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COMMENTS

The Federal Class Action in Environmental Litigation: Problems and Possibilities

As the first great wave of environmental litigation surged across the nation in the early years of this decade, concerned lawyers and legal scholars alike began to characterize the class action as "the most important device for the declaration of environmental rights."¹ Some lawyers specializing in environmental litigation apparently attempt to force every lawsuit into the limited mold of a rule 23 class action,² which may result in the absurd situation of a handful of persons purporting to represent the entire population of the United States.³ The reaction of many judges has been predictably negative when faced with these massive class suits seeking redress for environmental harm.

A recent case in the Second Circuit, *Zahn v. International Paper Co.*,⁴ is illustrative. Four named owners of lakefront property attempted to bring a class suit on behalf of some two hundred other lakefront property owners, seeking damages in the total amount of forty million dollars, for impairment of their property rights caused by the defendant's alleged pollution of Lake Champlain. The trial judge had found that, although the four named plaintiffs had each made good faith claims of damages in excess of ten thousand dollars, it was impossible that every member of the class had suffered pollution dam-

1. V. YANNAcone & B. COHEN, 1 ENVIRONMENTAL RIGHTS AND REMEDIES, § 6:10, at 363 (1972). See J. MACDONALD & J. CONWAY, ENVIRONMENTAL LITIGATION §§ 2.04a, 4.50 (1972); Ashe, *The Class Action: Solution for the Seventies*, 7 N.E.L. REV. 1 (1971); Lamm & Davison, *Environmental Class Actions Seeking Damages*, 16 ROCKY MT. MIN. L. INST. 59 (1971); Comment, *The Viability of Class Actions in Environmental Litigation*, 2 ECOL. L.Q. 533 (1972); Note, *The Cost-Internalization Case for Class Actions*, 21 STAN. L. REV. 383 (1969) [hereinafter cited as *Cost Internalization*]; Comment, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution*, 16 WAYNE L. REV. 1085, 1097-98 (1970).

2. Victor Yannacone, one of the most ubiquitous litigators in the limited group of nationally known environmental lawyers, brings every action that comes into his office "on behalf of all those entitled to the full benefit, use and enjoyment of whatever national natural resource treasure is involved . . ." Remarks during panel discussion recorded in LAW AND THE ENVIRONMENT 75 (M. Baldwin & J. Page eds. 1970).

3. E.g., *Yannacone v. Montrose Chem. Co.*, No. 3761-69 (S.D.N.Y., filed Oct. 14, 1969); see discussion in text at notes 183-84 *infra*.

4. 469 F.2d 1033 (2d Cir. 1972), cert. granted, 93 S. Ct. 1370 (1973) (No. 72-888).

age in that amount.⁵ Holding that *Snyder v. Harris*⁶ required that each class member in a federal diversity suit must meet the ten thousand dollar jurisdictional amount, the court refused to allow the suit to proceed as a class action.⁷

This decision is an ominous portent of things to come for environmentalists eager to expand the use of class actions. Perhaps most striking is the fact that it came from the Second Circuit, which has been the leader in giving rule 23 "a liberal rather than a restrictive interpretation,"⁸ particularly in the securities fraud and antitrust fields. Even more disturbing than the narrow holding itself, which might be excused as no more than a technical interpretation of the jurisdictional amount requirement,⁹ is the attitude revealed in the court's concluding *dicta*:

However, were this case to proceed as a class action it would in fact significantly increase the burden on the federal courts. Once appellee's liability had been established, and even assuming that appellee's defenses would not vary as to different members of appellants' class, it would be an enormously time consuming task to assess the damages suffered by each of the 200 riparian landowners, each of whose claims is regarded as separate and distinct. Indeed the Advisory Committee did not intend that Rule 23(b) (3) ordinarily be utilized in a mass tort situation. Moreover a second policy consideration relied on in *Snyder* is relevant here: local controversies involving claims to be settled on the basis of state law "can often be most appropriately tried in state courts."¹⁰

If the most liberal court of appeals takes the foregoing approach when confronted with a class of only two hundred members and a fairly straightforward and egregious case of injury to property caused by one polluter, it does not require great prescience to imagine what other courts might do with class actions on behalf of millions who allege more obscure personal injuries and aesthetic damage caused by a num-

5. *Zahn v. International Paper Co.*, 53 F.R.D. 430, 431 (D. Vt. 1971).

6. 394 U.S. 332 (1969); see text accompanying notes 70-134 *infra* for a full discussion of the *Snyder* decision and its impact on the jurisdictional amount requirement for class suits.

7. 469 F.2d at 1034.

8. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 563 (2d Cir. 1968) (*Eisen II*). Despite its "liberal" attitude to Rule 23, the Second Circuit recently reversed the District Court and dismissed the action. *Eisen v. Carlisle & Jacquelin*, Civil Nos. 72-1521, 30934 (2d Cir., May 1, 1973) (*Eisen III*). See discussion in text accompanying notes 312-19 and 337-44.

9. 28 U.S.C. § 1332 (1970).

10. 469 F.2d at 1035-36 (citations omitted).

ber of polluters in an urban area.¹¹

Nevertheless, this comment is not intended as a requiem for the environmental class action. The device has a place in environmental litigation even though recent developments have limited its utility. Litigants who enter the courtroom on the side of the environment face enormous obstacles without further deluding themselves as to the magical effects of the class suit. They must be more aware of the strategic strengths and weaknesses of the class action device, as well as the highly technical requirements for its use in the federal courts, if the class suit is to realize its potential in this field of law.

Part I of this comment considers the various purposes that have been suggested as justification for the use of class actions. Part II deals with two threshold matters: federal jurisdiction, with particular attention to the issue of jurisdictional amount in establishing diversity jurisdiction, and modern rules on "standing." Part III is a section-by-section analysis of the requirements of rule 23 of the Federal Rules of Civil Procedure.

I. SOME SUGGESTED PURPOSES OF THE CLASS SUIT

A. *Traditional View*

Although amended rule 23, the basis for class actions in the federal courts, is only seven years old, the origins of this procedural device can be traced back some 300 years to the English equity courts.¹²

The class action was an invention of equity . . . mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs.¹³

In order to avoid the wasted effort of a series of essentially identical lawsuits that might follow when many persons stood in the same position toward an adversary, the English Court of Chancery relaxed the older rules requiring joinder of all interested parties and developed the

11. See, e.g., *City of Chicago v. General Motors Corp.*, 467 F.2d 1262 (7th Cir. 1972), *aff'g* 332 F. Supp. 285 (N.D. Ill. 1971); *Heart Disease Research Foundation v. General Motors Corp.*, 3 E.R.C. 1710 (S.D.N.Y. 1972); *Diamond v. General Motors Corp.*, 20 Cal. App. 3d 374, 97 Cal. Rptr. 639 (1971) (all dismissed); see discussion in text accompanying notes 300-03 *infra*.

12. Precise dating is impossible, but sometime between 1675 and 1700 class actions seems to have begun to branch off from bills of peace. See Z. CHAFFEE, *SOME PROBLEMS OF EQUITY*, 157-66 (1950) and cases there cited, especially in n.29.

13. *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948).

bill of peace, which allowed the court to clear up the rights of many plaintiffs or defendants in a single action.¹⁴ The class action gradually evolved from the bill of peace.

The obvious advantages of the class action were recognized by the American judiciary at an early date. Equity rules authorized class actions in the federal courts for suits involving so many parties that it was impractical to join them all as parties.¹⁵ The representative suit took on more definite form in 1938 when the Supreme Court adopted original rule 23,¹⁶ described by one leading commentator as "a bold and well-intentioned attempt to encourage more frequent use of class actions."¹⁷ After three decades of experience revealed very serious defects in the original rule,¹⁸ the provisions were completely rewritten and augmented in the present form in 1966.¹⁹

Like its forerunners, amended rule 23 is a rule of convenience,²⁰ designed to "achieve economies of time, effort and expense, and promote uniformity of decision as to persons similarly situated . . ."²¹ A federal trial judge recently said that the purposes of rule 23 "are to avoid a multiplicity of suits, provide common binding adjudication, and prevent inconsistent or varying adjudications."²² While the rule may help to achieve the last two objectives, it most definitely does not

14. Z. CHAFFEE, *supra* note 12, at 200-01; Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (I), 81 HARV. L. REV. 356, 376 (1967).

15. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Z. CHAFFEE, *supra* note 12, at 220-42; Wheaton, *Representative Suits Involving Numerous Litigants*, 19 CORNELL L.Q. 399 (1934).

16. Rule 23 of the Rules of Civil Procedure for the District Courts of the United States, 308 U.S. 645, 689-90 (1938).

17. 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1732 (1972) [hereinafter cited as WRIGHT & MILLER].

18. Z. CHAFFEE, *supra* note 12, at 199-295; see The Advisory Committee Note to the 1966 amendment to rule 23, 39 F.R.D. 69, 98-107 (1966) [hereinafter cited as Advisory Committee Note]. See further discussion in text accompanying notes 70-79 *infra*.

19. 383 U.S. 1031, 1047 (1966); Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39 (1967); Kaplan, *supra* note 14, at 375-400. The revised rule 23 is reproduced in part at note 170 *infra*.

20. See Kraemer, *Some Problems of Consumer Class Actions*, 7 U. RICH. L. REV. 213-16 (1972).

21. Advisory Committee Note 102. See also the comment of Prof. Kaplan, the reporter for the Advisory Committee at the time of the 1966 amendments:

The object [of rule 23(b)(3)] is to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party.

Kaplan, *supra* note 14, at 390.

22. Mungin v. Florida E. C. Ry., 318 F. Supp. 720, 730 (M.D. Fla. 1970), *aff'd per curiam*, 441 F.2d 728 (5th Cir. 1971).

result in economies of time and effort, nor does it avoid a multiplicity of suits.²³ Rather than reducing the number of suits, the amended rule "has fostered a flood in class litigations which would not otherwise have been brought."²⁴ A statistical study on class actions in the Southern District of New York, for example, revealed that from 1967 to 1971 the number of class actions filed in that district increased four-fold.²⁵

Class actions have mushroomed because many judges and legal scholars have interpreted rule 23 with another objective in mind: to provide a remedy for those whose claim is too small to justify individual litigation and who would otherwise not be involved in judicial proceedings.²⁶ Judge Frankel attributes to Professor Kaplan, the reporter for the Advisory Committee at the time of the 1966 amendments, the statement that the class action's "historic mission [has been] taking care of the smaller guy."²⁷

For a while this approach seemed to hold the key to the pollution control crises. Those who stand on the side of the environment²⁸ have one perennial problem: a shortage of funds with which to finance litigation against large polluters, who are normally well-represented by skilled legal counsel and prepared to put up a good defense. Court

23. Blecher, *Is the Class Action Rule Doing the Job? (Plaintiff's Viewpoint)*, 55 F.R.D. 365 (1972). Blecher sees no cause for alarm in the failure of the new rule to achieve the traditional objectives: "Frankly, however, the purpose of the rule as set out in the Advisory Notes is, in my view, utopian on the one hand and of relatively modest importance on the other A judicial system which becomes consumed with "economies of time and effort" as its major objective soon loses sight of the real purpose it serves." *Id.*

24. Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 377 (1972).

25. See AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT & RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE (1972). The Report also indicates that more than 53 per cent of the actions commenced in 1966 were still pending in 1971.

26. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 560 (2d Cir. 1968); see *Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969); Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 501 (1969); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941). An environmental case rejecting the small claimant rationale is *Bailey v. Sabine River Authority*, 54 F.R.D. 42, 43 (W.D. La. 1971), where the judge held "[i]t is not the purpose of the class action to save every suit from dismissal because it is too insignificant to receive its own day in federal court." See also *Eisen v. Carlisle & Jacquelin*, Civil Nos. 72-1521, 30934 (2d Cir., May 1, 1973), rev'g 52 F.R.D. 253 (S.D.N.Y. 1971), discussed in the text accompanying notes 312-19 and 337-44.

27. Frankel, *Amended Rule 23 from a Judge's Point of View*, 32 ANTITRUST L.J. 295, 299 (1966).

28. See Comment, *Standing on the Side of the Environment: A Statutory Prescription for Citizen Participation*, 1 ECOL. L.Q. 561 (1971).

costs, expert witness fees, costs of transcripts, and minimal legal fees may total fifty to one hundred thousand dollars in a major case.²⁹ The class action allows the "small fellows," each injured too little to make an individual lawsuit worthwhile, to pool their resources. In practical terms, it provides the means whereby the few individuals really concerned about, for example, a fuming cement plant³⁰ can attract an attorney by the prospect of the substantial contingent fee³¹ that normally follows a successful class suit for damages. Although each individual may claim only one thousand dollars in damages, a class of ten thousand persons may sue for ten million dollars; sums of that magnitude arouse the interest of many lawyers.

The Supreme Court's decision in *Snyder v. Harris*³² sharply curtailed the use of rule 23 class actions by small claimants. The Court held that in diversity cases the class members cannot aggregate their claims to reach the ten thousand dollar jurisdictional minimum unless they share a common and undivided interest, an unlikely event in environmental litigation. As will be discussed more fully in Part II of this comment, the practical effect of the *Snyder* decision is to fence all but the unusually large "small claimants" out of the federal courts.³³ This is not to derogate the value of a class action in these rare cases; even if a number of persons have suffered injuries from pollution somewhat in excess of ten thousand dollars each, no one of them alone could hope to finance a successful suit against a large corporation. Furthermore, the class action for injunctive relief, rather than damages, may still be viable and will validly serve the needs of many small plaintiffs who are willing to forego damages if a source of pollution can be shut down.³⁴ The overall effect of *Snyder*, however, is clearly to frustrate the potential many lawyers and commentators saw in amended rule 23.

B. *Modern Economic Justification*

The economic concept of "externalities" has become increasingly popular among legal scholars attempting to allocate properly the liabil-

29. LAW AND THE ENVIRONMENT, *supra* note 2, at 85-87.

30. See generally *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

31. See *Simon*, *supra* note 24, at 391-92.

32. 394 U.S. 332 (1969). See text accompanying notes 70-89 *infra*.

33. *Snyder* had no effect on federally created claims, so the small claimant rationale still has validity in, for example, class actions for damages under the anti-trust and securities fraud statutes.

34. See text accompanying notes 84-94 *infra*.

ity for pollution.³⁵ If a food processor chooses not to treat the noxious wastes resulting from its operations but instead dumps the sewage into a nearby stream,³⁶ this is an example of what economists call an external diseconomy³⁷—a cost of production borne not by the business activity but by the public at large. This form of public subsidy, which provides an economic windfall to many enterprises, disturbs economists because it distorts the price mechanism, resulting in a misallocation of resources. Society is diverting too many resources into this food processor because his prices do not accurately reflect the total economic and social cost of the business.

If on the other hand the polluter had to pay, through the imposition of money damages, for the mental, physical, and ecological damage caused by him, several results would appear. First, if the costs of the penalties assessed against polluters were greater than the costs of pollution control equipment, the polluter would rationally choose to increase net profits by purchasing such equipment. Second, if all polluters were assessed these costs, a highly innovative pollution control industry would be created in response to the great demand for cheaper and more efficient pollution control devices. Third, in the long run the forced internalization of pollution costs would increase the sales of nonpolluting industries since consumer demand, unless inelastic, would shift toward goods whose price did not include the costly surcharge of court-imposed pollution damages.³⁸

One of the primary functions of a legal system, then, should be to force the polluter to internalize all of his costs.³⁹ The common law has not been oblivious to the social costs imposed by private profit seeking. The civil action for damages or injunctive relief on the theories of nuisance, negligence, or trespass has long been available as a means to internalize certain external costs and incorporate certain harmful side effects into the cost benefit calculations of industrial enterprises, although not with that avowed purpose.⁴⁰

35. *E.g.*, Esposito, *Air & Water Pollution: What to Do While Waiting for Washington*, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 32, 34-36 (1970); Katz, *The Function of Tort Liability in Technology Assessment*, 38 U. CIN. L. REV. 587, 606-22 (1969); McCarthy, *Recent Legal Developments in Environmental Defense*, 19 BUFF. L. REV. 195, 201 (1969); *Cost Internalization*, *supra* note 1; Michelman, *Book Review*, 80 YALE L.J. 647, 666-86 (1971).

36. *See, e.g.*, *Ratzlaff v. Franz Foods*, 250 Ark. 1003, 468 S.W.2d 239 (1971).

37. *E.g.*, A. PIGOU, *THE ECONOMICS OF WELFARE* 160-61 (1932).

38. Esposito, *supra* note 35, at 34-35.

39. Baxter, *The SST: From Watts to Harlem in Two Hours*, 21 STAN. L. R. 1, 39 (1968).

40. *See* Juergensmeyer, *Control of Air Pollution Through Assertion of Private Rights*, 1967 DUKE L.J. 1126.

There is at least the potential that these "internalizing" suits may become common enough to provide effective deterrents to the industrial pollution of the environment. This potential will never be fully realized, nor will the entire social cost of a defendant's pollution be assessed, however, so long as these suits are brought by one or two plaintiffs clustered near a factory. If polluters face the threat of paying damages only to a few persons, they will continue to echo the remarks of the manager of a Reynolds Metals plant who, quite accurately, stated: "It is cheaper to pay claims than it is to control fluorides."⁴¹

The class action has some potential for forcing a company to internalize more of these external social costs, thereby making the private lawsuit a more effective deterrent and allowing the price mechanism to allocate economic resources properly. In a persuasive note⁴² that thoroughly develops the economic theory surrounding the concept of externalities, a student writer has concluded that this economic theory provides a satisfactory rationale for class suits which is lacking in the traditional justifications.

It is only where a broader issue of public policy, or some therapeutic function, is envisioned that the courts can be expected to be receptive to cumbersome class suits.

