) (noting the potential for coercion where the defendant was a member-owned wholesaler that controlled supplies and the pricing of goods used by potential class members who were member hardware stores).

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potential class members about pending suits. But just as named plaintiffs and their counsel typically benefit from communicating with potential class members, there is little doubt that defendants have much to gain in communicating with potential class members to diminish support for suits and reduce the size of classes. First, as courts have recognized, a smaller class often means less liability for the defendant.<sup>115</sup> Second, reducing the size of the class may limit the pool of individuals willing to contribute relevant information to plaintiffs' counsel in the prosecution of the case. Third, the decisions of potential class members to opt out may influence public perceptions of the validity of the claims. Fourth, defendants may simply want to limit the number of individuals participating, even passively, in an adversarial contest against them—employers, for example, may worry that participation in a case will lower employee morale, decrease job performance, and create discord within the company. Finally, if plaintiffs cannot satisfy the numerosity requirement of Rule 23, defendants can defeat class certification altogether.<sup>116</sup>

There is nothing inherently troubling about defendants wanting to communicate their views about pending litigation even when potential class members choose not to participate in the suit as a result. But courts have recognized that both plaintiff and defendant communications can be abusive and that the potential for abuse is greater when a structurally coercive relationship exists. For one, courts have expressed concern about communications that pressure or coerce potential class members to take certain actions and, as a result, prevent them from independently assessing the merits of the suit. If defendants in a position of structural authority disparage the suit or encourage potential class members not to get involved, potential class members may worry that there will be economic reprisals for participating.<sup>117</sup>

Furthermore, courts recognize that communications that misinform potential class members about the lawsuit are inappropriate. Such communications may confuse potential class members and prevent informed decisions about participation.<sup>118</sup> When a structurally coercive

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115. See, e.g., *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1202 (11th Cir. 1985).

116. See *Rice*, *supra* note 13, at 155.

117. See, e.g., *Belt v. EmCare*, 299 F. Supp. 2d 664, 668 (E.D. Tex. 2003) (pointing to defendant communications that “prey[ed] upon fears and concerns” about future employment); *Abdallah v. Coca-Cola Co.*, 186 F.R.D. 672, 679 (N.D. Ga. 1999) (noting that certain “internal communication[s] could deter potential class members from participating in the suit out of concern for the effect it could have on their jobs”); *Hampton Hardware*, 156 F.R.D. at 633 (noting that potential class members were “less likely to feel that participation in the lawsuit [was] in their best interest” when the defendant made comments suggesting that the prices of goods, which the defendant controlled, would rise if the lawsuit proceeded).

118. See, e.g., *Kleiner*, 751 F.2d at 1203 (“The damage of misstatements could well be irreparable.”); *Erhardt v. Prudential Group*, 629 F.2d 843, 846 (2d Cir. 1980) (“Unapproved notices to class members which are factually or legally incomplete, lack objectivity and neutrality,

relationship exists, potential class members may rely on defendants for information regarding their business relationship and may thereby be more likely to accept as true subjective opinions or misleading statements.<sup>119</sup>

These two categories—coercion and misinformation—often work in concert. Speech that aims to coerce or intimidate can use exaggerated or incorrect information to accomplish its goal, and misleading speech can sometimes function to coerce and intimidate the listener.

These concerns are amplified when potential class members are captive audiences of defendants. When such communications go so far as to prevent the class from going forward or being certified, they may also interfere with general goals of class action litigation. Abusive defense tactics may prevent the efficient adjudication of common claims in a single suit<sup>120</sup> and inhibit the private-attorney-general function of class actions.

Defendant communications within structurally coercive relationships present different concerns than those at issue in *Bernard*. The *Bernard* Court struck down limitations aimed at preventing solicitation because they were impeding the goals of class action litigation. But communications within a structurally coercive relationship pose particular problems of coercion and misinformation that did not exist in *Bernard*. As Part III argues, these dangers justify certain prophylactic limitations.