The economics of externality costs provide a suitable policy focus. The concept is not obscure; it is precisely the same as that stressed in *Dolgow v. Anderson*: Damages prevent the insider, the oligopolist, the polluter, and the airline from acting in a manner that exploits weaknesses in the market system. That effect is the same whether or not the damages are ever paid to the small claimant in an amount equal to the losses he sustains. If the policies against burdensome litigation and claim solicitation outweigh the public interest in an efficient economy, many class suits may properly be dismissed, but at least the efficiency consideration should be given a place in the judicial balance.⁴³

Although the internalization argument has been urged upon at least one court in support of a plea for allowance of a massive class action against polluters,⁴⁴ there is no indication that any court has

41. *Reynolds Metals Co. v. Lampert*, 324 F.2d 465, 466 (9th Cir. 1963), cert. denied, 376 U.S. 910 (1964). This sentence, one of the most quoted lines in the field of environmental law, was largely responsible for an award of punitive damages to the plaintiffs, a result which at least partially refutes the boast.

42. *Cost Internalization*, supra note 1.

43. *Cost internalization* 419 (cites omitted).

44. *Diamond v. General Motors Corp.*, 20 Cal. App. 3d 374, 97 Cal. Rptr. 639 (1971). In this case, brought by one young lawyer on behalf of the population of Los Angeles (7,119,184 persons) against 293 polluters, the defendants demurrer was

accepted the rationale to this time. Unfortunately, the prospects for the future do not look bright. Most commentators suggest that the class action can function most effectively as an internalizer in the context of a lawsuit seeking relief in damages.⁴⁵ Yet in the federal courts, in addition to the normal reluctance of most judges to undertake these enormous class suits for damages, the jurisdictional amount requirement of *Snyder v. Harris*⁴⁶ arises to block most environmental litigation. Class actions based on state law are not subject to the limitations expressed in *Snyder*, of course, but one scholar has observed that "state class action doctrines are presently even less viable than was the federal provision before *Snyder*, although there may remain considerable room for innovation in the state courts."⁴⁷

sustained by the court. In plaintiff's Memorandum of Law, the attorney wrote: Plaintiff respectfully suggests that the court read the "Class Action," *Stanford Law Review* article, for it deals primarily with the utility and desirability of employing the class action device against those dumping their garbage into the atmosphere. "Air pollution imposes on outsiders an uncompensated cost that is not subject to any pricing mechanism. Many of those who are presently using the atmosphere for waste disposal are not required to pay for the privilege; conversely, there is no effective means whereby other air users may offer payment to stop the pollution.

Quoted in N. LANDAU & P. RHEINGOLD, *THE ENVIRONMENTAL LAW HANDBOOK* (1971).

45. *E.g.*, Comment, 3 *ECOL. L.Q.*, *supra* note 1, at 542-43.

46. 394 U.S. 332 (1969). *See* text accompanying notes 32-34 *supra* and 70-89 *infra*.

47. Esposito, *supra* note 34, at 36. The prospects for environmental class actions in the state courts are not uniformly bleak, however, as the following case summaries indicate:

The four petroleum firms sharing the oil drilling platform which caused the massive Santa Barbara, California, oil spill in 1969 agreed to pay 1,560 beachfront property owners a total of four and one-half million dollars damages in settlement of a class suit. The plaintiffs had sought 105 million dollars in damages. *Washington Post*, Nov. 26, 1971, at A24, col. 1.

The owners of 520 parcels of land in the path of jets taking off from Los Angeles International Airport were awarded damages totaling \$659,000 against the City of Los Angeles. 2 *Env. Rep.-Cur. Dev.* 1049 (1971).

The California Supreme Court ruled that property owners aggrieved by noise, fumes and vibrations coming from a city airport may bring a class suit for damages under the nuisance theory. The action was brought on behalf of seven hundred persons against the City of Santa Monica for property and personal injury damages. The trial court rejected defense motions to dismiss the class because of its great size. The court met the problem of establishing damages for all seven hundred class members by allowing the plaintiffs to select ten representative parcels purportedly affected and tried the issues related to these ten parcels separately. *Nestle v. Santa Monica*, 6 Cal. 3d 920, 101 Cal. Rptr. 568, 496 P.2d 480 (1972).

Property owners around the Miami International Airport brought a similar class action against the Dade County Port Authority, asking one hundred million dollars in damages. 2 *Env. Rep.-Cur. Dev.* 1181 (1972).

Residents of Port Huron, Michigan, filed a class action against Peerless Cement Company of Detroit in the Wayne County Circuit Court. The forty-seven named plaintiffs charged Peerless with air pollution and asked for 3.18 million dollars in

The student note writer mentioned above who contended that the class action would be an effective device for environmental cost internalization was forced, due to the lack of precedent directly on point, to rely to a considerable extent on the important role of the class suit in antitrust law.⁴⁸ It is important to note that such actions seek *treble damages* under section 4 of the Clayton Act,⁴⁹ which offers additional inducement to plaintiffs' lawyers interested in a contingent fee and also ensures a greater deterrent impact when the class prevails. A few courts have reached a somewhat similar result in pollution cases by allowing plaintiffs to recover punitive damages in addition to actual damages. In *McElwain v. Georgia-Pacific Corporation*,⁵⁰ for example, the jury found that plaintiff's property had been damaged by effluents and noxious gases from defendant's paper mill. Defendant knew when it built its mill that there might be damage to adjoining property, and there was sufficient evidence from which the jury could conclude that

damages for injury to health and property. 3 Env. Rep.-Cur. Dev. 596 (1972).

Lawyers for plaintiffs in state class actions can be guilty of overreaching, however. Residents of Detroit and six surrounding communities filed a class action suit in Wayne County Circuit Court charging twenty-four defendants (including both industrial corporations and government agencies) with air pollution. Eighty-two plaintiffs brought suit on behalf of all other residents similarly situated, alleging damages to health and property. The plaintiffs asked for an affirmative injunction requiring anti-pollution measures and damages totaling 250 million dollars. 3 Env. Rep.-Cur. Dev. 361 (1972). The class suit was denied. The trial judge ruled that litigation against all twenty-four defendants would be "unmanageable" and dismissed the action, reserving plaintiffs' right to file separate suits against each defendant. 3 Env. Rep.-Cur. Dev. 1191-92 (1973).

The Montana Supreme Court refused to overturn a trial court ruling permitting a class action air pollution suit against two Anaconda Company plants on behalf of fifteen hundred persons. The suit, filed in Flathead County District Court, asked for 21.5 million dollars in damages. 2 Env. Rep.-Cur. Dev. 882 (1971).

The Nevada Cement Company was ordered to pay 1.8 million dollars in damages for what Nevada District Judge Richard Waters termed the "deliberate, wanton destruction of the property of others." There were eighty-five members of the class. Each received five thousand dollars for property damage and an equal share of the 1.4 million dollars awarded as punitive damages. The trial judge stated that the company "knew, for every day of full operation, 27,000 pounds of dirt and dust were being expelled over the area. Yet never once did it shut down or offer to shut down the monstrous excretion it was spewing forth." Washington Post, Nov. 26, 1971, at A24, col. 1. The company filed an appeal in the Nevada Supreme Court January 19, 1972. 2 Env. Rep.-Cur. Dev. 1181 (1972).

For a more general treatment of state class actions in a different but related context, see Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609 (1971); Starrs, *The Consumer Class Action* (pts. 1-2), 49 B.U.L. REV. 211, 407 (1969); Comment, *Expanding the Impact of State Court Class Action Adjudications to Provide an Effective Forum for Consumers*, 18 U.C.L.A. L. REV. 1002 (1971).

48. *Cost Internalization* 415-18.

49. 15 U.S.C. § 15 (1970).

50. 245 Ore. 247, 421 P.2d 957 (1966).

the defendant had not done everything reasonably possible to control pollution and minimize the damage done to surrounding parties. Thus the court held that there was adequate evidence for a jury to award punitive damages.⁵¹ This is by no means a majority view; apparently Oregon is the only state that allows punitive damages when the defendant did not do everything within his power to eliminate or minimize damages from pollution.⁵²

An attorney's risk of non-reward in an antitrust or securities class suit "is minimized if he can base an action on judgments or records collected by governmental agencies that enforce antitrust and securities laws."⁵³ Environmental litigators may derive similar benefits from federal air and water pollution records and documents.⁵⁴ In explaining the citizen suit provision⁵⁵ of the Clean Air Act of 1970, for example, the Report of the Senate Committee on Public Works commented as follows:

Whether abatement were sought by an agency or by a citizen, there would be a considerable record available to the courts in any enforcement proceeding resulting from the Federal and State administrative standard-setting procedures. . . .

The information and other disclosure obligations required throughout the bill are important to the operation of this provision. The Secretary would have a special duty to make meaningful information on emitting sources available to the public on a timely basis.⁵⁶

When these records are compiled and made available to plaintiffs' lawyers, they may lessen the burdens of environmental litigation

51. See also *Reynolds Metals Co. v. Lampert*, 316 F.2d 272, 324 F.2d 465 (9th Cir. 1963), cert. denied, 376 U.S. 910 (1964), where the court found there was enough evidence to submit the issue of punitive damages to the jury. But see *Fairview Farms, Inc. v. Reynolds Metals Co.*, 176 F. Supp. 178 (D. Ore. 1959).

52. *MACDONALD & CONWAY*, *supra* note 1, at § 2.26. Perhaps this fact explains the interesting series of air pollution cases against the aluminum plants in the Pacific Northwest, which includes the cases cited in the two previous notes and also *Reynolds Metals Co. v. Wand*, 308 F.2d 504 (9th Cir. 1962); *Renken v. Harvey Aluminum, Inc.*, 226 F. Supp. 169 (D. Ore. 1963); *Martin v. Reynolds Metals Co.*, 135 F. Supp. 379 (D. Ore. 1952), *aff'd sub nom. Reynolds Metals Co. v. Yturbide*, 258 F.2d 321 (9th Cir.), cert. denied, 358 U.S. 840 (1958); *Martin v. Reynolds Metals Co.*, 221 Ore. 86, 342 P.2d 790 (1959), cert. denied, 362 U.S. 918 (1960).

53. *Cost Internalization* 418.

54. See *Miller & Borchers, Private Lawsuits and Air Pollution Control*, 56 A.B.A.J. 465 (1970).

55. 42 U.S.C. § 1857h-2 (1970).

56. S. REP. No. 91-1196, 91st Cong., 2d Sess. 38 (1970). See also S. REP. No. 92-414, 92d Cong., 1st Sess. 80-81 (1971) (describing the citizen suit provision of the Water Pollution Control Act of 1972).

considerably. Even with this new information, however, parties who attempt to internalize the costs of pollution by using the class action device face an uphill struggle. Problems such as the jurisdictional amount requirement, standing, causation, manageability, and predominance of common questions still must be surmounted.

II. THRESHOLD QUESTIONS

A. Federal Jurisdiction

Although not all environmental litigators seem to be aware of the fact,⁵⁷ it is clear that the class action is a procedural device that does not broaden the subject matter jurisdiction of the federal district courts.⁵⁸ Therefore, a class suit must comply with the requirements of the jurisdictional statute under which it is brought. For the past several years, bills have been introduced in both houses of Congress that would broaden the concepts of standing and class actions in order to enable citizens to sue to protect the environment without regard to the amount in controversy.⁵⁹ Until such legislation is enacted, however, most environmental class suits will be brought under diversity of citizenship jurisdiction⁶⁰ although general federal question jurisdiction may occasionally exist.⁶¹ The questions that have arisen are twofold:

First . . . there is the problem of whose citizenship can or must be considered for purposes of ascertaining whether diversity jurisdiction exists. Second . . . courts frequently are faced with the question whether the claims of the representative parties or of the entire class may be aggregated in order to satisfy the amount in controversy requirement of the applicable jurisdictional statute.⁶²

The first of these issues, although not yet conclusively resolved by the Supreme Court, seems less difficult. The general rule prior to the 1966 amendments was that only the citizenship of the named parties would be considered in determining whether complete diversity ex-

57. See, e.g., *Pacific Inter-club Yacht Ass'n v. Morris*, 197 F. Supp. 218, 223 (N.D. Cal. 1960), wherein the court stated: "Banding together a group of individuals who could not invoke the jurisdiction of this Court does not cloak the group with rights not granted to the several individuals."

58. FED. R. CIV. P. 82.

59. See, e.g., S. 1032, 92d Cong., 2d Sess. (1972); H.R. 49, 92d Cong., 2d Sess. (1972). It is significant that both these bills restricted citizens to seeking injunctive or declaratory relief under the easier jurisdictional standards.

60. 28 U.S.C. § 1332 (1970).

61. 28 U.S.C. § 1331 (1970). See generally *Illinois v. City of Milwaukee*, 406 U.S. 91, 95 (1972) (suggesting that there is a federal common law of water pollution).

62. 7 WRIGHT & MILLER § 1755, at 548.

isted.⁶³ There were some suggestions that the 1966 amendments required a different rule,⁶⁴ but most courts that have considered the question have concluded that the citizenship of the named representatives continues to be determinative.⁶⁵ A leading commentator has written:

This conclusion seems sound inasmuch as Rule 23 would be completely unworkable in the diversity context and its value significantly compromised if the citizenship of all the members of the class, many of whom may be unknown, had to be considered in establishing jurisdiction.⁶⁶

Establishing diversity for the named plaintiffs may still be a problem in pollution cases, however. The injured parties in this context are normally going to be clustered near a major facility of the corporate defendant. The representative parties, quite obviously, must be members of the class suffering the harm⁶⁷ and will therefore share this geographical proximity to the defendant. Since the 1958 amendment to the federal diversity statute,⁶⁸ which attributed corporate citizenship to the state of principal business activity as well as to the state of incorporation, the defendant will often be a citizen of the same state as that of the class members. Nevertheless, it is likely that many national corporations are still candidates for environmental class suits in the federal courts.⁶⁹

The more difficult problem for plaintiffs in environmental class actions is that of satisfying the jurisdictional amount requirement, as construed by the Supreme Court in *Snyder v. Harris*.⁷⁰ A complete

63. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 365 (1921).

64. Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1219 (1966).

65. *E.g.*, *Hobbs v. Northeast Airlines, Inc.*, 50 F.R.D. 76 (E.D. Pa. 1970); *Winegar v. First Nat'l Bank*, 267 F. Supp. 79 (M.D. Fla. 1967). There is a statement by Mr. Justice Black in *Snyder v. Harris*, 394 U.S. 332, 339-40 (1969), which indicates that he assumes the old doctrine has not been changed by the 1966 amendments.

66. 7 WRIGHT & MILLER § 1755, at 551.

67. "One or more members of a class may sue . . . as representative parties on behalf of all only if . . . (2) the claims . . . of the representative parties are typical . . ." FED. R. CIV. P. 23(a).

68. Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415, amending 28 U.S.C. § 1332 (codified at 28 U.S.C. § 1332(c) (1970)).

69. *See, e.g.*, *Zahn v. International Paper Co.*, 53 F.R.D. 430 (D. Vt. 1971), *aff'd* 469 F.2d 1033 (2d Cir. 1972), *cert. granted*, 93 S. Ct. 1370 (1973) (No. 72-888); *Chicago v. General Motors Corp.*, 332 F. Supp. 285 (N.D. Ill. 1971), *aff'd*, 467 F.2d 1262 (7th Cir. 1972) (both based on diversity of citizenship and dismissed on other grounds). *Cf. Biechele v. Norfolk & W. Ry.*, 309 F. Supp. 354 (N.D. Ohio 1969) (a successful class action to abate air pollution that was removed to the federal court by the defendant under 28 U.S.C. § 1441(c) (1970)), discussed in text accompanying notes 104-112 *infra*.

70. 394 U.S. 332 (1969).

understanding of the impact of *Snyder* entails another brief digression into the history of the federal class action statute. Original rule 23 divided all class suits into three categories, cast in terms of jural relationships involving a complicated balance of rights and liabilities: "true," "hybrid," and "spurious."⁷¹ The true class action was one in which the right to be enforced was "joint, or common,"⁷² which was normally interpreted to mean that it was one wherein the joinder of all interested parties would be required.⁷³ All class suits that were not true, the highest or most honored type, were either hybrid or spurious. These two categories were alike in that the claims involved were "several"⁷⁴ rather than joint or common as in the true class action. They were distinguished in that the object of a hybrid proceeding was the adjudication of claims that might affect the specific property involved in the action. One court phrased it as follows:

If the rights of the individual plaintiffs are separate causes of action and they have no right to a common fund or to common property, the class action at bar is a "spurious" one. If, upon the other hand, the individual plaintiffs having individual causes of action have also a right to a common fund or in common property, the class action may be "hybrid."⁷⁵

Most suits against polluters, whether equitable or in law for damages, would have been characterized as spurious, since any of the injured parties could sue without joining other interested parties even though a successful defense might prejudice the rights of other potential class members. The important lesson to be gained from the foregoing discussion is that the claims of members of a spurious class could not be aggregated to satisfy the jurisdictional amount requirement.⁷⁶

71. These labels were not found in rule 23 itself but were coined by Prof. Moore, chief architect of the original rule. See J. MOORE, 3B MOORE'S FEDERAL PRACTICE ¶¶ 23.08-11 (2d ed. 1969) [hereinafter cited as MOORE]; Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 570-76 (1937).

72. FED. R. CIV. P. 23(a)(1), 308 U.S. 689 (1938).

73. 3B MOORE ¶ 23.08.

74. FED. R. CIV. P. 23(a)(2), (3), 308 U.S. 689 (1938). It is difficult to attach much meaning to terms such as this when such a renowned scholar as Prof. Chaffee was moved to remark that he had as much trouble distinguishing a "common" right from a "several" one as in deciding whether some ties were green or blue. Z. CHAFFEE, *supra* note 12, at 257.

75. *Pennsylvania Co. for Ins. on Lives & Granting Annuities v. Deckart*, 123 F.2d 979, 983 (3d Cir. 1941). "Spurious class actions . . . were in essence merely a form of permissive joinder in which parties with separate and distinct claims were allowed to litigate those claims in a single suit simply because the different claims involved common questions of law or fact." *Snyder v. Harris*, 394 U.S. 332, 335 (1969).

76. *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Pinel v. Pinel*, 240 U.S. 594 (1916); 7 WRIGHT & MILLER § 1756.

In 1966 the statute was completely rewritten, the framers having concluded that "[i]n practice, the terms 'joint,' 'common,' etc., which were used as the basis of the Rule 23 classification, proved obscure and uncertain."⁷⁷ Revised rule 23 "substitutes functional tests for the conceptualisms that characterized practice under the former rule."⁷⁸ Superficially resembling the old rule in that the class must qualify under one of the three headings of amended rule 23(b), the three general categories are now based on the nature of the relief sought rather than the jural relationships of the parties.⁷⁹ Because the new rule omits the reference to joint or common interests found in the original version of the rule and because the framers of the revised rule specifically repudiated the old scheme, there was a brief period of uncertainty regarding the non-aggregation doctrine. Some courts held that amended rule 23 had not changed the principle that separate and distinct claims, such as ecologists normally bring, could not be aggregated in class actions to satisfy the jurisdictional amount requirement.⁸⁰ Other courts,⁸¹ as well as the draftsmen of new rule 23⁸² and various commentators,⁸³ thought that the amended rule had the effect of redefining amount in controversy for class action purposes and therefore concluded that aggregation was possible in those actions that would formerly have been termed "spurious."

The Supreme Court dashed these latter expectations when it resolved the controversy with *Snyder v. Harris*⁸⁴ in 1969. The Court

77. Advisory Committee Note 98; see Kaplan, *supra* note 14.

78. 7 WRIGHT & MILLER § 1753, at 538.

79. These new groupings were not intended to be coterminous with the three categories of old rule 23. 7 WRIGHT & MILLER § 1752, at 514-15.

80. *Alvarez v. Pan. Am. Life Ins. Co.*, 375 F.2d 992 (5th Cir.), *cert. denied*, 389 U.S. 827 (1967); *Hartman v. Secretary of Dep't of HUD*, 294 F. Supp. 794 (E.D. Mass. 1968); *Lesch v. Chicago & E. Ill. R.R.*, 279 F. Supp. 908 (N.D. Ill. 1968); *Neville v. Delta Ins. Co.*, 45 F.R.D. 345 (D. Minn. 1968); *Pomierski v. W. R. Grace Co.*, 282 F. Supp. 385 (N.D. Ill. 1967); *Dixon v. Northwestern Nat'l Bank*, 276 F. Supp. 96, 99 (D. Minn. 1967).

81. *Gas Serv. Co. v. Coburn*, 389 F.2d 831 (10th Cir. 1968), *rev'd*, 394 U.S. 332 (1969); *Snyder v. Epstein*, 290 F. Supp. 652 (E.D. Wis. 1968); *Collins v. Bolton*, 287 F. Supp. 393 (N.D. Ill. 1968); *Booth v. General Dynamics Corp.*, 264 F. Supp. 465 (N.D. Ill. 1967).

82. Advisory Committee Note 104; Kaplan, *supra* note 14, at 400; Kaplan, *A Prefatory Note*, in *The Class Action-A Symposium*, 10 B.C. IND. & COM. L. REV. 497 (1969).

83. See, e.g., Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1221 (1966); Dole, *Consumer Class Actions Under Recent Consumer Credit Legislation*, 44 N.Y.U.L. REV. 80, 110 (1969); Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 501, 504 (1969).

84. 394 U.S. 332.

breathed new life into the discarded categories of the old rule⁸⁵ by adopting the pre-1966 standard, holding that claim aggregation will be allowed only in those suits involving multiple plaintiffs who are enforcing a single right in which they have a common interest—*i.e.*, “true” class actions. It is not within the scope of this comment to analyse the merits of *Snyder*;⁸⁶ suffice it to say that it is now the controlling authority. For the environmental lawyer, the decision means that resort to rule 23 will not be possible in most situations. Class actions for pollution damages will generally not meet the standard of *Snyder* because each member of the class will have suffered a separate wrong and fairly small individual damage amount will be at issue.⁸⁷ The effect of the decision, therefore, may be to restrict litigants to whatever relief is available in the state courts.

Although the Court in *Snyder* reasoned that denying the plaintiffs a federal forum was justified since such diversity cases only involve issues of state law,⁸⁸ it did not consider the practical fact that the state remedies are of limited utility. Plaintiffs attempting to secure relief for pollution-related injuries may not be able to secure effective relief in state courts, particularly if the local procedural system discourages class suits.⁸⁹

For this reason it is important that environmental litigators note that the limitations of the *Snyder* decision may still be circumvented

85. Although the Court stated that the discarded “spurious” and “true” categories were never and are not now the reason for not allowing aggregation of separate and distinct claims, since the non-aggregation “doctrine is based . . . upon this Court’s interpretation of the statutory phrase ‘matter in controversy,’” *id.* at 336, it is quite clear that *Snyder* forces the district courts to determine whether the interests involved are “joint” or “several” for jurisdictional purposes, “an inquiry that not only frequently is quite difficult but one that supposedly the amended rule is designed to avoid.” 7 WRIGHT & MILLER § 1756, at 561.

86. “Despite the strong arguments advanced by the Court, the soundness of the *Snyder* decision is dubious.” 7 WRIGHT & MILLER § 1756, at 558. As this remark indicates, the decision has been frequently and vigorously criticized. See, e.g., *id.*, at 558-65; Kaplan, *A Prefatory Note*, *supra* note 82, at 498; Strausberg, *Class Actions and Jurisdictional Amount: Access to a Federal Forum—A Post Snyder v. Harris Analysis*, 22 AM. U.L. REV. 79 (1972); Note, *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 202 (1970); Note, *Taxpayer Suits and The Aggregation of Claims: The Vitiation of Flast by Snyder*, 79 YALE L.J. 1577 (1970). But see, Maraist & Sharp, *After Snyder v. Harris: Whither Goes the Spurious Class Action?* 41 MISS. L.J. 379 (1970).

87. See Lamm & Davison, *supra* note 1, at 87-88. See also C. WRIGHT, FEDERAL COURTS § 72, at 316 (2d ed. 1970).

88. “Suits involving issues of state law and brought on the basis of diversity of citizenship can often be most appropriately tried in state court.” 394 U.S. at 341.

89. For further discussion of state class actions, see text accompanying note 47 *infra*.

in several ways. First, many federal statutes provide a special jurisdictional basis without regard to the amount in controversy.⁹⁰ Specific legislation that would allow class actions by citizens to protect the environment has at least been proposed, although most of the bills limit the remedies available to declaratory or injunctive relief.⁹¹ Secondly, as a result of the ambiguity of the old categories, a court interested in seeing the class action continue because a "common element" so predominates might label an essentially "spurious" action "true."⁹² Thirdly, some courts have allowed plaintiffs to meet the jurisdictional amount requirement by measuring the matter in controversy from the point of view of the defendant rather than the plaintiffs.⁹³ This "defendant's view" doctrine is particularly appropriate when the class is seeking equitable relief that, if granted, might force the defendant to shut down a multi-million dollar factory or to install very expensive anti-pollution equipment. Fourthly, a recent Supreme Court decision indicated that the courts should liberally evaluate environmental rights when it concluded: "The considerable interests involved in the purity of interstate waters would seem to put beyond question the jurisdictional amount provided in § 1331(a)."⁹⁴ Again, this is an attitude that will likely be restricted to suits for injunctive or declaratory relief, and will thus be of small comfort to litigators seeking damages for pollution.

Fifthly, Professors Wright and Miller⁹⁵ see great promise in the approach taken by the Second Circuit in *West Virginia v. Chas. Pfizer & Co.*,⁹⁶ where the court indicated that the limitations of *Snyder* might be circumvented in some situations by allowing the state to bring an

90. See, e.g., 42 U.S.C. § 1857h-2(a)(1) (1970) (Clean Air Act Amendments); 33 U.S.C. § 1365(a) (1973 Supp.) (Water Pollution Control Act); 28 U.S.C. § 1337 (interstate commerce and antitrust matters) and § 1343 (civil rights) (1970).

91. See text accompanying note 59 *supra*.

92. E.g., *Manufacturers Cas. Ins. Co. v. Coker*, 219 F.2d 631 (4th Cir. 1955); *Dixon v. Northwestern Nat'l Bank*, 276 F. Supp. 96 (D. Minn. 1967).

93. *Mississippi & Mo. R.R. v. Ward*, 67 U.S. 485 (1862); *Ronzio v. Denver & Rio Grand W.R.R.*, 116 F.2d 604 (10th Cir. 1940); *Chicago v. General Motors Corp.*, 332 F. Supp. 285 (N.D. Ill. 1971), *aff'd* 467 F.2d 1262 (7th Cir. 1972) (alternative holding); *Biechele v. Norfolk & W. Ry.*, 309 F. Supp. 354 (N.D. Ohio 1969) (alternative holding). See Strausberg, *supra* note 86, at 102-07, wherein the author suggests this approach as the principal way to mitigate the impact of *Snyder*, particularly in all federal question cases.

94. *Illinois v. City of Milwaukee*, 406 U.S. 91, 98 (1972); *accord*, *Chicago v. General Motors Corp.*, 332 F. Supp. 285 (N.D. Ill. 1971), *aff'd*, 467 F.2d 1262 (7th Cir. 1972) (alternative holding); *Biechele v. Norfolk & W. Ry.*, 309 F. Supp. 354 (N.D. Ohio 1969) (alternative holding).

95. 7A WRIGHT & MILLER § 1782, at 105-09.

96. 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

action on behalf of its citizens. In this private antitrust action brought under rule 23 by several states against a manufacturer of antibiotic drugs, the court said that recovery by the states could be justified under two theories. The first was institution of the suit as *parens patriae*.⁹⁷ Use of this doctrine is limited, however, to cases in which the state has an interest independent of its citizens.⁹⁸ In the *Pfizer* case the state itself had purchased antibiotics from the defendant and was thus able to meet this requirement; had the state lacked this independent claim for more than ten thousand dollars, it could not have used *parens patriae* to sue solely on behalf of its injured citizens. As was stated by another court in *Hawaii v. Standard Oil Co.*:

[T]he state's *parens patriae* claim cannot be a disguised attempt to recover damages on behalf of the state's individual citizen-claimants. It is not a substitute for a class action under Rule 23⁹⁹

The *Pfizer* court actually relied upon a second theory, that the state was bringing a traditional rule 23 class action on behalf of its citizens.¹⁰⁰ In its discussion of the adequacy of the notice sent to the class members, the court seemed to be characterizing the situation as one in which the citizens had assigned their claims to the state. Citizens having small claims for environmental injury could thus circumvent the *Snyder* decision by transferring their claims to the state attorney general; although this would prevent personal recovery by the citizens, it would serve the more important social goals of cost internalization and deterrence.¹⁰¹ In light of the Supreme Court's decision in *Kramer v. Caribbean Mills, Inc.*,¹⁰² however, there is a serious question as to the validity of assignments to create federal jurisdiction. Although *Kramer* can be distinguished from the assignment of damages claims in the environmental context,¹⁰³ the environmental litigator

97. *Id.*, at 1089. See generally *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945); Note, *State Protection of Its Economy and Environment: Parens Patriae Suits for Damages*, 6 COLO. J. OF LAW & SOC. PROB. 411 (1970); Comment, *Wrongs Without Remedy: The Concept of Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 43 S. CAL. L. REV. 570 (1970).

98. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1944).

99. 301 F. Supp. 982, 986 (D. Haw. 1969), *rev'd on other grounds*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972); *accord*, *In re Motor Vehicle Air Pollution Control Equipment*, 52 F.R.D. 398, 401 (C.D. Cal. 1970). For comments on the *Hawaii* cases by counsel for the plaintiffs, see Blecher, *supra* note 23.

100. 440 F.2d at 1089.

101. See text accompanying notes 35-56 *supra*.

102. 394 U.S. 823 (1969).

103. *Cf.* 7A WRIGHT & MILLER § 1782, at 109.

should be aware that he must tread cautiously when urging upon a court the *Pfizer* approach.

A sixth possible means of avoiding the limitations of *Snyder* was suggested by *Biechele v. Norfolk & Western Ry.*,¹⁰⁴ one of the few successful federal class actions in the environmental context. Ironically enough, the action was filed in a state court and removed¹⁰⁵ to the federal district court by the defendant on the ground of diversity of citizenship. The plaintiffs' class action sought damages and injunctive relief to abate the air pollution created by the railroad's coal storage and shipping facilities. The court kept the possibility of monetary damages open, even after acknowledging that *Snyder* would not permit aggregation of these claims for less than ten thousand dollars each, by holding that "there are two separate and distinct class actions involved."¹⁰⁶ The court described the claim for injunctive relief as the "first and principal action,"¹⁰⁷ and was able to find the requisite jurisdictional amount for this action on two of the theories suggested above: a liberal evaluation of the right to live in a clean environment,¹⁰⁸ and the defendant's viewpoint:¹⁰⁹

It appears to the Court that the right of each member of the class to live in an environment free from excessive coal dust and conversely, the right of defendant to operate its coal loading facility are both in excess of \$10,000.00.¹¹⁰

Having established the jurisdictional basis for the injunctive action, the court turned to the second action—that for damages. This action, by itself, could not have been heard in a federal court, because without aggregation the plaintiffs could not have met the jurisdictional amount requirement. But since the same evidence would be presented for the damage claims as for the equitable claim already properly before the court, the district judge concluded that "this Court, in the interest of judicial efficiency, will assume jurisdiction over the entire controversy."¹¹¹

Although the result is both logically sound and emotionally satisfying to environmental lawyers starved for success in class actions for

104. 309 F. Supp. 354 (N.D. Ohio 1969).

105. Jurisdiction was therefore based on 28 U.S.C. § 1441 (1970), as well as the general diversity provision, 28 U.S.C. § 1332 (1970). 309 F. Supp. at 354-55.

106. 309 F. Supp. at 355.

107. *Id.*

108. See text and cases cited at note 94 *supra*.

109. See text and authorities cited at note 93 *supra*.

110. 309 F. Supp. at 355.

111. *Id.*

damages, the precedential value of *Biechele* is indeterminate due to the peculiar factual setting of the case. The court was not working with the basic jurisdictional provisions, but with the removal statute, which states:

Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.¹¹²

The procedural context of *Biechele* provided a perfect opportunity for a sympathetic judge to consider both the damage claim and the equitable claim on the basis of this statute, but most environmental litigation will not begin in a state court only to be removed subsequently to federal court and consequently will not be susceptible to the *Biechele* approach.

The narrow holding of *Biechele* may be of limited utility, but the rationale underlying that decision has more general applicability insofar as it supports a district court's exercise of ancillary jurisdiction in a similar factual setting. As Professor Wright has written:

By this concept it is held that a district court acquires jurisdiction of a case or controversy as an entirety, and may, as an incident to disposition of a matter properly before it, possess jurisdiction to decide other matters raised by the case of which it could not take cognizance were they independently presented.¹¹³

Thus a court might assume jurisdiction over a claim for injunctive relief, jurisdictional amount presenting lesser problems in such cases, and then exercise its ancillary jurisdiction to hear a claim for damages arising out of the same facts, regardless of the amount in controversy of that latter action.¹¹⁴ If this looks promising to the environmental litigator, he should be aware that it seems almost too easy a way to

112. 28 U.S.C. § 1441(c) (1970).

113. C. WRIGHT, FEDERAL COURTS § 9, at 19 (2d ed. 1970).

114. See *John B. Kelly, Inc. v. Lehigh Nav. Coal Co.*, 151 F.2d 743 (3d Cir. 1945), an action based on nuisance and continuing trespass for alleged siltation of a river by the defendant's coal mines, where the court concluded:

[T]he money damage allegations of the bill are merely a collateral item which the District Court can pass upon provided it possessed jurisdiction of the all important injunctive feature of the litigation.

Id. at 746. See generally *Moore v. New York Cotton Exch.*, 270 U.S. 593 (1926); 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 23 (C. Wright ed. 1960); Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27 (1963); Comment, *Ancillary Jurisdiction of the Federal Courts*, 48 IOWA L. REV. 383 (1963).

clamber over the restrictions of *Snyder*. Nevertheless, at least the *Biechele* court would apparently sanction this approach in pollution control cases.

The final option that may be available to keep a class suit alive when each member of the class cannot validly allege a damage claim of over ten thousand dollars is also based on the ancillary jurisdiction concept. If at least one of the named representatives meets the jurisdictional amount and otherwise establishes either federal question or diversity jurisdiction, a district court might hear the entire case and adjudicate the ancillary claims of the other class members who have no independent jurisdictional grounds.¹¹⁵ This view was accepted by the court in *Lesch v. Chicago & Eastern Illinois R.R.*,¹¹⁶ when it said:

[I]n a spurious class action, if one of the representative parties has a claim in excess of the jurisdictional minimum, then federal jurisdiction attaches, and if that party alone can adequately represent the entire class, then there is federal jurisdiction over the entire class action even where members of the class having smaller claims are originally named parties.¹¹⁷

This holding "seems sound and is a natural corollary to other applications of the ancillary jurisdiction concept."¹¹⁸ In the fifty years since the Supreme Court's decision in *Moore v. New York Cotton Exchange*,¹¹⁹ the doctrine of ancillary jurisdiction has evolved from a tool used only when necessary for the effective operation of the federal courts¹²⁰ into a "rule of convenience for resolving all issues involved in the subject of the matter before the Court."¹²¹ This development was especially stimulated by the enactment of the Federal Rules of Civil Procedure in 1938 with their provisions for liberal joinder of parties and claims. The rules broadened the traditional concept of a single triable "case or controversy" by allowing all parties and claims related to the main action to be joined in one case.¹²² Courts found the ancillary jurisdiction doctrine helpful in putting to use some of the

115. See generally 7 WRIGHT & MILLER §§ 1659 and 1756, 7A WRIGHT & MILLER § 1917.

116. 279 F. Supp. 908 (N.D. Ill. 1968).

117. *Id.* at 912.

118. 7 WRIGHT & MILLER § 1756, at 564.

119. 270 U.S. 593 (1926) (ancillary jurisdiction employed to avoid piecemeal litigation).

120. See, e.g., *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Freeman v. Howe*, 65 U.S. (24 How.) 450 (1861).

121. Note, *Federal Practice: Jurisdiction of Third-Party Claims*, 11 OKLA. L. REV. 326, 329 (1958); see, e.g., *Hunr v. Oursler*, 289 U.S. 238 (1933).