### III. PROPHYLACTIC ORDERS LIMITING DEFENDANT COMMUNICATIONS IN STRUCTURALLY COERCIVE RELATIONSHIPS

#### A. *Why Prophylactic Orders Are Desirable*

It is hard to know how often defendant communications about class actions occur or affect the decisionmaking of potential class members. But both plaintiffs' and defendants' attorneys recognize the significance of defendant communications with potential class members,<sup>121</sup> suggesting that

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or contain untruths will surely result in confusion and adversely affect the administration of justice.”); *Hampton Hardware*, 156 F.R.D. at 634.

119. See, e.g., *Hampton Hardware*, 156 F.R.D. at 633 (noting that because potential class members “necessarily rely upon the defendant for dissemination of factual information . . . [t]hey are therefore particularly susceptible to believing the defendant’s comments that the lawsuit will cost them money”).

120. See Levenhagen, *supra* note 13, at 146.

121. For examples from the perspective of defendants’ attorneys, see GEORGE A. STOHNER ET AL., MORGAN, LEWIS & BOCKIUS LLP, TRENDS IN EMPLOYMENT LAW: AVOIDING CLASS ACTIONS 31 (2001), available at [http://www.morganlewis.com/pdfs/16B33497-936C-4ED8-BAAC6729DC0D4091\\_Publication.pdf](http://www.morganlewis.com/pdfs/16B33497-936C-4ED8-BAAC6729DC0D4091_Publication.pdf) (“[T]he employer’s public relations strategy should address guidelines for control of the inevitable ‘rumor-mill’ as well as address issues related to internal communications with both potential class members and non-members.”); Charles S. Mishkind et al., *The EEO Class Action in the New Millennium*, in LITIGATING EMPLOYMENT DISCRIMINATION CASES 1998, at 133, 219 (PLI Litig. & Admin. Practice, Course Handbook Series No. H0-001C, 1998) (“Today, effective public and internal communication is essential in class action litigation.”); and Christina Feege et al., *The Stealth Class Action*, N.Y. L.J., Dec. 20,

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such communications are not only common but an important part of defendants' response to class suits. And studies in the contexts of union campaigns and sexual harassment have demonstrated that a high percentage of employees believe that disagreement with employers' positions leads to retaliation in some form.<sup>122</sup> Further, judicial opinions make clear that numerous defendants in structurally coercive settings have engaged in communications that seek to persuade potential class members that suits are meritless and that appear to encourage them not to participate.<sup>123</sup>

Addressing inappropriate communications after they have occurred does not sufficiently counter the potential dangers inherent in a structurally coercive relationship. First, plaintiffs and the court may not detect the abusive communications in time to properly respond and remedy the harm. It is possible that many potentially inappropriate communications never come to courts' attention because potential class members do not recognize their impropriety or worry about reporting them to plaintiffs' counsel. Even with prophylactic limitations, of course, unreported improper communications may occur, but a court order of which potential class members have notice is likely to both reduce improper communications and increase reporting of such communications.

Second, limitations imposed by courts after abusive communications often do not fully address the harms that have occurred. Although prohibiting future communications, requiring notice about the case, or mandating that communications be filed with the court may help prevent further abuse, this does not remedy the abuse that may have already taken place.<sup>124</sup> For example, if potential class members have already reacted to

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2004, at 8 (recommending that employers “[m]anage communications with employees” and “prepare ‘talking points’ for HR and managers”). For the plaintiffs’ attorney perspective, see Arnold Levin, *An Overview from a Plaintiffs’ Perspective of the Limits Set by the Law on Discovery Directed to, and Communications with, Absent Class Members, in NATIONAL INSTITUTE ON CLASS ACTIONS*, at D-17, D-17 (1998) (“[T]he successful prosecution of class actions may depend, in part, upon protecting the class from . . . improper communications by defendants . . .”).