122. *Brandt v. Olson*, 179 F. Supp. 363, 370 (N.D. Iowa 1959).

new joinder devices, particularly rules 14, 20 and 24, in that it solved jurisdictional problems, such as amount in controversy or lack of complete diversity, which were often attendant upon joinder.¹²³

Sound as application of the ancillary doctrine concept in this context might seem, three courts of appeals have rejected the approach and held that *all* members of the class must present a jurisdictionally proper claim. One¹²⁴ of these decisions was rendered before *Snyder*; the other two, *Zahn v. International Paper Co.*¹²⁵ and *City of Inglewood v. City of Los Angeles*,¹²⁶ were environmental lawsuits decided after *Snyder*.

Although the *Zahn* court explained that it felt "precluded" by *Snyder* from taking jurisdiction over those members of the class who did not meet the jurisdictional amount requirement,¹²⁷ it is important to note that *Snyder* did not deal directly with this issue since none of the representatives in that case asserted a claim for more than ten thousand dollars.¹²⁸ In *Zahn*, on the other hand, at least the four named representatives had a valid claim that met the amount in controversy requirement, and it appears that some other members of the proposed class could have recovered that amount.¹²⁹ The factual distinction is of more than passing interest inasmuch as one of the principal considerations that moved the Court to affirm the non-aggregation doctrine in *Snyder* was a felt need to reduce the "burdens of an already overloaded federal court system."¹³⁰ If *Snyder* had allowed aggregation when *none* of the class members could individually have come into the fed-

123. See, e.g., *Jacobson v. Atlantic City Hosp.*, 392 F.2d 149 (3d Cir. 1968) (simple joinder of parties); *Formulabs, Inc. v. Hartley Pen Co.*, 318 F.2d 485 (9th Cir. 1963) (intervention as of right); *Dery v. Wyer*, 265 F.2d 804 (2d Cir. 1959) (impleader of third party defendant). But see *Hymmer v. Chai*, 407 F.2d 136 (9th Cir. 1969) (simple joinder of parties). See generally *Fraser*, *supra* note 114.

124. *Alvarez v. Pan Am. Life Ins. Co.*, 375 F.2d 992 (5th Cir.), *cert. denied*, 389 U.S. 827 (1967).

125. 53 F.R.D. 430 (D. Vt. 1971), *aff'd*, 469 F.2d 1033 (2d Cir. 1972), *cert. granted*, 93 S. Ct. 1370 (1973). See text accompanying notes 4-10 *supra*.

126. 451 F.2d 948 (9th Cir. 1971).

127. 53 F.R.D. at 431-32.

128. 394 U.S. at 333-34. The dissenters in *Snyder*, however, thought that the rule there announced would apply "in all cases where one or more of the co-plaintiffs have a claim of less than the jurisdictional amount . . ." *Id.* at 343 (Fortas, J., dissenting).

129. This supposition is supported by the fact that the defendant contended that "many members of the proposed class fail to meet the jurisdictional amount. . ." (53 F.R.D. at 431) (emphasis added) as well as by the court's discussion of the possibility of a class defined as all plaintiffs in the named class having \$10,000 in controversy. 53 F.R.D. at 433.

130. 394 U.S. at 341.

eral courts, it would have provided a means for plaintiffs to circumvent the jurisdictional requirement and perhaps have appreciably increased the federal courts' case load. Conversely, in *Zahn* the four named representatives and all other plaintiffs who can allege the jurisdictional amount must be allowed to go to trial in the federal district court. Their former fellow class members must duplicate all of the evidence in the state court. The *Zahn* extension of *Snyder* is thus unnecessary and irrational. It does not lessen the burdens on the federal judiciary, but it does promote expensive and time-consuming duplicative litigation in the state courts.¹³¹

Like the earlier controversy over aggregation that precipitated the *Snyder* decision, this issue will soon be resolved by the Supreme Court.¹³² If the Court affirms *Zahn*, it will have effectively eliminated the rule 23(b)(3) class action for damages for pollution-related injuries.¹³³ Whether the Court affirms or reverses *Zahn*, the decision will be an important clue as to the role federal courts will play in the struggle to redress environmental despoilation.¹³⁴

B. *Standing to Sue*

Whereas the jurisdictional amount requirement is more often a problem faced by the class seeking damages for pollution, standing is a requirement that falls most heavily on the organizational plaintiff asking for equitable or declaratory relief in a "public" lawsuit.¹³⁵ The distinction between public and private causes of action¹³⁶ is central

131. 469 F.2d at 1039 (Timbers, J., dissenting); see Note, *Class Actions*, 9 HOUSTON L. REV. 852, 857 (1972).

132. The Supreme Court granted certiorari in the *Zahn* case February 20, 1973. 93 S. Ct. 1370.

133. Such a decision would mean that the class suit "cannot be used in diversity cases save for the *extraordinary* situation in which every member of the class has a claim in excess of \$10,000. . . ." WRIGHT § 72, at 316 (emphasis added). See *Zahn*, 53 F.R.D. at 433, where the court concluded:

We reach our decision today with great reluctance. . . . The requirement that each class member meet the jurisdictional amount clearly undermines the usefulness of Rule 23(b)(3) class suits, because the problem of defining an appropriate class over which the court has jurisdiction will often prove insuperable.

134. Most of the Court's decisions in the environmental sphere have involved claims for injunctions or declaratory judgments. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972). *Zahn* may be the first suit for damages in this area to reach the Supreme Court.

135. "The law of standing is almost exclusively concerned with such public law questions as determinations of constitutionality and review of administrative or other governmental action." WRIGHT § 13, at 39.

136. See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS 583-602 (4th ed. 1971); Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601 (1968);

to the concept of standing. Certainly "private" plaintiffs suing a polluter for monetary damages must establish their standing to sue, but normally such standing is self-evident. Generally, a private suit is the assertion of "a distinctive or discriminating impact which specially entitles [a litigant] to challenge an allegedly illegal . . . action."¹³⁷ Thus private citizens will have little trouble establishing standing when they can show that pollution threatens or actually causes economic loss or damage to their health.¹³⁸

On the other hand, actions brought by organizations such as the Sierra Club or the Environmental Defense Fund are "public" in the sense that they seek to vindicate broad social concerns rather than individual interests.¹³⁹ These public suits ordinarily lie against government officials, although a private defendant may be involved, and seek equitable relief. The objective is more often conservation rather than the control or prevention of pollution.¹⁴⁰ Traditionally, standing has been more troublesome in such cases.

Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961). The latter two articles, in revised form, constitute chapters 12 and 13 in L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965).

137. L. JAFFE, *JUDICIAL CONTROL*, *supra* note 136 at 501. Almost any injury suffered has been found sufficient for standing. For example, the courts have given standing to the following plaintiffs: young mothers who asserted that the government's rejection of a plan of zero tolerance for DDT made their own milk less safe and, consequently, they could not breast feed their babies, *Environmental Defense Fund, Inc. v. HEW*, 428 F.2d 1083 (D.C. Cir. 1970); students who asserted that a proposed highway through their campus would affect their status as pedestrians by destroying trees and increasing traffic and noise, *Nolop v. Volpe*, 333 F. Supp. 1364 (D.S.D. 1971); persons who regularly engaged in canoeing and other recreational activities in an affected waterway, *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971); a plaintiff who regularly visited his father's property, which was near the site of a radioactive project, *Crowther v. Seaborg*, 312 F. Supp. 1205 (D. Colo. 1970); and a tour guide who regularly conducted parties through an endangered forest area, *Parker v. U.S.*, 307 F. Supp. 685 (D. Colo. 1969).

138. When faced with a class suit against a major local polluter, a court will sometimes state that the group lacks standing to sue because the harm it is suffering in the form of fouled air, for example, is not distinguishable from the harm suffered generally by the public. Of course, scientists could prove that the air is not uniformly polluted, but some courts would dismiss the suit on the pleadings and never allow the proof to come in. Although the decision is often framed in terms of a lack of "standing", it is more properly seen as a manifestation of the troublesome distinction between public and private nuisance. See generally Prosser, *Private Actions for Public Nuisance*, 52 VA. L. REV. 997 (1966); Note, *Air Pollution as a Private Nuisance*, 24 WASH. & LEE L. REV. 314 (1967).

139. See Jaffe, *Standing to Secure Judicial Review*, *supra* note 136.

140. See, e.g., *Parker v. United States*, 448 F.2d 793 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972) (Forest Service may not permit logging in areas being

An offspring of the "case or controversy" requirement of the Constitution,¹⁴¹ standing is simply a judicial tool to insure that the plaintiff is a proper party to bring a particular legal action. This is obviously a difficult determination to make when a plaintiff purports to represent the public interest because many parties might desire to slip into that role even though they lack the ability to play it well. Fearing a multiplicity of suits, the federal courts attempted to screen out collusive suits and nominal presentations by requiring potential plaintiffs to demonstrate a "personal stake"¹⁴² or a "legal wrong."¹⁴³ These standards demand more than the common meaning of the words might indicate; not even an economic interest was sufficient¹⁴⁴ and it was certainly insufficient to base one's interest on aesthetic or conservation grounds. The basic guidelines were clearly summarized in *Associated Industries of New York v. Ickes*:¹⁴⁵

[I]n a suit in a federal court by a citizen against a government officer, complaining of alleged past or threatened future unlawful conduct by the defendant, there is no justiciable "controversy" . . . unless the citizen shows that such conduct or threatened conduct invades or will invade a private substantive legally protected interest of the plaintiff citizen; such invaded interest must be either of a "recognized" character, at "common law" or a substantive private legally protected interest created by statute.¹⁴⁶

The last five years, though, have witnessed a dramatic liberalization of the standing doctrines insofar as they apply to the organizational plaintiff bringing a public action to protect the environment. This shift began with *Flast v. Cohen*¹⁴⁷ when the Supreme Court suggested that a "legally protected interest" would not always be a prerequisite for standing:

considered for wilderness designation); *Buch v. Morton*, 449 F.2d 600 (9th Cir. 1971) (California may not open public domain lands to entry or location under federal mining laws); *Scenic Hudson Preservation Conf. v. FPC*, 453 F.2d 463 (2d Cir. 1971), cert. denied, 407 U.S. 926 (1972) (suit under Federal Power Act to challenge siting of power plant); *Harrison Coalition v. Volpe*, 330 F. Supp. 918 (M.D. Pa. 1971) (action under the Federal-Aid Highway Act to block construction of highway through public park).

141. U.S. CONST. art. III, § 2.

142. *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

143. Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970). See generally, Juergensmeyer, *supra* note 39.

144. *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1939).

145. 134 F.2d 694, 700-01 (2d Cir.), vacated as moot, 320 U.S. 707 (1943); see *Frothingham v. Mellon*, 262 U.S. 447 (1923).

146. 134 F.2d at 700.

147. 392 U.S. 83 (1968).

Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.¹⁴⁸

The new trend was clarified in *Association of Data Processing Service Organizations, Inc. v. Camp*¹⁴⁹ and *Barlow v. Collins*,¹⁵⁰ in which the court announced a new two-part standing test. The first element, arising out of the constitutional case or controversy requirement, requires the plaintiff to allege that the challenged injury has caused him "injury in fact, economic or otherwise."¹⁵¹ Secondly, the court specifically considered and rejected the traditional "legal interest" standard, because that issue goes to the merits.¹⁵² Instead, a trial court must ask "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."¹⁵³ In a significant aside, the court added that this interest might at times "reflect 'aesthetic, conservational and recreational' as well as economic values."¹⁵⁴

Further guidance as to the nature of the non-economic interests that would suffice to establish standing came in a recent public interest lawsuit, *Sierra Club v. Morton*.¹⁵⁵ The court dismissed the complaint for lack of standing, holding that a plaintiff "seeking review must allege facts showing that he is himself adversely affected" by the conduct at issue.¹⁵⁶

The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents.¹⁵⁷

148. *Id.* at 101.

149. 397 U.S. 150 (1970).

150. 397 U.S. 159 (1970).

151. 397 U.S. at 152.

152. *Id.* at 153.

153. *Id.*

154. *Id.* at 154.

155. 405 U.S. 727 (1972).

156. *Id.* at 740.

157. *Id.* at 735. See *Sierra Club v. Mason*, 351 F. Supp. 419 (D. Conn. 1972), where the court quoted this statement and then opined: "Implicit in this statement is the conclusion that such allegations as to the [Sierra] Club's members would have been

Noting only the result and not the language of the court, some commentators foresaw the death of the public lawsuit by organizational plaintiffs and turned to the class action device as a possible substitute.¹⁵⁸ This epitaph seems premature in light of the first group of lower court decisions applying the *Sierra Club* guidelines.¹⁵⁹ Organizational plaintiffs have been allowed to establish standing in these cases by alleging that some of the club members use the affected area for recreation. It is difficult to imagine a significant threat to the environment which will not impinge upon the recreational activities of at least a few members of the Sierra Club, to name but one major environmental organization. In retrospect, it is now clear that *Sierra Club* gave environmental litigators much more than it took away. The court emphasized two important points: first, that "aesthetic, conservational, and recreational" interests may properly be urged as a basis for standing,¹⁶⁰ and, secondly, that once standing has been established, the plaintiff "may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate."¹⁶¹ This development should be of value both to the organizational plaintiff and to representative parties in a class suit brought to stop environmental despoilation.

sufficient to afford the Club standing in the action." *Id.* at 423. See also note 159 *infra*.

158. Comment, *The Viability of Class Actions in Environmental Litigation*, 2 *ECOL. L.Q.* 533, 563-64 (1972).

159. *E.g.*, *Environmental Defense Fund v. TVA*, 468 F.2d 1164, 1171-72 (6th Cir. 1972) (in a suit to enjoin construction of a dam, two organizational plaintiffs established standing by alleging that "many of their members have used the Little Tennessee for various purposes and wish to preserve the river to protect its fish, wildlife, surroundings, and water quality."); *Sierra Club v. Mason*, 351 F. Supp. 419, 422-24 (D. Conn. 1972) (in a suit to enjoin harbor dredging, organizational plaintiffs established standing by alleging that many club members "used the area . . . for various recreational activities, including hiking, photographing, fishing, sailing and swimming. . ."); *Citizens for Clean Air, Inc. v. Corps of Engineers*, 349 F. Supp. 696, 704-05 (S.D.N.Y. 1972) (in a suit to enjoin issuance of a construction permit for a power plant, the court *inferred* a threat to the health of the organizational plaintiffs' members from the "bare-boned" allegations of residence near the proposed site and "dangers to the quality of air" and therefore denied a motion to dismiss for lack of standing, on the condition that the plaintiffs amend the complaint to make explicit what was implicit in the original pleadings).

Even *Sierra Club v. Morton* was resurrected on remand, when a trial judge allowed the plaintiff to amend the complaint to make further allegations concerning standing and to add additional parties. 348 F. Supp. 219, 220 (N.D. Cal. 1972). Thus the Supreme Court's decision was something less than the "death blow" for organizational suits brought to protect the environment.

160. 405 U.S. at 734, 738.

161. *Id.* at 737.

III. PROCEEDING UNDER FEDERAL RULE 23

Despite the proliferation of environmental litigation in the past few years, the class action has rarely been the procedural device that the successful environmental plaintiff has utilized.¹⁶² Several reasons for the disutility of the class action have already been discussed;¹⁶³ even if the class action plaintiff is able to surmount the jurisdictional hurdles, he still must make his way through the procedural pitfalls of rule 23. Behind the procedural difficulties, which will be examined at length hereafter, lie two more basic reasons for the failure of environmental class actions.

The first reason, noted by numerous commentators of late, has been the tendency of the plaintiff's reach to exceed his grasp in environmental class actions. The most notorious example to date was a suit by two plaintiffs seeking to represent 125 million persons and seeking damages for air pollution totaling 375 trillion dollars.¹⁶⁴ Commenting upon this case, one recent writer concluded:

Because of the plaintiff's failure to place realistic limits on the size of the class and the claim, this court may well have been permanently inoculated against all environmental class actions. If so, the judge is scarcely to blame.¹⁶⁵

Evident as the danger of over-ambitious litigants may be, there is another side to the coin. While there are numerous examples of unrealistic claims, there are also instances in which courts have been unwilling to experiment when plaintiffs with valid, albeit small, claims have no foreseeable method of relief except by means of the class action. Courts frequently recite the litany that rule 23 is to be given a liberal rather than a restrictive interpretation, and that a primary function of the rule is to provide a "device for vindicating claims which taken individually are too small to justify legal action."¹⁶⁶ In practice though, courts seem to vary widely in their attitudes towards use of the

162. Notable exceptions are *Izaak Walton League v. Macchia*, 329 F. Supp. 504 (D.N.J. 1971); *In re Motor Vehicle Air Pollution Control Equip.*, 52 F.R.D. 398 (C.D. Cal. 1970); *Biechele v. Norfolk & W. Ry.*, 309 F. Supp. 354 (N.D. Ohio 1969).

163. See discussion of standing in text accompanying notes 135-61 *supra*, and of jurisdictional amount in text accompanying notes 70-134 *supra*.

164. *Heart Disease Research Foundation v. General Motors Corp.*, 3 E.R.C. 1710 (S.D.N.Y. 1972). The trial judge, in dismissing on the merits, noted that "plaintiffs and their counsel have failed to realize that the damages sought are some 300 times more than the gross national product of the United States." *Id.* at 1711.

165. Comment, 3 *ECOL. L.Q. supra* note 1, at 537. See also Lamm & Davison, *supra* note 1, at 69-70.

166. *Escott v. Barchris Constr. Corp.*, 340 F.2d 731, 733 (2d Cir. 1965).

class action device in environmental suits.¹⁶⁷ As one practitioner has recently said, "When the class becomes immense, the issue seems to be resolved primarily by whether the court is convinced that the defendant needs punishing or not."¹⁶⁸ This pragmatic approach to rule 23 is understandable when the scope of discretion that the trial judge possesses under rule 23 is fully understood. What is said below about the requirements of rule 23 in environmental litigation must be taken in the light of the litigant's restraint (or lack of it) and the attitude of the particular court called upon to make the determination as to whether a class action should be maintained.

A. Requirements of Rule 23(a)

The burden of proof on the issue of whether a class action can be maintained is on the party who seeks to establish his right to pursue the class action device.¹⁶⁹ To fulfill that burden, the would-be class representative must plead the existence of the four factors set out in rule 23(a) and demonstrate that the action meets the criteria of one of the three categories of class action enumerated in rule 23(b).¹⁷⁰

167. *Compare Zahn v. International Paper Co.*, 469 F.2d 1033 (2d Cir. 1972), cert. granted, 93 S. Ct. 1370 (1973) (No. 72-888) with *In re Motor Vehicle Air Pollution Control Equip.*, 52 F.R.D. 398 (C.D. Cal. 1970).

168. Fitzgerald, *When Is a Class a Class*, 28 BUS. LAW. 95, 99 (1972).

169. *Poindexter v. Teubert*, 462 F.2d 1096, 1097 (4th Cir. 1972); *Demarco v. Edens*, 390 F.2d 836, 845 (2d Cir. 1968).

170. FED. R. CIV. P. 23(a) and (b) read as follows:

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent

The scope of the rule 23(a) prerequisites is not fully revealed by a reading of the rule itself. At least two additional prerequisites have been required by courts before allowing a class action to proceed. First is the obviously essential necessity that an ascertainable class exist; second is the requirement that the would-be representative be a member of that class. Both of these implied requirements present problems for the class representative in environmental suits in addition to the stated prerequisites of rule 23(a).

1. *Ascertainability*

The definition of the class has become a crucial issue under the amended rule 23 since a judgment is now binding upon all class members.¹⁷¹ Although it is clear that there must be a "class," it is not clear how well-defined that class must be. One need not know exactly how many persons are in the class, nor must every class member be individually identified.¹⁷² But the boundaries of the class must be drawn with "some precision"¹⁷³ so that "it is administratively feasible for the court to determine whether a particular individual is a member."¹⁷⁴ For example, a class of "all Texas citizens who are for the orderly development of Texas Parks and Recreational Facilities in accordance with the State Comprehensive Outdoor Recreation Plan" was held not adequately defined to identify an ascertainable class of persons.¹⁷⁵ The court determined that it was impossible to delineate in-

to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

171. Prior to 1966 the court's judgment in "true" and "hybrid" class actions was binding upon all the members of the class, whether or not represented. But judgment in "spurious" class actions purported to bind only those class members actually present and represented. Subsection (b)(3) of the new rule 23, though somewhat analogous to the "spurious" class action, was given a binding effect on all persons who (1) are found to be members of the class, and (2) do not "opt-out" by way of rule 23(c)(2). The problem of defining who is a class member and who is not assumes considerable importance not only with regard to a later challenge of the judgment by an unrepresented party who claims not to be a member of the class but also as to the problem of giving adequate notice to the unnamed class members via rule 23(c)(2) for purposes of fulfilling the requirements of due process.

172. *Dolgow v. Anderson*, 43 F.R.D. 472, 492 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1970).

173. *Fischer v. Kletz*, 41 F.R.D. 377, 384 (S.D.N.Y. 1966).

174. 7 WRIGHT & MILLER § 1760, at 581.

175. *Johnson v. Russell*, 3 E.R.C. 1523, 1525 (W.D. Tex. 1971), *rev'd on other grounds sub nom. Johnson v. Morton*, 456 F.2d 68 (5th Cir. 1972).

dividually those persons who were "for orderly development" other than through polling every person in the state as to his opinion.¹⁷⁶ Ideological delineation would thus seem to be impossible; a class cannot be formed according to common ideas, beliefs or opinions.

Geographical and institutional delineation has been more successful. In *Biechele v. Norfolk & Western Ry.*,¹⁷⁷ discussed earlier with regard to the jurisdictional amount issue,¹⁷⁸ plaintiffs alleged that coal dust was blowing off defendant's storage piles and accumulating on their houses and furniture. The court itself undertook the task of delineating the geographical boundaries of the class. Evidence taken during a hearing for a temporary restraining order as to the extent and location of complaints was combined with a knowledge of prevailing winds in the area to determine the geographical boundaries of the action. Everyone within those boundaries was to have his rights vis-à-vis the defendant determined in a single action. The court, in explaining the rationale for geographical delineation, said:

Without such geographical delineation any person who felt that he had been aggrieved by defendant's operation of its coal dock, regardless of the geographical remoteness of his claim, would have had the right to gain redress in this Court. Through this limitation the Court is able to give attention to the vast body of claims for which a reasonably plausible geographical basis can be determined, avoid placing great strain on its docket with numerous actions with only nuisance value, and preserve to the truly aggrieved individual whose claim is geographically remote his right of action (since he, not being a member of the class, is not bound by the judgment).¹⁷⁹

The use of a carefully limited, geographically defined class has been successfully utilized in similar cases.¹⁸⁰

Illustrative of the institutional delineation approach is *Nolop v. Volpe*,¹⁸¹ a suit by two students of the University of South Dakota on behalf of all members of the student body to halt construction of an interstate highway through the campus. In finding that all the re-

176. *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970).

177. 309 F. Supp. 354 (N.D. Ohio 1969).

178. See discussion in text accompanying notes 104-12 *supra*.

179. 309 F. Supp. at 355-56.

180. See, e.g., *Foster v. City of Detroit*, 405 F.2d 138 (6th Cir. 1968) (all persons within an area of 25 city blocks); *Izaak Walton League v. Macchia*, 329 F. Supp. 504 (D.N.J. 1971) ("all persons having beneficial rights and interests in the subaqueous lands, tidal marshes, tidal waters and related natural marine resources in the vicinity of Gravens Island, Middle Township, Cape May County, New Jersey." *Id.* at 507).

181. 333 F. Supp. 1364 (D.S.D. 1971).

quirements of rule 23(a) were met,¹⁸² the court implicitly recognized that determination of whether a particular individual was or was not a member of the class could be made by reference to the University's records.

In contrast to *Biechele* and *Nolop* are the pleadings in *Yannacone v. Montrose Chem. Co.* in which plaintiff sought to represent "all the people of the United States, not only of this generation, but of those generations, yet unborn, . . . who are entitled to the full benefit, use and enjoyment of the environment and natural resources of the several States and the United States without damage and degradation from the production, distribution and use . . ." of D.D.T.¹⁸³ Though such a class is definable in the sense that anyone who might walk into court would be a member of it, it hardly meets the functional criteria that rule 23 was designed to implement.¹⁸⁴ For the serious environmental plaintiff, geographical or institutional class delineation would seem to be the approach most likely to fulfill the requirement that an ascertainable class exist.

2. Class Membership

Once a proper class has been defined, the representative party must then show that he is a member of that class.¹⁸⁵ This is the second of the implied requirements under rule 23(a), and it is based upon the requirements of rule 17(a) that the real party in interest prosecute the suit¹⁸⁶ and of rule 23(a) that "[o]ne or more *members of a class* may sue or be sued as representative parties. . . ."¹⁸⁷ The re-

182. *Id.* at 1366.

183. No. 3761-69 (S.D.N.Y., filed Oct. 14, 1969), quoted in Lamm & Davison, *supra* note 1, at 63.

184. See also *Fischer v. American Smelting & Refining Co.*, No. 70-CIU-729 (S.D.N.Y., filed Feb. 24, 1970). In *Fischer* the plaintiff first sought to represent:

[C]itizens and residents of Texas, New Mexico, and Mexico, who have suffered injury, damages, annoyance, and inconvenience from the alleged pollution of the air by the defendants, and those who have shown "a special interest" in protecting the public, their property, and the environment from damage by air pollution.

Id., quoted in Lamm & Davison, *supra* note 1, at 64. Not content with the international flavor of their pleadings, plaintiffs amended their complaint, added new plaintiffs and sued:

[O]n behalf of all those people, both of this generation and of generations yet unborn, entitled to the protection of their health and welfare and to the protection of their environment from damage from the failure of the defendant to install "state-of-the-art" pollution control equipment.

Id. at 63-64.

185. *Bailey v. Patterson*, 369 U.S. 31 (1962).

186. 7 WRIGHT & MILLER § 1761, at 585.

187. FED. R. CIV. P. 23(a) (emphasis added).

quirement assumes considerable importance in environmental litigation when a class action is brought by a conservation organization or a similar organizational plaintiff on behalf of itself and those similarly situated. The issue is frequently lost in a discussion of standing and never directly addressed,¹⁸⁸ but at least one court has specifically considered the issue. In *Environmental Defense Fund, Inc. v. Hoerner Waldorf Corp.*,¹⁸⁹ the organizational plaintiff, a New York non-profit corporation, sued on behalf of "all those entitled to the full benefit, use and enjoyment of the . . . Missoula Regional Ecosystem."¹⁹⁰ After denying defendant's motion to dismiss for lack of standing, the district court proceeded to dismiss the class allegations "[b]ecause the plaintiff is not a member of the class it alleges to represent . . ."¹⁹¹

Two possible exceptions to this rule have been recognized. In some cases an organizational plaintiff has been allowed to sue if it has specific authority¹⁹² or, as the court in *Norwalk CORE v. Norwalk Redevelopment Agency* noted, "where its *raison d'être* is to represent the interests of . . . [the] class."¹⁹³ Addressing itself to the language quoted above, the court in *Hoerner Waldorf* dismissed it as dictum "and in any event not persuasive."¹⁹⁴ A more logical exception seems to be provided by the Eighth Circuit in *Smith v. Board of Education*.¹⁹⁵ In that case the fact that one plaintiff, Arkansas Teachers Association, was not technically an individual class member was found to be an insufficient basis for a rule 23(a) dismissal because plaintiff had standing and was a real party in interest under rule 17(a).¹⁹⁶ Whether *Norwalk CORE* and *Smith* provide an exception applicable only to civil rights cases or whether they constitute a proper rationale for the organizational plaintiff to escape the class membership requirement may be a superfluous issue in light of the recent decision in *Sierra Club v. Morton*.¹⁹⁷ Justice Stewart, writing for the majority, said, "It is clear that an organization whose members are injured may represent those

188. See, e.g., *Izaak Walton League v. Macchia*, 329 F. Supp. 504, 510-13 (D.N.J. 1971).

189. 1 E.R.C. 1640 (D. Mont. 1970).

190. *Id.*

191. *Id.* at 1641. But cf. *Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F. Supp. 728, 736 (E.D. Ark. 1971).

192. *National Hairdressers' & Cosmetologists' Ass'n v. Philad Co.*, 3 F.R.D. 199 (D. Del. 1943).

193. 395 F.2d 920, 937 (2d Cir. 1968).

194. 1 E.R.C. at 1641.

195. 365 F.2d 770 (8th Cir. 1966).

196. *Id.* at 777.

197. 405 U.S. 727 (1972); see discussion in text accompanying notes 155-61 *supra*.

members in a proceeding for judicial review."¹⁹⁸ Rule 23 is merely another form of representative action. As long as the requirements of the rule are met, there seems to be no valid reason for denying the organizational plaintiff representative capacity simply because the organization itself cannot show injury in fact.

3. *Impracticality of Joinder*

Rule 23(a)(1) requires that a class action may be maintained only where "the class is so numerous that joinder of all members is impracticable." Though it is quite clear that "impracticable" does not mean "impossible,"¹⁹⁹ there are no hard and fast rules as to how many class members are needed before the realm of impracticality has been reached.²⁰⁰ The most that can be said is that impracticality of joinder is a case-by-case determination. Professor Moore discusses the impracticality ("numerosity") criterion as follows:

Neither the multiplicity of parties, nor the inexpediency nor the inconvenience of bringing parties before the court will, in themselves, justify the class suit; they are, however, matters which evidence impracticality.

A reading of the cases convinces one that whether a number is so large that it would be impractical to join all the parties is dependent not upon any arbitrary limit, but rather upon the circumstances surrounding the case; and there must be a positive showing of such circumstances.²⁰¹

Most cases which have been decided in the environmental area have been sufficiently large to obviate the necessity of discussing rule 23 (a)(1).²⁰² Where impracticality has been contested, the response has generally been conclusory rather than explicative.²⁰³ When and if the

198. 405 U.S. at 739.

199. *Goldstein v. North Jersey Trust Co.*, 39 F.R.D. 363, 367 (S.D.N.Y. 1966).

200. Classes of eighteen [*Coffman v. City of Wichita*, 165 F. Supp. 765 (D. Kan.), *aff'd per curiam*, 261 F.2d 112 (10th Cir. 1958)], twenty [*Ciaramitaro v. Woods*, 324 F. Supp. 1388 (E.D. Mich. 1971)], and twenty-six [*Corporation of Haverford College v. Reeher*, 329 F. Supp. 1196 (E.D. Pa. 1971)] have been held too small to permit a class action under rule 23. But classes of eighteen [*Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648 (4th Cir. 1967)], twenty-five [*Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 463 (E.D. Pa. 1968)] and thirty-five [*Fidelis Corp. v. Litton Indus., Inc.*, 293 F. Supp. 164 (S.D.N.Y. 1968)] have been held large enough to make joinder impracticable.

201. 3B MOORE ¶ 23.05. See also 7 WRIGHT & MILLER § 1762.

202. Frequently cases brought under rule 23(b)(3) raise the opposite consideration—is the class too numerous? This problem of the unmanageability of the class action involving large numbers of class members is treated in the text accompanying notes 296-309 *infra*.

203. See, e.g., *Foster v. City of Detroit*, 405 F.2d 138 (6th Cir. 1968). Plaintiffs

rule 23(b)(3) class action seeking damages becomes a viable procedure, litigation involving rule 23(a) will probably increase as class action representatives begin to narrow the scope of their class to meet the manageability criterion of rule 23(b)(3).²⁰⁴

4. Common Questions

Rule 23(a)(2) requires that "there be questions of law or fact common to the class." Most commentators have found that this provision adds little, if anything, to the substance of rule 23; indeed, the requirement that there be common questions seems implicit in each of the three types of class actions under subsection (b) of rule 23.²⁰⁵ Consequently, most courts have either ignored the requirement or found it satisfied without elaboration.²⁰⁶

A finding of common questions sufficient to justify the use of a class action assumes much greater importance in the context of rule 23(b)(3) in which the stricter requirement that "common questions predominate" becomes applicable. Thus subsection (b)(3)-type class actions tend to swallow up the subsection (a)(2) requirement in a consideration of predominance.²⁰⁷

5. Typicality

Rule 23(a)(3) makes necessary a showing that "the claims or defenses of the representative parties are typical of the claims or de-

brought suit against the city for loss of property value during a ten year period in which the defendant kept condemnation proceedings pending against the property before finally discontinuing the planned renewal project. The court held: "Clearly the number of persons in an area encompassing nearly 25 city blocks is too large for it to be practicable to bring them all before the court." *Id.* at 146.

204. See discussion in text accompanying notes 296-309 *infra*.

205. See 3B MOORE ¶ 23.06-1, at 23-301; 7 WRIGHT & MILLER § 1763, at 609-10.

206. In *Nolop v. Volpe*, 333 F. Supp. 1364 (D.S.D. 1971), discussed in the text accompanying note 181 *supra*, the court held that the question of the applicability of the National Environmental Policy Act was common to all members of the class and satisfied rule 23(a)(2). The holding in *Nolop* would seem to cast doubt upon the interpretation of Professors Wright and Miller that "the use of the plural 'questions' suggests that more than one issue of law or fact must be common to members of the class." 7 WRIGHT & MILLER § 1763, at 604. Though perhaps other common questions could be distilled from the factual situation in *Nolop*, the Court made no effort to define common questions of fact, relying entirely on a single common question of law to satisfy rule 23(a)(2). For a sampling of the types of issues which have been held to constitute "common questions" outside of the environmental area, see 3B MOORE ¶ 23.06-1, at 23-302 to -303; 3B MOORE ¶ 23.06-1, at 27-30 (Supp. 1972).

207. See *In re Motor Vehicle Air Pollution Control Equip.*, 52 F.R.D. 398 (C.D. Cal. 1970). The predominance requirement of rule 23(b)(3) is discussed in the text accompanying notes 271-94 *infra*.

fenses of the class." The requirement of typicality also seems merely duplicative of other provisions of rule 23 and has been largely ignored or summarily treated by the courts. One writer has defined the typicality provision as follows:

The requirement that the claim of the representative be typical of those of the entire class is the same as stating that the interests of the representative party must coincide with, and "be compatible with and not antagonistic to those whom he would represent."²⁰⁸

This is no more than is required by the adequacy of representation requirement of rule 23(a)(4),²⁰⁹ and most courts have interpreted subsection (a)(3) in conjunction with (a)(4).²¹⁰

Even if the typicality requirement has little, if any, substantive meaning by itself, two problem areas require that pleading under rule 23(a)(3) be more than a matter of form. One problem, especially prevalent in subsection (b)(3) class actions, arises when individual class members have claims arising from differing factual settings or where there is a disparity in the damages claimed by the representative parties and those that the unnamed class members can be reasonably expected to claim. At least one court has held that "typical" means "that the interests of the named representatives in a class action must be co-extensive with the interests of all other members of the proposed class."²¹¹ Most courts seem to adopt a more relaxed standard, finding that it is the nature of the claim and not the facts on which it arose or the relief sought that must be typical.²¹² Adoption of this latter,

208. Lamm & Davison, *infra* note 1, at 80 (footnotes omitted).

209. See text accompanying notes 219-36 *infra*.

210. *City of Chicago v. General Motors Corp.*, 332 F. Supp. 285 (N.D. Ill. 1971), *aff'd*, 467 F.2d 1262 (7th Cir. 1972). The court in *City of Chicago* dismissed plaintiff's products liability class action for failure to meet the requirements of rule 23(a). In its opinion the court quoted rule 23(a)(3) and (a)(4) together, and, treating it as a single requirement, stated:

Essentially, this rule establishes adequacy of representation as a prerequisite to the bringing of a class action and requires that "the interest of the representative party must be coextensive with the interests of the other members of the class, and that there be a lack of adverse interests between the representative party and other members of the class." 3B MOORE ¶ 23.06-2, at 23-325 (1969).

Id. at 287.