122. See *supra* note 99.

123. For example, in *Hampton Hardware* the defendants mailed potential class members a letter saying that the lawsuit “will cost you precious dollars” and encouraging them to “[d]ecide not to participate in the lawsuit.” 156 F.R.D. at 631 (internal quotation marks omitted). In *Belt* the defendants sent a letter to potential class members that “encourag[ed] class members not to join” and that “suggest[ed] that . . . [the] action could affect the potential class members’ employment.” *Belt v. EmCare*, 299 F. Supp. 2d 664, 667-68 (E.D. Tex. 2003) (internal quotation marks omitted); see also *Shores v. Publix Super Mkts.*, No. 95-1162-CIV-T-25(E), 1996 WL 859985, at \*3 (M.D. Fla. Nov. 25, 1996) (finding that the defendant employer distributed written materials that “clearly imply that it would be futile, and possibly detrimental to participate in the class”); *Haffer v. Temple Univ.*, 115 F.R.D. 506, 510 (E.D. Pa. 1987) (finding that the defendants distributed a memo to potential class members that “was false and misleading in several respects”).

124. See, e.g., *Kleiner v. First Nat’l Bank of Atlanta*, 751 F.2d 1193, 1203 (11th Cir. 1985) (“[A] solicitations scheme relegates the essential supervision of the court to the status of an afterthought.” (internal quotation marks omitted)); *Zarate v. Younglove*, 86 F.R.D. 80, 90 n.13 (C.D. Cal. 1980) (“If there were an opt-out period, the difficulty in repairing damage from misstatements during that limited time might well justify court control.”); 1982 MANUAL FOR

and made decisions based on coercive or misleading communications, prohibiting future communications does little. And while corrective notices may address this concern to some extent, courts have recognized that such a remedy is highly imperfect and may even harm potential class members by creating confusion about the case.<sup>125</sup>

Third, defendants that believe it is to their advantage to reduce the size of the class may have an incentive to use abusive communications to accomplish this goal. In order for any remedy to be administered, plaintiffs' counsel must learn about and have access to evidence that abusive communications have occurred and then convince a court that limitations are justified. At worst, from a defendant's perspective, a court may impose one of the remedies discussed above, but by then the defendant will already have communicated its message to potential class members.

Although these same points can be made in regard to all party communications, in structurally coercive relationships the potential for harm is greatest.<sup>126</sup> Defendants in a position of structural power can engage in regular, even daily, communications that may be difficult to monitor after the fact. And the nature of structurally coercive relationships means that even communications that are not overtly coercive can still have a powerful coercive effect. Courts have engaged in detailed fact-finding and have struggled to determine when statements are coercive or misleading.<sup>127</sup> The current majority approach—considering limitations only when plaintiffs can demonstrate that inappropriate communications have occurred—thus fails to sufficiently protect class members when a structurally coercive relationship exists.

The nature of structurally coercive relationships justifies some prophylactic limitations on defendant communications as long as the limitations are crafted to protect potential class members from abuse while taking into account the interests of defendants. Cases like *Burrell* are wrong to read *Bernard* as precluding such limitations without evidence that defendants have already engaged in abusive communications. Although it is plausible to read *Bernard*'s language this way, the background of the case and Rule 23 policies suggest that prophylactic restrictions may be justified in limited circumstances. As explained above, *Bernard* was a response to sweeping restrictions on communications that inhibited plaintiffs from pursuing their claims. The Court called for "a clear record and specific findings" to ensure that courts properly based limitations on some showing

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COMPLEX LITIGATION, *supra* note 14, § 1.41, at 30 n.43 ("[I]mproper and unethical communications were frequently difficult, and sometimes impossible, to detect in time to prevent harm . . .").

125. See, e.g., *Hampton Hardware*, 156 F.R.D. at 635.

126. See *supra* Section II.C.

127. For examples of opinions that have analyzed defendant communications and concluded there was not enough evidence that they were inappropriate or misleading, see *supra* note 51.