Rule 23(a)(3) has also been read in conjunction with rule 23(a)(2) (existence of common questions). See *Iowa v. Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391 (S.D. Iowa 1968).

211. *Insley v. Joyce*, 330 F. Supp. 1228, 1234 (N.D. Ill. 1971).

212. In a class action against the two major odd-lot brokers on the New York Stock Exchange, the plaintiff, representing a class of over 3 million persons, charged that the brokers had conspired to monopolize trading and to fix the odd-lot differential at an excessive figure. The Second Circuit, per Judge Medina, stated: "[P]laintiff's claim is 'typical of the claims . . . of the class'. . . . [A]lthough there are varying

more permissive standard of typicality can be very important for the environmental litigant seeking damages for pollution-related injuries under rule 23(b)(3) since there will almost certainly be varying types and scope of harm for each class member or his property. A consideration of this variance of degree of injury among class members, while relevant to the questions of predominance²¹³ and manageability,²¹⁴ should not preclude a finding of typicality unless there is a significant difference in the basic structure of the representatives' claims as compared with the claims of other class members.²¹⁵

A second problem, noted by Professor Moore, may arise from a court's belief that some members of the class "may prefer to leave the violation of their rights unremedied."²¹⁶ Rule 23(a)(3) does not set out a subjective test to be applied by the judge according to his view of whether class members other than the representatives wish the suit to be brought.²¹⁷ The difficulty stems from an attempt to distinguish between a judge's subjective finding that claims are not typical and his finding under rule 23(a)(4) that the representative cannot adequately represent the class because they have interests antagonistic to other class members.²¹⁸ The rule itself is too vague to be helpful in making such a distinction. The best course of action would probably be for litigants to attempt to skirt the problem by carefully delineating the class and by utilizing rule 23(c)(4) devices such as subclasses or the class action for particular issues.

6. *Adequacy of Representation*

Rule 23(a)(4) provides that a class action is maintainable only where "the representative parties will fairly and adequately protect the interests of the class." Of the four express prerequisites of rule 23(a),

fact patterns underlying each individual odd-lot transaction, the same allegedly unlawful differential is charged to all buyers and sellers." *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968). A similar approach was taken where the issue was a disparity of damages between class representatives and other class members. *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559 (D. Minn. 1968).

213. See text accompanying notes 270-93 *infra*.

214. See text accompanying notes 296-309 *infra*.

215. See Degnan, *Foreword: Adequacy of Representation in Class Actions*, 60 CAL. L. REV. 705 (1972) [hereinafter cited as *Degnan*].

216. 3B MOORE ¶ 23.06-2, at 23-327.

217. *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 937 (2d Cir. 1968); *Snyder v. Board of Trustees*, 286 F. Supp. 927, 931 (N.D. Ill. 1968). *But cf. Ward v. Luttrell*, 292 F. Supp. 165 (E.D. La. 1968).

218. The requirement that the representatives have interests compatible with those they seek to represent is more fully discussed in the text accompanying notes 219-36 *infra*.

subsection (4) is probably the most vital because of its role in assuring due process²¹⁹ to unnamed class members. This is especially true since the 1966 amendment to rule 23 which made judgments in subsection (b)(3) actions binding upon the class unless the would-be class member exercises his privilege to exclude himself under rule 23(c)(2)(A).²²⁰

The due process problem that the class action device raises is easily recognized; it is much more difficult to explain how the words "adequacy of representation" fulfill the constitutional demand. The most highly regarded statement of the meaning of "adequacy of representation" is that by Judge Medina in *Eisen v. Carlisle & Jacquelin*.²²¹ Judge Medina's opinion sets forth several "ingredients" of adequate representation: (1) competent counsel;²²² (2) lack of interests antagonistic to other class members;²²³ and (3) case-by-case assessment of the "quality" of representation rather than an emphasis of "quantitative elements."²²⁴ Each of these elements has been widely discussed in case law outside the environmental area.²²⁵

The ingredient that has received the widest attention in environ-

219. "If the absent members are to be conclusively bound by the result of an action prosecuted or defended by a party alleged to represent their interests, basic notions of fairness and justice demand that the representation they receive be adequate." 7 WRIGHT & MILLER § 1765, at 617. The leading case on the constitutional dimensions of adequacy of representation in class actions is *Hansberry v. Lee*, 311 U.S. 32 (1940).

220. 7 WRIGHT & MILLER § 1765, at 615-17; *Degnan* at 710.

221. 391 F.2d 555 (2d Cir. 1968). The Second Circuit ultimately dismissed the *Eisen* case because of failure to give proper notice under rule 23(c)(2) and because it was unmanageable under rule 23(b)(3). *Eisen v. Carlisle & Jacquelin*, Nos. 72-1521, 30934 (2d Cir., May 1, 1973), *rev'g* 52 F.R.D. 253 (S.D.N.Y. 1971). The holding that *Eisen* could not be maintained as a class action, while important for reasons to be discussed later, would not seem to affect that court's conclusions as to the adequacy of representation expressed in its earlier ruling. The court specifically stated that it did not reach the question. *Id.* at 3234.

222. 391 F.2d at 562.

223. *Id.*

224. *Id.* at 563. Judge Medina felt that the district court placed undue reliance on "quantitative elements", *e.g.*, the amount of *Eisen's* claim (\$70), the fact that he was the only representative of the class, and the number of class members he alone sought to represent (over 3 million).

225. As to competence of counsel, *see* *Carpenter v. Hall*, 311 F. Supp. 1099, 1114 (S.D. Tex. 1970) (competence of counsel revealed through earlier experience in the particular type of litigation); *Dolgow v. Anderson*, 43 F.R.D. 472, 496 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1970) (court's assessment of competence in the early stages of litigation).

For a collection of the various types of interests that have been found to be conflicting or antagonistic, *see* 7 WRIGHT & MILLER § 1768, at 640 n.97.

A discussion of the quality factor and the extent to which the size of representative parties' claims bear on adequacy can be found in 7 WRIGHT & MILLER §§ 1766-67. *See also* 3B MOORE ¶ 23.07[4].

mental class suits is that dealing with antagonistic interests. The court in *Nolop v. Volpe*,²²⁶ while noting that the student class members were represented by "competent counsel,"²²⁷ seemed to place greater emphasis on the fact that "[a] student poll received in evidence indicated that over 80% of the students support this action . . . so that the representative parties do fairly and adequately protect the interests of the class."²²⁸ While a representative party does not have to show affirmatively that a majority of the class find his representation adequate,²²⁹ the court in *Nolop* seems clearly correct in using such an affirmative showing as a factor in its determination of adequacy. But was the court in *Nolop* correct in the inferences that it drew from the poll? The fact that eighty percent of the students favored the suit would seem to mean that a rather significant proportion (twenty percent) of the students had conflicting interests.²³⁰ Student disagreement over whether the suit should be brought, however, is not a "conflicting or antagonistic interest" for purposes of determining adequacy of representation. The classic example of antagonistic interests was the plaintiff who sought to enforce a racially restrictive covenant on behalf of a class of landowners, part of whom were desirous of enforcing it and part of whom sought to prevent its application.²³¹ But in *Nolop* there is no question of enforcing rights held by persons whose interests dictate that the rights not be enforced. Either a proper impact statement was filed in *Nolop* or it was not. As the court in *Snyder v. Board of Trustees* recognized: "Resolution of this issue will, as a practical matter, be dispositive of the rights of all other members of the class, whether or not they approve of the maintenance of this suit."²³² Most environmental class suits challenging the validity of administrative action for failure to abide by statutory requirements or administrative regulations would thus seem to have greater leeway in defining a class because they will decide the issue for the class, one way or the other,

226. 333 F. Supp. 1364 (D.S.D. 1971); see discussion in text accompanying note 181 *supra*.

227. 333 F. Supp. at 1367.

228. *Id.* at 1366-67.

229. See *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (2d Cir. 1968).

230. *Cf. Snyder v. Board of Trustees*, 286 F. Supp. 927 (N.D. Ill. 1968) (a class action by unincorporated association of students and several faculty members was allowed even though some members of the student body and faculty did not approve of the action).

231. *Hansberry v. Lee*, 311 U.S. 32 (1940).

232. 286 F. Supp. at 931. *Accord, Rosado v. Wyman*, 322 F. Supp. 1173, 1193-94 (E.D.N.Y.), *aff'd on other grounds*, 437 F.2d 619 (2d Cir.), *cert. denied*, 397 U.S. 397 (1970).

regardless of antagonistic interests within the class.²³³

A different result can be anticipated, however, in environmental class actions seeking damages. In *City of Chicago v. General Motors Corp.*²³⁴ the City sought to represent "all Illinois citizens who are residents of the municipality" and whose health was endangered by defendant's failure to install anti-pollution devices on its automobiles. Plaintiff claimed injury to itself because defendant's conduct interfered with "the maintenance of its property and the performance of its corporate functions of protecting the health and welfare of its citizens and . . . reduced the revenues of the city."²³⁵ In finding that the plaintiff did not adequately represent the class, the court noted that although plaintiff and its class shared "in a common atmospheric condition," there were significant portions of the class who would not seek damages, even if it were shown that such a right to relief existed. Specifically the court pointed to "many motor vehicle dealerships, repair and service stations, and gasoline outlets" and to those citizens "who are strongly attached to the motor vehicle as a recreational or luxury item and would not want their individual activities curtailed or made more expensive" as being adversely affected.²³⁶ Thus where the right to be enforced is an individual right, such as money damages for personal or property damage, a court may be more intent to demand that the representative define his class free of antagonistic interests as far as possible.

City of Chicago involved more than a determination that representation was inadequate because of antagonistic interests or that the

233. This distinction can perhaps be more clearly understood by reference to Professor Hohfeld's concept of the jural opposites, "privilege" and "duty". In the example of the racial covenant, the class member may be thought of as possessing a "privilege" to enforce the covenant. See *Hansberry v. Lee*, 311 U.S. 32 (1940), and text accompanying note 231 *supra*. Some class members wished to assert that privilege; others did not. Where class members have such a privilege in common, a court should apply rule 23(c)(4) so as to exclude from the class those members who did not seek to assert the privilege. However, the class representative in *Nolop* is asserting not that he has a privilege to prevent the building of the highway but that the Secretary of Transportation has a "duty" to see that an environmental impact statement is filed with regard to the proposed highway construction. Such a duty may exist whether or not the other members of the class wish to challenge the Secretary's failure to comply with his statutory duty. Antagonistic interests of this latter type should not defeat a finding of adequacy of representation under rule 23(c)(4). See generally 1 H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 141-53 (tent. ed. 1958); Corbin, *Legal Analysis and Terminology*, 29 *YALE L.J.* 163 (1919).

234. 332 F. Supp. 285 (N.D. Ill. 1971), *aff'd*, 467 F.2d 1262 (7th Cir. 1972).

235. *Id.* at 287-88.

236. *Id.* at 288.

plaintiff's claims were not typical of those of other class members. Also at issue was the question of whether, given lack of antagonistic interests, a governmental body could ever be an adequate representative of its citizens in a class action. The court in *City of Chicago* merely skirted the issue by stating that it knew of no cases allowing a municipality to bring a class action on behalf of its citizens.²³⁷ Without deciding the issue of whether the city was a member of the class, and thus a proper representative, it relied on the city's failure to satisfy the rule 23(a)(4) prerequisite discussed above.²³⁸

Unknown to the court in *City of Chicago*, the validity of a class action by a municipal corporation had been discussed a year earlier in *In re Motor Vehicle Air Pollution Control Equipment*.²³⁹ Various governmental plaintiffs, state and local, sought damages for an alleged conspiracy on the part of motor vehicle manufacturers to prevent the installation of anti-pollution equipment. Some of the actions asked for damages for individual citizens; others sought damages only for other

237. Class actions brought by a state or other governmental unit must be distinguished from the *parens patriae* suit by such governmental body. The two types of suits have received their clearest interpretation in the area of consumer class actions—an area analogous to, and sometimes overlapping, the environmental class suit. In the leading case of *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1089-91 (2d Cir.), *cert. denied sub nom. Cotler Drugs, Inc. v. Chas. Pfizer & Co.* 404 U.S. 871 (1971), the Second Circuit relied on the dual rationale of class actions or *parens patriae* suit.

One commentator has referred to the *parens patriae* suit as nothing more than a "super class action," the only difference from a rule 23 class action being the "nature of the representative." Comment, *Wrongs Without Remedy: The Concept of Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 43 S. CAL. L. REV. 570, 593 (1970). However, there does seem to be a difference between the two as to the theory for the recovery of damages. *Hawaii v. Standard Oil Co.*, 301 F. Supp. 982, 986 (D. Hawaii 1969), *rev'd on other grounds*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972). The *Pfizer* case makes this clear. So long as the state has a claim against the defendant which meets the jurisdictional amount (here there was no requirement because an antitrust violation was alleged), it may sue on that claim and assert, *parens patriae*, the smaller claims of its citizens under a theory of ancillary jurisdiction. The major limitation on *parens patriae* suits is evident; the state must have a claim individually against the defendant (in *Pfizer*, the purchase of antibiotics for use by welfare recipients). The importance of this suit for overcoming problems raised by the requirement of \$10,000 in controversy is discussed in the text accompanying notes 96-99 *supra*. The second theory of *Pfizer*—the rule 23 action—seems to be based on an assignment of claims by citizens to the state or its attorney general. Once again, a theory for avoiding the jurisdictional amount problem can be seen. Professors Wright and Miller suggest that if such a theory holds up it might permit the state to sue on behalf of its citizens, even though it had no individual claim against the defendant. 7A WRIGHT & MILLER § 1782, at 108-09; see discussion in text accompanying notes 100-103, *supra*.

238. 332 F. Supp. at 288.

239. 52 F.R.D. 398 (C.D. Cal. 1970).

similarly situated governmental units (for example, all the cities in the United States). The court first dismissed all suits brought *parens patriae*.²⁴⁰ It then stated:

[T]he question raised is the adherence to the principle that a plaintiff representative must be a member of the class purportedly represented. It is conceivable that a governmental agency might, with reference to a particular act or series of acts, stand in the same position as an individual resident within its jurisdiction. But in the context of the acts alleged herein and any impact and/or damage resulting therefrom, a governmental agency raises issues which are peculiar only to its status as a governmental agency. It cannot, therefore, be a member of the class of citizens or residents and cannot maintain a class action on behalf of individual plaintiffs.

The representation of governmental agencies as a class is, of course, properly the subject of a class action.²⁴¹

Under this view a state or other governmental unit cannot sue on the basis of such quasi-sovereign interests as "health, safety and welfare" of its citizens, interstate water rights, or protection of its atmosphere from interstate pollutants and at the same time bring claims on behalf of its citizens for individual damages. The state or city must "stand in the same position as the individual" as to "a particular act or series of acts" in order to be held to be a member of the class.

The use of the class action device by a governmental plaintiff suing on behalf of its citizens may not be as limited as the *Motor Vehicle* case might suggest. Justice Marshall, in his recent opinion in *Hawaii v. Standard Oil Company*,²⁴² seemed to invite the use of the class action by a state on behalf of its citizens. Hawaii had originally brought both a class action and a *parens patriae* suit on behalf of its citizens for an injunction and monetary damages because of defendant's alleged conspiracy to restrain the marketing and sale of refined petroleum products. The District Court had dismissed the class action and only the propriety of the *parens patriae* suit was reviewed by the Supreme Court. While finding that the State's allegation of an injury to its "general economy" was not an injury to "business or property"

240. "The status of *parens patriae* cannot be used to substitute for a class action as to individual claims of the residents of political subdivision [sic]." *Id.* at 401. As to this point the court cited *Hawaii v. Standard Oil Co.*, 301 F. Supp. 982 (D. Hawaii 1969), *rev'd on other grounds*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972); see discussion at note 237 *supra*.

241. 52 F.R.D. at 405.

242. 405 U.S. 251 (1972).

within the meaning of the Clayton Act and that the State could thus not sue *parens patriae*,²⁴³ the Court went on to note:

The District Court dismissed Hawaii's class action only because it was unwieldy; it did not hold that a State could never bring a class action on behalf of some or all of its consumer citizens. Respondents . . . virtually conceded that class actions might be appropriate under certain circumstances

Parens patriae actions may, in theory, be related to class actions, but the latter are definitely preferable in the antitrust area. Rule 23 provides specific rules for delineating the appropriate plaintiff-class, establishes who is bound by the action, and effectively prevents duplicative recoveries.²⁴⁴

Whether courts will see fit to apply this language to environmental actions, and under what circumstances, remains to be seen. Though certain fact situations, even under the restrictive interpretation of the *Motor Vehicle* case, are appropriate for class action treatment,²⁴⁵ the usefulness of such a suit by a governmental body, in light of *Hawaii*, remains an open question.

B. THE REQUIREMENTS OF RULE 23(b)

The requirements of rule 23(a) have been discussed at length for a simple reason: most environmental class actions have failed to meet them. Even if the class plaintiff can satisfy the above prerequisites, he still must fit his action within one of the three categories of rule 23(b) and fulfill the requirements set out in that category.

The environmental class plaintiff will normally frame his action under either subsection (b)(2) or subsection (b)(3), depending upon whether he seeks an injunction or damages. However, there are occasions when subsection (b)(1) may be appropriate because of the effect that the injunctive or damage relief will have either upon the party opposing the class or on individual members of the class. The categories of rule 23(b) are not mutually exclusive. Thus, an action may very well be maintainable under two different categories of the rule. Where the action is maintainable under either subsections (b)(1) or (b)(2), the choice of which category controls is not significant since the same *res judicata* effect can be achieved under either category.

243. *Id.* at 265.

244. *Id.* at 266.

245. *See West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1097 (2d Cir.), *cert. denied sub nom. Cotler Drugs, Inc. v. Chas. Pfizer & Co.*, 404 U.S. 871 (1971).