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that abuse was of particular concern in the case at hand rather than on broad allusions to the dangers of solicitation. But a prophylactic order that aims to protect potential class members involved in a structurally coercive relationship is a far cry from the pervasive and automatic bans on communication that preceded *Bernard* and prompted that Court to call for findings, a clear record, and a weighing of interests.

It is not inconsistent with the language of the opinion to impose prophylactic restrictions when there is “a clear record and specific findings” that a structurally coercive relationship exists. Nowhere in *Bernard* did the Court mandate that specific instances of inappropriate communications be demonstrated. It would be helpful for the Court to clarify *Bernard*, but until then, courts should not read *Bernard* as precluding prophylactic limitations to protect potential class members.

#### B. *A Proposal for Prophylactic Restrictions*

In order to protect potential class members and the class action device, courts should impose prophylactic limitations on a defendant’s communications upon finding that the defendant is in a structurally coercive relationship with potential class members. The employer-employee relationship would automatically constitute such a relationship, as would other relationships in which defendants have some control over the economic well-being of potential class members. If a court determines that such a relationship exists when the class claim is filed, it should issue the following restrictions, which combine and build on those imposed in *Bublitz* and *Abdallah*.<sup>128</sup>

First, courts should prohibit defendants from communicating orally about the case with potential class members unless potential class members initiate the conversation.<sup>129</sup> As a number of courts have recognized, verbal communications, especially in-person ones, are particularly dangerous.<sup>130</sup>

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128. One might argue that restrictions are only appropriate after class certification, because only then is there certainty that the class action will proceed. But “[t]he effect of a defendant attempting to influence potential plaintiffs not to join a potential class action is just as damaging to the purposes of Rule 23 as a defendant that influences members of an already certified class to opt out.” *Jenifer v. Del. Solid Waste Auth., Nos. CIV.A. 98-270 MMS & CIV.A. 98-565 MMS*, 1999 WL 117762, at \*2 (D. Del. Feb. 25, 1999).

129. There may be times where defendants and their counsel will need to communicate with certain potential class members in order to gather evidence and prepare their defense. Courts might consider “excluding such persons from the class if they have no genuine claims,” *MANUAL FOR COMPLEX LITIGATION (FOURTH)*, *supra* note 2, § 21.33, at 301, or permitting defendants to speak to those specific individuals.

130. *See, e.g., Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 457 (1978) (“[I]n-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education . . . .” (footnote omitted)); *Bublitz v. E.I. duPont de Nemours & Co.*, 196 F.R.D. 545, 549 (S.D. Iowa 2000)

This is of special concern in the context of coercive relationships where defendants often have routine contact with potential class members and may enjoy a captive audience. Second, any written communications should be filed with the court and with plaintiffs' counsel. This will allow courts and plaintiffs to respond to inappropriate communications when they occur and will discourage defendants from making misleading or coercive communications in the first place. Third, these written communications should include notices explaining that defendants cannot retaliate against potential class members for participating in the suit. Fourth, courts should enunciate clear guidelines to all parties regarding permissible kinds of communications.<sup>131</sup> Defendants should be able to get prior approval from the court if they are uncertain about whether a communication is appropriate. Finally, as with other written communications, offers of individual settlements should be filed with the court and opposing counsel and should allow sufficient time for potential class members to reflect on the offer and for plaintiffs' counsel to respond.

#### IV. FIRST AMENDMENT CONCERNS AND OTHER OBJECTIONS

These proposed restrictions aim to limit communications in a fashion that will sufficiently protect class members and advance the goals of class action litigation. By exclusively addressing communications about the suit, the proposal is sensitive to defendants' need to conduct their business. But there are a number of possible arguments against the automatic imposition of such limitations. This Part explains how the proposal satisfies the requirements of the First Amendment and responds to other potential criticisms.