However, where there is a choice between subsections (b)(1) and (b)(3) or (b)(2) and (b)(3), courts will normally chose the (b)(1) or (b)(2) categories over (b)(3). In this manner the court can avoid the requirement that class members be given the option to exclude themselves from the action and the notice requirements that are peculiar to subsection (b)(3) actions.²⁴⁶

1. Rule 23(b)(1)

The subsection (b)(1) class suit is designed to deal with the risks of separate adjudications to the party who opposes the class (subsection (b)(1)(A)) or to individual class members (subsection (b)(1)(B)). At least one environmental class action has utilized the (b)(1) category. In *Biechele v. Norfolk & Western Railway Co.*²⁴⁷ plaintiffs sought both an injunction against defendants' coal storage and loading operation and damages for injury from coal dust to their persons and property.²⁴⁸ In response to plaintiffs' request for injunctive relief, the court allowed a class action to be maintained under rule 23(b)(1) and (b)(2).

In *Biechele* it is clear that the court's reliance on rule 23(b)(1) referred to the dangers set out in subsection (B). "As a practical matter" an injunction sought by an individual member of the class would have been "dispositive of the interests of the other members" of the class.²⁴⁹ Were the injunction unsuccessful if sought by an individual class member, the other class members who were not represented would, in effect, be foreclosed from later seeking an injunction. The *stare decisis* effect of the first ruling would be difficult, if not impossible, to overcome. To protect the interests of the entire class, a class action under rule 23(b)(1)(B) was allowed.

Like the categories of rule 23(b), the two subcategories of subsection (b)(1) are not mutually exclusive. Thus a class action may be

246. "When such options are available, the Court should treat the action as one under Rule 23(b)(1) or (b)(2) instead of under (b)(3) in order to achieve the purposes of the Rule which are to avoid a multiplicity of suits, provide common binding adjudication, and prevent inconsistent or varying adjudications." *Mungin v. Florida E. C. Ry.*, 318 F. Supp. 720, 730 (M.D. Fla. 1970), *aff'd per curiam*, 441 F.2d 728 (5th Cir. 1971). Cf. *Nolop v. Volpe*, 333 F. Supp. 1364 (D.S.D. 1971).

247. 309 F. Supp. 354 (N.D. Ohio 1969). With regard to problems of jurisdictional amount, see text accompanying notes 104-12 *supra*. With regard to class delineation, see text accompanying notes 177-80 *supra*.

248. The damages issue in *Biechele* is discussed more fully in the text accompanying notes 285-90 and 324-26 *infra*.

249. FED. R. CIV. P. 23(b)(1)(B).

justified both to protect the interests of other class members and to protect the opposing party. It is not difficult to think of a situation in which individual litigations of property owners' rights and duties with respect to a claimed nuisance would subject the defendant to incompatible adjudications.²⁵⁰ In such a case, rule 23(b)(1)(A) might be applicable as well as rule 23(b)(1)(B).

The use of rule 23(b)(1) seems to be of rather limited utility in environmental litigation. Whenever the problem is one of riparian rights or enjoining a nuisance, however, its use should be considered.

2. Rule 23(b)(2)

For the class plaintiff seeking injunctive relief, the obvious place to look would seem to be rule 23(b)(2). The rule itself states that it is designed for use when "final injunctive relief" is "appropriate."²⁵¹ But why bring a class action for an injunction? The injunction will either be granted or it will not, and one plaintiff can sue just as effectively as one million. On its face, such an "all or nothing" argument seems convincing. When one considers the fact that the subsection (b)(2) plaintiff risks final defeat for the entire class, since there is no provision allowing subsection (b)(2) class members to exclude themselves from the class as with subsection (b)(3), the utility of class suits seeking injunctions would seem to be marginal.

At least four reasons can be given in support of the usefulness of the subsection (b)(2) class actions. An obvious reason is the sharing of the costs of litigation; a single plaintiff might not be able to afford the expense of pressing his claim. Where a number of plaintiffs can join together to seek relief, an action may be possible when otherwise it would not.²⁵²

250. For example, what would the defendant in *Biechle* do if in one action he was enjoined from storing the kind of coal which caused the dust problem while a second court in a separate action required that he install covered bins for storing the coal to prevent the dust from escaping? With the growing use of partial and experimental injunctions in nuisance cases, such a result is not inconceivable. See generally D. DOBBS, REMEDIES § 5.7 at 360-61 (1973).

In at least one environmental suit originally brought by several conservation organizations, the defendant successfully petitioned the district court to have the suit designated a class action: "The threat of harassment through consecutive lawsuits was effectively foreclosed in this litigation by the court's order designating this suit a class action. . . . [I]n the absence of any requests to be excluded under Rule 23(c)(2) all members are bound by the decision of this court." *Sierra Club v. Hardin*, 325 F. Supp. 99, 110 (D. Alas. 1971).

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

252. Protection of the plaintiff with a small claim has long been recognized as a

The subsection (b)(2) action also gives the class plaintiff a "psychological advantage" over the individual plaintiff, based on the notion that there is strength in numbers.²⁵³ The Supreme Court recently took note of this particular advantage when it stated:

Rule 23 . . . provides for class actions which may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.²⁵⁴

This "more powerful litigation posture" is not just a recognition by the defendant that plaintiffs are financially more capable of pursuing the action. Such a class action may spur the court's recognition that plaintiffs are engaged in something more than a "strike" suit. The scope of the action, if brought on a class basis, together with the realization by defendant of both plaintiffs' financial ability to sustain the litigation and their seriousness of purpose²⁵⁵ may very well put defendant in a position in which the possibilities for settlement or compromise are greatly increased.²⁵⁶ Certainly this is more likely than if defendant faced only a single plaintiff.

Aside from the psychological effect of the class suit generally, the "strength in numbers" rationale assumes an even greater importance in suits to enjoin a nuisance. The modern approach in determining

justification for the class device. "To permit the defendants to contest liability with each claimant in a single, separate suit, would, in many cases, give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit practice was [designed] to prevent." *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 90 (7th Cir. 1941).

One court has recently recognized this factor in an environmental class action: "The policy reasons for permitting the conservation groups to represent the interests of their members in a class action are compelling. Any other rule would have the practical effect of preempting many meritorious actions, as one individual, or a small number of individuals, would have to sustain the entire financial burden of the lawsuit." *Sierra Club v. Hardin*, 325 F. Supp. 99, 110-11 (D. Alas. 1971).

253. See Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433, 435 (1960).

254. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972).

255. The psychological effect of instilling greater determination on the part of class members in pursuing the litigation has been noted by one writer in the context of consumer class actions:

The class action publicizes the named parties, clothed in the garb of dedicated selfless individuals rather than as "malcontents and eccentrics" who are attempting to upset the system by a frolic of their own.

. . . The class action compensates for a lack of cohesiveness and willingness to participate among poor persons which makes joint action by them often ineffectual. There is now a common fight against a known foe.

Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B.U.L. REV. 407, 410 (1969).

256. See, e.g., *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir.), cert. denied sub nom. *Cotler Drug Co. v. Chas. Pfizer & Co.*, 404 U.S. 871 (1971).

whether a nuisance should be enjoined is a balancing of the hardships and equities that will result to plaintiff if the nuisance is allowed to continue and to defendant if he is forced to cease the nuisance-producing activity.²⁵⁷ Whether plaintiff gets injunctive relief or only permanent damages (which, in effect, gives defendant an easement to continue his activities with regard to plaintiff's property)²⁵⁸ will be determined by how successful the plaintiff is in demonstrating the extent of the harm caused by the alleged nuisance. The use of a class action in such a case might well be the determinative factor in balancing the scales in favor of an injunction.

A final reason which supports the use of the class action to seek injunctive relief rests on the likelihood that such actions are more likely to call attention to the alleged environmental wrong and thus more likely to elicit public support for the action. As one writer has commented:

Apart from its legal and economic advantages, the class action has still another appealing feature—its capacity for forcing into public and judicial view the urgent issues concerning the contamination of the environment. In this respect the class action has been described by one commentator as “the judicial analogue to the mass demonstrations of the street [whose success] often hinges less on the ultimate outcome of the particular case than on the publicity, visibility and aroused popular reaction it evokes.”²⁵⁹

In assessing the usefulness of the subsection (b)(2) class action in environmental litigation, one recent commentator concluded:

In the current state of the law . . . the environmental class action for injunctive relief . . . seems a poor strategic choice. Indiscriminate selection of this form invites time-consuming objections by defendants eager to stall. More significantly, it also encourages adverse determinations by hostile judges, who are sometimes only too glad to cloak substantive dismissal in the garb of procedural defect.²⁶⁰

Despite this assessment, it should be noted that at least three recent suits to enjoin activities in violation of the National Environmental Pol-

257. See generally D. DOBBS, REMEDIES § 5.7 (1973); Juergensmeyer, *supra* note 40, at 1130-34.

258. See, e.g., *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970). In a suit by a single plaintiff, the New York Court of Appeals reversed the grant of an injunction against a \$45 million cement plant and granted permanent damages instead.

259. Comment, 16 WAYNE L. REV., *supra* note 1, at 1098 (quoting Starrs, *supra* note 255, at 408).

260. Comment, 2 ECOL. L.Q., *supra* note 1, at 564.

icy Act of 1969 (NEPA) have succeeded. Each was based on rule 23(b)(2), and each was aimed at a specific, limited objective. In *Nolop v. Volpe*²⁶¹ the court enjoined the construction of an interstate highway through the campus of the University of South Dakota. It found that failure of the Secretary of Transportation to file an environmental impact statement, as required by NEPA,²⁶² was a refusal to act "on grounds generally applicable to the class, thereby making appropriate final injunctive relief." *Harrisburg Coalition v. Volpe*²⁶³ involved the construction of an interstate highway through a park in Harrisburg, Pennsylvania. An *ad hoc* group of local residents joined in a subsection (b)(2) class action challenging the failure of the Secretary of Transportation to abide by several federal and state statutes governing highway construction²⁶⁴ as well as NEPA. The court required the Secretary of Transportation to submit an environmental impact statement in strict compliance with the standards set out in NEPA. The organizational plaintiff in *Izaak Walton League v. Macchia*²⁶⁵ was allowed to sue on behalf of "all persons having beneficial rights and interests" in the tidal marshes surrounding an island of Cape May, New Jersey.²⁶⁶ The subsection (b)(2) class action in *Macchia* was held maintainable as to plaintiffs' claims under NEPA for an injunction, a declaratory judgment, and pecuniary damages.²⁶⁷ The fear that a hostile judge would "cloak substantive dismissal in the garb of procedural defect" was obviously misplaced, at least in this particular court.

The class action seeking injunctive relief, while obviously no panacea, can serve a specific, limited purpose in the environmentalists' still meager arsenal. It has already demonstrated its usefulness in suits to enforce the requirements of NEPA and related statutes. It would also

261. 333 F. Supp. 1364 (D.S.D. 1971); see text accompanying notes 181 and 226-32 *supra*.

262. Such a statement is required by § 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1970).

263. 330 F. Supp. 918 (M.D. Pa. 1971).

264. Department of Transportation Act, 49 U.S.C. §§ 1651-58 (1970); Federal Aid Highway Act, 23 U.S.C. §§ 101-04 (1970); Pennsylvania Department of Transportation Act of 1970, 71 P.S. § 512 (Supp. 1972).

265. 329 F. Supp. 504 (D.N.J. 1971).

266. *Id.* at 507.

267. Although the merits of *Macchia* remained to be heard by the court, it is interesting to note that plaintiff's suit for an injunction to stop defendant's dredge and fill operation was allowed to carry with it a claim for damages incurred by the class. It is doubtful, however, that by merely pleading a damage claim together with a claim for injunctive relief under rule 23(b)(2), a plaintiff can escape the normal strictures that rule 23(b)(3) imposes on claims for damages.

appear to be of significant value in common law nuisance claims where there is diversity of citizenship or in which a state has a class action device similar to rule 23(b)(2).

3. Rule 23(b)(3)

Just as the environmental class action seeking an injunction will normally be cast in terms of rule 23(b)(2), the plaintiff who seeks damages on behalf of a class will ordinarily frame his action under the third category of rule 23(b). But for a very few exceptions, the case law dealing with subsection (b)(3) class actions in the environmental context is non-existent. One notable commentator has assumed that the very nature of the requirements of rule 23(b)(3) preclude an environmental class action seeking damages:

There has recently been a very great development of the so-called "class action." This is a suit in which one or more persons of a class whose rights are more or less similarly invaded can sue as representatives of the class. There are certain limiting conditions for such an action. There must be a common question of fact or law and all of those in the class must be entitled to common relief. *Of course, were the object of the suit to secure damages the latter condition would not be satisfied, since the amount of damages among the members of the class would differ depending on the amount and location of the property of each.*²⁶⁸

The writer takes an unnecessarily negative view. Although it is subject to the greatest abuse, rule 23(b)(3) is potentially the most valuable of the three categories for protecting the environment and the rights of small-claim plaintiffs. A rule 23(b)(3) class action for damages would certainly seem feasible where the plaintiff class is carefully delineated and the relief sought is reasonably circumscribed. Much of the discussion that follows will necessarily rely on analogy to the successful use of subsection (b)(3) class actions in securities fraud and antitrust cases. Much of the usefulness of the discussion is also dependent upon how strictly the jurisdictional amount standard is interpreted by the Supreme Court in *Zahn v. International Paper Co.*²⁶⁹

In order to maintain a subsection (b)(3) class action the plaintiffs must demonstrate, first, "that the questions of law or fact common to the members of the class *predominate* over any questions affecting

268. Jaffe, *Standing to Sue in Conservation Suits*, in *LAW AND THE ENVIRONMENT* 123, 130-31, (M. Baldwin & J. Page eds. 1970) (emphasis added).

269. 469 F.2d 1033 (2d Cir. 1972), *cert. granted*, 93 S. Ct. 1370 (1973) (No. 72-888); see text accompanying notes 4-10 and 125-34 *supra*.

only individual members" and secondly, "that a class action is *superior* to other available methods"²⁷⁰

(1) *Predominance*. There is no well-defined test to determine when common questions predominate, since there was no such requirement prior to the 1966 amendments to rule 23. It is clear that predominance does not call for a quantitative evaluation of how much time will be spent litigating the common questions as opposed to those questions that must be resolved individually for each class member.²⁷¹ Courts have also found predominance despite the fact that there is not a complete identity of facts that relate to each class member, so long as there is a "common nucleus of operative fact"²⁷² or a "common course of conduct"²⁷³ on the part of the defendant. Nor is it necessary that the common questions be determinative of the entire action.²⁷⁴

270. FED. R. CIV. P. 23(b)(3) (emphasis added).

271. The most emphatic rejection of the quantitative test was in *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559 (D. Minn. 1968), where the court, in an antitrust case, reasoned as follows:

[I]t is true that *as a class action* more time in toto will be spent in proof of individual damage claims . . . than will be spent in proof of conspiracy. . . . [I]t would seem, however, that the situation should be considered and compared to that which would exist were *no class action* to be allowed. So for instance, if there were to be but a single case for trial, the court would expect that the great bulk of the time of that trial would be consumed with proof or the attempted proof of the existence and effect of a conspiracy and that the fraudulent concealment and damage issues would be far less predominant in the sense of time consumed at trial. Were there to be 500 separate suits, this same pattern undoubtedly would prevail as to each. It seems specious and begging the question to say that if these 500 law suits were brought into a class so that proof on the issues of conspiracy need be adduced only once and the result then becomes binding on all 500, that thereby the common issue of conspiracy no longer predominates because from a *total time* standpoint, cumulatively individual damage proof will take longer.

Id. at 569 (emphasis added).

272. This phrase was first coined in *Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969). Although it was probable that defendant had made differing oral misrepresentations to numerous purchasers of his securities, the court found questions relating to the omission of certain material facts to be common to all of these misrepresentations. "Consequently," the court concluded, "there does exist as to the totality of issues a common nucleus of operative facts such as would justify allowing the class action to proceed under . . . Rule 23." *Id.* at 99. *Accord*, *Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484, 488 (N.D. Ill. 1969) ("a common core of questions").

The application of this "common nucleus" test appears to be quite analogous to the test for the finding of pendent jurisdiction announced in *UMW v. Gibbs*, 383 U.S. 715, 725 (1966), from which the key words were taken.

273. *See, e.g.*, *Epstein v. Weiss*, 50 F.R.D. 387, 393 (E.D. La. 1970); *Dolgow v. Anderson*, 43 F.R.D. 472, 489 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1970).

274. "The fact that questions peculiar to each individual member of the class may remain after the common questions have been resolved does not dictate the conclusion that a class action is not permissible." *Dolgow v. Anderson*, 43 F.R.D. 472, 490 (E.D.N.Y. 1968).

Professors Wright and Miller come no closer to defining a predominance standard than the following statement:

[W]hen common questions represent a *significant aspect* of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than on an individual basis.²⁷⁵

The standard is clearly a pragmatic one. Thus, with the relegation of predominance-determination to a case-by-case approach, the success of a subsection (b) (3) action may very well turn on the attitude of the particular court to whom the predominance arguments are addressed.

*In re Motor Vehicle Air Pollution Control Equipment*²⁷⁶ is a good example of the problem that faces the subsection (b)(3) litigant in attempting to show predominance in an environmental case. Plaintiffs alleged an unusual type of antitrust injury in the *Motor Vehicle* case: "injury resulting from pollution caused by the conspiracy to hinder and delay the research, development, manufacture and installation of effective motor vehicle air pollution control equipment." The conspiracy alleged by the plaintiffs was, in effect, "a conspiracy to maintain a public nuisance—smog."²⁷⁷ Thus, even though the court recognized that the conspiracy was a question common to all of the classes involved in the action, it could not predominate over the individual issues of "impact" and "damages." Unlike the price-fixing conspiracy cases on which plaintiffs relied,²⁷⁸ in which the question of defendants' liability was concluded by a determination that a particular plaintiff was a buyer at the illegally fixed price, the conspiracy alleged by the plaintiffs in *Motor Vehicle* required a determination, first, that smog could produce the type of injury alleged and, secondly, the amount of such damages. Since the alleged smog-produced injuries—which the court referred to as "impact"—would be "as varied as the public itself,"²⁷⁹ "impact" and the amount of damages were issues that would have to be litigated individually. The court determined that common questions did not predominate and thus that a class action on the particular issue of conspiracy could not be maintained.²⁸⁰

275. 7A WRIGHT & MILLER § 1778, at 53 (emphasis added).