##### A. *The First Amendment and Employer Interests in Communicating with Employees*

As discussed above, protective orders prohibiting speech in class actions must serve the policies and goals of Rule 23. But a court's analysis cannot end there. As *Bernard* makes clear, any limitations must also satisfy "standards . . . mandated by the First Amendment."<sup>132</sup> Critics of my proposal might assert that the current system is a sufficient and preferable means of responding to abusive communications because courts impose restrictions when there are abusive communications and can require

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("[U]nsupervised oral solicitations produce distorted statements and the coercion of susceptible individuals . . .").

131. In cases where there is no coercive relationship, courts should still warn parties at the outset about making misleading statements to potential class members.

132. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 104 (1981).

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defendants to issue corrective notices. They might further argue that prophylactic orders of the type I suggest would represent an unnecessary prior restraint that chills speech.<sup>133</sup>

Courts plainly have the power to regulate and restrict speech to the extent necessary to administer lawsuits. They routinely restrict speech during litigation with no mention of the First Amendment, and the Supreme Court has on numerous occasions affirmed courts' ability to regulate speech in this context.<sup>134</sup> Inside the courtroom, courts regularly limit what counsel and parties can say and when they can say it, and although "courtroom speech is commonly regulated in ways that in other contexts would constitute prior restraints, . . . [s]uch regulation is not thought to raise particular First Amendment problems."<sup>135</sup> Courts have more closely scrutinized restraints on speech outside the courtroom,<sup>136</sup> upholding restraints only if it can be shown that they are necessary to protect the integrity of the judicial process.<sup>137</sup>

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133. Some made this type of argument about limitations on plaintiff communications prior to *Bernard*. See, e.g., *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1600 (1976) ("Class attorneys and class opponents may limit their communications with a class in order to avoid the time consuming process of obtaining prior judicial clearance and limit the risk of antagonizing the judge.").

134. In *Bernard*, for example, the Court noted that "[i]n the conduct of a case, a court often finds it necessary to restrict the free expression of participants, including counsel, witnesses, and jurors." *Bernard*, 452 U.S. at 104 n.21; see also *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 n.18 (1984) ("[O]n several occasions this Court has approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant."); Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 705 (2004) ("[A]djudicative speech—speech intended to influence court decisions—is regularly and systematically constrained by rules of evidence, canons of professional ethics, judicial gag orders, and similar devices.").

135. Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169, 203; see also Peters, *supra* note 134, at 725 ("[C]ourts have never found restrictions on adjudicative speech to be constitutionally controversial except when judges reach outside their courtrooms . . ."). Others have noted that, through rules of evidence and procedure, courts regularly restrict what counsel and parties can say and when they can say it and utilize the punishment of contempt to enforce these rules. See, e.g., Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 690 (1997) ("[T]he trial that is both created and regulated by prohibitions on speech is thereby among the most constrained of all communicative environments.").

136. See, e.g., *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991) (holding that a state rule prohibiting lawyers from making certain extrajudicial statements to the press was void for vagueness); *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 467 n.8 (5th Cir. 1980) ("Whatever may be the limits of a court's powers in this respect, it seems clear that they diminish in strength as the expressions and associations sought to be controlled move from the courtroom to the outside world."), *aff'd*, 452 U.S. 89.

137. For example, the Court in *Rhinehart* upheld a protective order that prohibited one of the parties from disseminating information gathered through discovery. It rejected arguments that this violated the First Amendment, stating that "[t]he government clearly has a substantial interest in preventing . . . abuse of its processes." *Rhinehart*, 467 U.S. at 35. Courts have also long upheld rules prohibiting attorney communications with opposing represented parties. See, e.g., Gregory G. Sarno, Annotation, *Communication with Party Represented by Counsel as Ground for Disciplining Attorney*, 26 A.L.R.4TH 102, § 2, at 107 (1983) ("[I]n many decisions the courts have expressly or apparently adopted or recognized the general view that a lawyer should or shall not

Usually judicial restrictions on speech during adjudication limit what parties can say in their capacity as litigants.<sup>138</sup> Employers in the contexts I discuss, however, occupy the roles both of party to litigation and of employer. It is often difficult to neatly categorize communications as falling into either the employer speech or the litigant speech category, and there are a number of legitimate reasons that defendant employers in class actions may want to communicate with potential class members about the class action. Defendants may simply seek to inform potential class members about the suit,<sup>139</sup> respond to questions, or address plaintiff communications that appear misleading or that threaten to cause serious financial damage to the company.<sup>140</sup> For example, in an employment discrimination claim, defendants may want to tell employees about steps they are taking to remedy problems raised by the lawsuit, such as firing those responsible for the discriminatory conduct. Further, defendants may want to express a sincere belief that participating in the lawsuit is not in the best economic interests of the business or of potential class members. In all of these scenarios, employers' communications with potential class members may be an effort to ensure an efficient and productive workplace, without any intent to intimidate employees into not participating in the suit. But these and other types of communications about the suit may also improperly pressure or coerce potential class members, depending on their exact content and context.

The Supreme Court faced a similar conflict of roles in *Gissel*, which involved the extent to which the NLRB could limit employer communications about unionization under the National Labor Relations Act.<sup>141</sup> The Court concluded that the free speech rights of employers

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communicate on the subject matter of the representation of his or her client with one who is known to be represented in the matter by another attorney." (citation omitted)).

138. One way to understand these limitations is through Robert Post's conception of "managerial authority," in which "ordinary first amendment rights are subordinated to the instrumental logic characteristic of organizations, and the state can in large measure control speech on the basis of an organization's need to achieve its institutional ends." Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1775 (1987). But because employers may be speaking both as litigants and as employers in class actions, Post would view limits on their communications with potential class members as falling outside the boundaries of courts' managerial authority: "[F]or constitutional purposes an organization's boundaries can be recognized by the predominance of functionally defined organizational roles." *Id.* at 1793.

139. *See Burrell v. Crown Cent. Petrol.*, 176 F.R.D. 239, 245 (E.D. Tex. 1997) ("Simply because the company chooses to keep its employees informed of litigation affecting the company does not attach an improper motive.").

140. *See, e.g., Jackson v. Motel 6 Multipurposes*, 172 F.R.D. 462, 467 (M.D. Fla. 1997).

141. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The Court was considering the application of 29 U.S.C. § 158(c), which stated,

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.  
29 U.S.C. § 158(c) (1964).

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“cannot outweigh the equal rights of the employees to associate freely” but held that employers can express their “general views” on unionization, including “prediction[s] as to the precise effects . . . unionization will have on [the] company.”<sup>142</sup> It determined that the NLRB’s authority to limit speech extended only to the prevention of employer threats, a restriction that the Justices viewed as necessary to protect employees from inappropriate coercive tactics. The Court appropriately sought to balance the interest of the NLRB in ensuring fair union campaigns, as well as the rights of employees to organize, with the free speech interests of employers.<sup>143</sup>

What the First Amendment requires, then, is that courts balance the two roles of defendants—parties to a suit and employers—when considering limitations on employer communications about class actions. So what are the countervailing First Amendment interests of employers, and how reluctant should courts be to limit their speech? There are two general views of the extent to which the First Amendment protects workplace speech. Some view such speech as generally outside public discourse and deserving of limited constitutional protection.<sup>144</sup> Others argue that the workplace is an important site of social interaction in which citizens should be able to communicate their views on political or cultural issues.<sup>145</sup> Engaging in this general debate is beyond the scope of this Note. But under either view, it is appropriate to restrict employer communications with potential class members about ongoing litigation.

Under the view that speech in the workplace is outside public discourse, courts should recognize that the value embodied in employer speech is an instrumental one aimed at production.<sup>146</sup> As a result, limitations on

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142. *Gissel*, 395 U.S. at 617-18.

143. While the application of *Gissel* has sometimes allowed abusive communications, *see supra* notes 109-110 and accompanying text, I believe the Supreme Court was correct to analyze the problem as one of competing interests.

144. *See, e.g.*, Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1273 (1995) (explaining that the workplace is “ordinarily regarded as a site of production”); Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 207 (1990) (“[T]he government may treat speech involving economic transactions, for example, in both the public and private sector employment context, as outside the general marketplace of discourse . . .”).

145. *See, e.g.*, KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* 83 (1995) (“For many people, the workplace is a main locus of discussion about public affairs and matters of personal significance. . . . The scope of free speech is not limited to discourse in some public space.”); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1797-98 (1992).

146. Some scholars and courts have asserted that we should define defendant speech with potential class members as commercial and thereby accord it less protection than noncommercial speech. *See, e.g.*, *Kleiner v. First Nat’l Bank of Atlanta*, 751 F.2d 1193, 1203-04 (11th Cir. 1985); *Hampton Hardware v. Cotter & Co.*, 156 F.R.D. 630, 633 (N.D. Tex. 1994); Levenhagen, *supra* note 13, at 150. Although this might be an attractive and practical means of triggering a lower level of judicial scrutiny and achieving the correct result, it does not seem to fit with typical commercial speech cases addressing issues like advertising and solicitation, nor does it comport with analyses of employer speech in cases like *Gissel*.

communications are not constitutionally problematic if they protect potential class members and do not interfere with employers' ability to run their businesses. A more robust view of speech in the workplace, by contrast, might argue for greater First Amendment protection than what business operations require. But even proponents of such a position do not deny the need to sometimes restrict speech in the workplace to serve state interests.<sup>147</sup> The judiciary has a strong interest in ensuring the administration of justice and protecting the integrity of its processes. As I have argued, prophylactic limitations will protect potential class members and the efficacy of the class action device. Further, the limitations I propose are fashioned to interfere as little as possible with the employer's ability to run the workplace.

It is true that defendants might censor their speech more than is necessary. But any such censoring of comments about a pending class action would likely be minimal and would not interfere with employers' ability to run their businesses. Written communications would still be allowed, and the limitation on oral communications would extend only to the case and not to other matters. Defendants might also self-censor ambiguous oral statements that could be construed either as part of business operations or as about pending class action.<sup>148</sup> Or they might refrain from expressing political views that could implicate the suit.<sup>149</sup> Courts should therefore make clear that unless the communications directly address the case, they are presumptively appropriate. This presumption should be overcome when there is evidence suggesting that the communications are interfering with the administration of justice or that the defendant's true purpose is to discourage support for the suit.

#### B. *Other Objections to Prophylactic Limitations*

There are a number of other possible objections to the limitations I propose. One might be that defendants must have the ability to defend themselves to their employees and the public when faced with a claim that the company believes to be false.<sup>150</sup> This is of special concern if named

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147. For example, Eugene Volokh concedes that there is a "state interest in ensuring equality of working conditions," Volokh, *supra* note 145, at 1867, and that "[m]uch of harassment law" is constitutional, *id.* at 1796.

148. In response to discrimination problems highlighted by a filed claim, for instance, employers might reasonably want to communicate about new policies that have been implemented without making reference to the pending suit.

149. Communications about an employer's views on class action tort reform, for example, might fall into this category.

150. See *Wiginton v. CB Richard Ellis, Inc.*, No. 02 C 6832, 2003 WL 22232907, at \*3 (N.D. Ill. Sept. 16, 2003) (discussing the relevance of an employer e-mail sent to employees "in response to publicity surrounding the filing of the complaint"); Mishkind et al., *supra* note 121, at 210-11 ("[C]lass actions raise heightened concerns where the employer is large and well known because, inevitably, there will be a battle for the hearts and minds of both the public and the

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plaintiffs and their counsel engage in widespread communications alleging violations, thereby coercing the defendant into settling despite its belief that the plaintiffs' claims are tenuous or false. This is a legitimate concern, and courts managing class actions should not allow plaintiffs and their counsel to improperly attack defendants. But because defendants can communicate in writing, a court should only relax the restrictions in exceptional situations, when it is clear that fairness demands that defendants be able to respond immediately to plaintiff statements.

Another critique might assert that prohibiting defendants from communicating freely with potential class members prevents defendants and willing potential class members from reaching individual settlements.<sup>151</sup> But as one court aptly stated, "Settlement cannot come . . . at the expense of the class action mechanism itself to the detriment of putative class members."<sup>152</sup> And under my proposal, defendants can still communicate in writing as well as with potential class members who initiate contact. Further, the court can grant the defendant leave from the order to discuss settlements if the situation warrants it.

Finally, one might assert that the proposal will burden courts with the time-consuming task of reviewing defendant communications filed with the court and responding to plaintiffs' complaints. But motions and cross-motions seeking limitations can already consume significant amounts of courts' and parties' time.<sup>153</sup> It is doubtful that my proposal will increase the burden on courts, and if courts set out clear guidelines after class actions are filed, it is possible that it will actually reduce the time devoted to communications issues.

#### CONCLUSION

The recent and widely publicized gender discrimination claims against Wal-Mart and Morgan Stanley illustrate that class actions often involve defendants who hold a structurally coercive position over potential class members. Such relationships present special problems for judges, who are

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defendants' employees which will, in turn, affect the employer's relations with its workers as well as pose a real and immediate threat to its business goodwill and integrity with the public.").

151. *Cf.* *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 n.14 (1981) ("In Title VII, Congress expressed a preference for voluntary settlements of disputes through the conciliation process."); *In re The Exxon Valdez*, 229 F.3d 790, 795 (9th Cir. 2000) ("[T]he general policy of federal courts to promote settlement before trial is even stronger in the context of large-scale class actions.").

152. *Keystone Tobacco Co. v. U.S. Tobacco Co.*, 238 F. Supp. 2d 151, 154 (D.D.C. 2002).

153. The time-consuming nature of communications issues is demonstrated in *Babbitt v. Albertson's*, No. C-92-1883 SBA (PJH), 1993 WL 150300 (N.D. Cal. Mar. 31, 1993). There the court refused to issue a corrective notice after determining that the passage of time meant that such notice was "more likely to add to the confusion of potential class members than to dispel it." *Id.* at \*8; *see also* Miller, *supra* note 13, at 731 ("[D]ebate over communications can be very time consuming.").

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responsible for protecting potential class members from abuse. As with other aspects of class action lawsuits, the issue of communications engenders contentious debate. While plaintiffs' counsel seek orders that they claim are necessary to protect class members and the administration of justice,<sup>154</sup> others postulate that the "concerns about potential coercion are as a general rule exaggerated, overblown and overstated."<sup>155</sup> Without clear guidance from the leading Supreme Court opinion on the matter, conflicts have emerged among lower courts over how to protect potential class members in structurally coercive relationships with defendants. Carefully crafted protective orders that do not interfere with defendants' interests in conducting their business are consistent with the First Amendment, the goals of class action litigation, and the courts' responsibility to protect potential class members.

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154. See, e.g., Levin, *supra* note 121, at D-17.

155. Douglas R. Richmond, *Class Actions and Ex Parte Communications: Can We Talk?*, 68 MO. L. REV. 813, 857 (2003). The attorney-author goes on to assert that [p]laintiffs' counsel typically want to limit or prohibit defendants' communications with putative class members not because they truly fear coercion, but because they fear truthful communications and reasonable individual settlements that will have the effect of reducing the expected fee awards. For this reason alone courts should be reluctant to restrain defendants' communications with putative class members. In the event challenged communications actually are coercive, a court can always send a curative notice at the defendant's expense.

*Id.* at 857-58 (footnote omitted).