276. 52 F.R.D. 398 (C.D. Cal. 1970); see discussion in text accompanying note 239 *supra*.

277. 52 F.R.D. at 404.

278. *In re Water Meters*, 304 F. Supp. 873 (J.P.M.L. 1969); *Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484 (N.D. Ill. 1969); *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452 (E.D. Pa. 1968).

279. 52 F.R.D. at 404.

280. Under FED. R. CIV. P. 23(c)(4), "when appropriate . . . an action may be brought or maintained with respect to particular issues"

It is interesting to note that the class actions in *Motor Vehicle* that were found to be maintainable involved classes of political subdivisions of a state, public corporations or authorities, municipal corporations, and all of the farmers in the United States. As to these classes, common questions were held to predominate.²⁸¹ Only as to the class in which governmental bodies attempted to represent their citizens individually were common questions found not to predominate. One wonders how the task of determining the effect of smog on "crops, fauna and flora" will be measurably less difficult than determining its effect on human beings, but the court's opinion gives no insight into this anomaly. Perhaps the answer lies in the fact that the classes that were held maintainable were smaller and more manageable, a rationale that has nothing to do with the predominance of common questions.

A problem similar to that which the court faced in the *Motor Vehicle* case was resolved in an identical manner in *Diamond v. General Motors Corp.*,²⁸² a class action brought in the state courts of California. Plaintiffs in *Diamond* purported to represent a class composed of all the citizens of Los Angeles County (7,119,184 persons) in a suit against 293 industrial corporations and municipalities who were alleged to have polluted the atmosphere of the County. The crux of plaintiffs' case was that defendants were maintaining a public nuisance. Under California law, a private person could maintain an action for a public nuisance only if it were "specially injurious to himself."²⁸³ In evaluating the difficulties that would arise in trying to resolve special damages issues in a class setting, the court in effect summarized the major problem that the subsection (b)(3) plaintiff must overcome in federal court anytime he seeks damages:

Whether an individual has been specially injured in his person will depend largely upon proof relating to him alone—going to such matters as his general health, his occupation, place of residence, and activities. Whether a parcel of real property has been damaged will depend upon its unique characteristics, such as its location, physical features and use.²⁸⁴

At least two cases of considerably less magnitude have found com-

281. "Although there may be some differences in the effect of smog on various crops or the fauna and flora of a state, political subdivision, public corporation or public authority, the pleadings as they now stand do allege a class properly represented . . . with respect to common issues of law and fact which predominate over questions affecting only individual members." 52 F.R.D. at 404.

282. 20 Cal. App. 3d 374, 97 Cal. Rptr. 639 (Ct. App. 1971).

283. CAL. CIV. CODE § 3493 (West 1970).

284. 20 Cal. App. 3d at 379, 97 Cal. Rptr. at 643.

mon questions to predominate. One, in which only an injunction was sought under both subsections (b)(2) and (b)(3), found that the common question of defendant's failure to file an environmental impact statement predominated over any individual issues so as to justify the (b)(3) action.²⁸⁵ The crucial area of consideration, however, is that dealt with in *Biechele v. Norfolk & Western Railway Co.*²⁸⁶ As will be recalled from an earlier discussion, *Biechele* involved the pollution of a portion of Sandusky, Ohio, by coal dust from defendant's coal storage and loading facilities. Assuming jurisdiction of plaintiffs' subsection (b)(3) action through removal jurisdiction,²⁸⁷ the court held *without discussion* that common questions predominated even though it was obvious that if defendant were found liable the court would be faced with 731 separate claims for damages.²⁸⁸ Though it could be argued that most of these damages would be of a similar nature—the cost of cleaning up the personal property on which the coal dust accumulated—the opinion of the court does not seem to bear out the notion that only a limited scope of damage recovery was being considered. “The factual conclusion is inescapable,” the court stated, “that the plaintiffs were injured in various respects, and to various extents, in their real estate, their personal property and effects, and in their persons by large quantities of coal dust blown from the shipping and storage facilities of the defendant.”²⁸⁹

What were the common questions in *Biechele* that were held to be predominant? Clearly liability of the defendant was the major area that the court found to be common to all members of the class. Just as clearly, the amount of each class members' damages had to be determined individually. The only remaining issue was that of causation or, as the *Motor Vehicle* court put it, “impact.” The *Biechele* court made an attempt to handle part of the causation issue as a common question. It permitted testimony at trial to show the various types of damage which could be caused by “airborne coal dust.”²⁹⁰ This use of expert testimony to delineate the scope of actual causation was important in that it reduced the scope of inquiry of the special master

285. *Nolop v. Volpe*, 333 F. Supp. 1364, 1367 (D.S.D. 1971).

286. 309 F. Supp. 354 (N.D. Ohio 1969); see discussion in text accompanying notes 247-49 *supra*.

287. For a discussion of how the *Biechele* subsection (b)(3) action escaped the jurisdictional amount requirement, see text accompanying notes 104-12 *supra*.

288. 309 F. Supp. at 355.

289. *Id.* at 357.

290. *Id.*

appointed to determine damages. Plaintiffs were left in such a position that, individually, they had only to show that they were in fact injured and the amount of the injury.²⁹¹ The question of whether defendant's conduct *could* cause plaintiffs' injury was determined largely as a common question.

The innovative manner in which the court in *Biechele* handled the problem of actual causation can be utilized in other types of pollution cases in which the effects of the pollutant on property and persons is capable of determination through expert witnesses. The plaintiffs can perhaps utilize subclasses under rule 23(c)(4) when the effects of the pollutant fall into specific categories. Even where the causation issue cannot be determined in a common setting, plaintiffs may still convince a court that a class action on a particular issue—the defendant's liability—will result in a considerable savings of the court's time and effort and the parties' expense. Even where a court is uncertain as to whether common questions predominate or a class action on a particular issue is appropriate, the plaintiffs may seek a "conditional order"²⁹² that the action is maintainable, subject to a later alteration or amendment by the court striking the class action portion of the complaint when it becomes clear that common questions do not predominate or the action is unmanageable.

Most of the discussion that concerns meeting the standard of predominance in environmental actions for damages should be prefaced with a caveat. Except for a case which arose before the 1966 amendments,²⁹³ only the *Biechele* case provides a favorable precedent for finding predominance under subsection (b)(3) in class actions for damages. And *Biechele*, when one considers how jurisdiction over the action was obtained,²⁹⁴ looms as a rather special case in itself.

(2) *Superiority*. Rule 23(b) also requires that a class action be "superior to other available methods for the fair and efficient adjudication of the controversy." The thrust of the superiority determination is explained by Professors Wright and Miller as follows:

291. *Id.* at 359.

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

293. *Foster v. City of Detroit*, 405 F.2d 138 (6th Cir. 1968). Defendant brought condemnation proceedings against property in a 25-block area; the proceedings remained pending for some 10 years before they were dismissed. Plaintiffs, residents of the area, sued for damages resulting from the deterioration of property value while the proceedings were pending. In an action under old rule 23's "spurious" class action category, the court stated: "In the present case there are important common questions of law and fact affecting all members of the class which override the factual differences regarding the damages suffered by each individual." *Id.* at 146.

294. See text accompanying notes 104-12 *supra*.

The rule requires the court to make a determination that the objectives of the class action procedure really will be achieved *in the particular case*. In determining whether the answer to this inquiry is to be affirmative, the court must initially consider what other procedures, if any, exist for disposing of the dispute before it. It then must compare the possibilities to determine whether Rule 23 is sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the Court.²⁹⁵

Among the alternatives to the class action that must be considered are individual actions, the test case, and multidistrict consolidation. In most environmental class actions the search for alternatives will be fruitless; the question will be one of a class action or else no relief at all. The environmental plaintiff seeking damages generally has a claim too small to merit individual litigation other than in a class setting. If the class action is maintainable, such that the other requirements of rule 23(a) and (b) are met, a finding that it is superior to other means of adjudicating the claim will, ordinarily, present no problem.²⁹⁶

(3) *Manageability*. To aid the court in determining predominance and superiority, rule 23(b) lists four factors that are "pertinent" to its findings:

- (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
- (D) the difficulties likely to be encountered in the management of a class action.

Although the first three of these factors are by no means unimportant,²⁹⁷ the fourth—manageability—looms as the most crucial for the environmental plaintiff. In most cases the manageability issue is closely related to that of superiority; however, in environmental class actions seeking damages, where there is usually no question of superiority, the manageability standard assumes greater significance. The issue usually determines whether or not there will be a lawsuit; if a class action is

295. 7A WRIGHT & MILLER § 1779, at 59 (emphasis added).

296. See 7A WRIGHT & MILLER § 1779, at 61; 3B MOORE ¶ 23.45[3], at 23-807 to -808.

297. For a discussion of the meaning which courts have given to rule 23(b)(A), (B) and (C), see 7A WRIGHT & MILLER § 1780, at 64-74.

found to be unmanageable there will be no action, by a class or by an individual, because plaintiffs' claims are normally too small to be worth asserting individually.

Recognizing the "all or nothing" aspect of the manageability determination, the court in the *Motor Vehicle* case concluded:

Manageability of the classes alleged herein may certainly tax the imagination and ingenuity of the litigants, counsel and the court. But until management is recognized as impossible or near impossible, the Court will depend upon the ingenuity and aid of counsel to solve the complex problems this litigation may bring. If successful, the economies of time, effort and expense will more than compensate the effort.²⁹⁸

While a court should never find an action unmanageable because it will result in a complex, lengthy adjudication,²⁹⁹ there is a point at which the court must consider whether the court is capable of resolving the issues which plaintiffs present. Four problems are frequently responsible for the judgment of the court that an action is unmanageable—the size of the class and the number of defendants, the scope of relief requested, the presence of issues requiring individual adjudication, and the difficulties of providing proper notice to the class.

The size of the class and the scope of relief requested on its behalf are very often factors considered by a court even though it dismisses the case for other reasons. For example, the requirements of rule 23(a) that there be a properly defined class and that it be adequately represented are essentially issues of management. The court in *City of Chicago v. General Motors Corp.*³⁰⁰ while it dismissed the action under rule 23(a)(4) after finding antagonistic interests within the class, could not have avoided consideration of the broader management problems that would result from any attempt to deal with "that gigantic and extraordinarily diverse class."³⁰¹ And the court in *Dia-*

298. 52 F.R.D. at 404.

299. Professors Wright and Miller state:

In no event should the court use the possibility of becoming involved with the administration of a complex lawsuit as a justification for evading the responsibilities imposed on federal judges by Rule 23. If judicial management of a class action, no matter what its dimensions may be, will reap the rewards of efficiency and economy for the entire system that the draftsmen of the federal rule envisioned, then the individual judge should undertake the task. Ironically, those Rule 23(b)(3) actions requiring the most management may yield the greatest payoff in terms of effective dispute resolution.

7A WRIGHT & MILLER § 1780, at 76.

300. 332 F. Supp. 285 (N.D. Ill. 1971), *aff'd*, 467 F.2d 1262 (7th Cir. 1972); see text accompanying notes 234-38 *supra*.

301. 332 F. Supp. at 288.

mond v. General Motors Corp.,³⁰² even if it could have dealt with a class of over seven million, recognized that it was being called upon to do what the elected officials of the state had not done—*i.e.*, find a solution to the problem of automobile pollution. The damage relief sought by plaintiffs in *Diamond* would result, the court realized, in a situation in which “the critical fact of injury would have to be litigated on distinct facts by each of the seven million residents against each of the [293] defendants.”³⁰³ Where the defendant is a single polluter and the results of his pollution are clearly distinguishable from other sources of pollution in an area, as in *Biechele*, manageability may be achieved. But the relief sought by plaintiffs in *Diamond* (and most of the other motor vehicle pollution cases), when considered with the size of the class involved, presented issues that were beyond the competence of the courts. Even utilization of the various techniques provided for in rule 23(c) and (d) to facilitate administration cannot compensate for the follies of the over-ambitious litigant.

The situation in *Zahn v. International Paper Co.*³⁰⁴ is different. The court there reasoned that a class action was not proper because assessment of two hundred damage claims would be “an enormously time consuming task”³⁰⁵ and, at any rate, rule 23(b)(3) was not intended for use in a mass tort situation.³⁰⁶ But was the “tort” that plaintiffs alleged in *Zahn* the type of claim that the Advisory Committee had in mind when it delivered its judgment as to the utility of the subsection (b)(3) device in “mass accident” cases? Clearly there was a tort in *Zahn*, but it was a tort that involved an intentional act and not the negligence issues of a mass accident situation.³⁰⁷ There appears to be nothing “accidental” about defendants’ action in *Zahn*. Then, too, the Advisory Committee probably used the term “mass accident” to refer to airplane crashes, train wrecks, and similar disasters in which each plaintiff has a substantial claim for personal injury. While the Advisory Committee felt that such claims could be left to the individual plaintiffs without fear that the claims would not be brought absent

302. 20 Cal. App. 3d 374, 97 Cal. Rptr. 639 (Ct. App. 1971).

303. *Id.* at 379, 97 Cal. Rptr. at 643.

304. 469 F.2d 1033 (2d Cir. 1972), *cert. granted*, 93 S. Ct. 1370 (1973) (No. 72-888); *see* text accompanying notes 4-10 *supra*.

305. 469 F.2d at 1036.

306. The court in *Zahn* relies on an analogy to the suggestion of the Advisory Committee on rule 23 that the rule was not designed for use in “mass tort” situations. *Id.* *See* Advisory Committee Note, 103.

307. Indeed, this may very well be a case where a theory of strict liability is applicable. *Cf. Biechele v. Norfolk & W. Ry.*, 309 F. Supp. 354, 358 (N.D. Ohio 1969).

the class setting, such is often not the case where an environmental tort is alleged. As discussed earlier,³⁰⁸ the question is essentially one of maintaining a class action or receiving no relief at all. The latter result was not necessarily intended by the Advisory Committee in its "mass accident" caveat.

The *Zahn* court's reliance on the "flood of litigation" argument and the enormous amount of time that resolution of the damages issue would require seems more obviously misplaced. At the very least, a class action on the particular issue of liability would be manageable under rule 23(c)(4)(A). To throw plaintiffs out of court because they present small claims that are difficult to ascertain is to encourage polluters to insulate themselves from any liability by spreading out the pollution so as to yield only small damage claims. "Difficulty of ascertainment [of damage] is no longer confused with right of recovery."³⁰⁹ To do so, Chief Justice Stone has said,

would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain.³¹⁰

The *Zahn* court's remarks as to manageability are only dicta, the jurisdictional amount question having already been decided against plaintiffs, but what they portend for environmental class actions seeking damages, at least in the Second Circuit, is discouraging.

(4) *Notice*. In the preceding discussion, three of the four most common manageability problems were discussed—size, scope of relief, and presence of individual issues. The problem of notice is reserved for separate discussion since it carries with it due process as well as manageability considerations such as cost and practicability.

Rule 23(c)(2) requires that class members in subsection (b)(3) class actions be given "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Each class member must be advised that (1) he can exclude himself from the class if he so requests and the judgment will not include him, (2) if he does not exclude himself, the judgment will include him "whether favorable or not," and (3) he may enter an appearance through counsel if he does not wish to be excluded. Rule 23(d)(2) provides for additional, discretionary

308. See text accompanying notes 295-97 *supra*.

309. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 566 (1931), quoting *Straus v. Victor Talking Machine Co.*, 297 F. 791, 802 (1924).

310. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946).

notice procedures that the court may utilize in order to protect the interests of the class.

Framed in the light of *Mullane v. Central Hanover Bank & Trust Co.*,³¹¹ the requirements of rule 23(c)(2) are essential to guarantee due process in subsection (b)(3) class actions. Those requirements, however, leave a great deal of leeway to the courts to determine what is "practicable" and when a "reasonable effort" has been made to identify individual class members. Thus the notice determination yields itself only to a case-by-case approach, as the facts and circumstances of each particular case dictate. The two primary notice problems with which the environmental plaintiff in a subsection (b)(3) action must be concerned are when individual notice is required and, if such notice is not required, what other form of notice is the "best notice practicable under the circumstances."

The question of whether individual notice is required has been greatly illuminated by the Second Circuit's recent decision in *Eisen v. Carlisle & Jacquelin (Eisen III)*.³¹² *Eisen* was a class action brought by a single plaintiff on behalf of over three million persons who purchased securities in odd lots on the New York Stock Exchange. Plaintiff alleged that defendants, the two major odd lot dealers, had conspired to monopolize trading and to fix the odd lot differential at an excessive figure. The Second Circuit decided that the original dismissal of the case had been too summary and had applied improper standards under rule 23; the case was remanded to the district court for further consideration (*Eisen II*).³¹³ Four years later, when the case returned to the Second Circuit, the class had grown to more than six million persons, of which 2,250,000 could be "easily identified."³¹⁴ In an attempt to comply with the notice provisions of rule 23, the district court had ordered individual notice to the approximately two thousand class members who had ten or more odd lot transactions during the period relevant to the litigation and to five thousand other class members selected at random from among the 2,250,000 who were easily identifiable. As to the rest of the class, the court approved a schedule of publications of the action designed to "increase the likelihood of reaching a significant portion of the class."³¹⁵ In approving such a notice procedure, the district court was aware of the fact that the initial finan-

311. 339 U.S. 306 (1950).

312. Nos. 72-1521, 30934 (2d Cir., May 1, 1973).

313. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968).

314. Nos. 72-1521, 30934, at 3222.

315. *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253, 267 (S.D.N.Y. 1971).

cial burden of notice could be so prohibitive to representatives with only small claims that a class action would become impossible. As the court noted:

Where a class consists of a large number of claimants with relatively small individual claims, notice to individual class members, as a legal and practical matter, becomes less important and need not be unduly emphasized or required.³¹⁶

Despite recognition of the district court's desire to make the class action device viable in the case, the court of appeals disallowed the district court's solution to the notice problems of *Eisen*. It held that individual notice was not a matter of discretion on the part of the trial judge but was controlled by the language of rule 23(c)(2) that "notice to the class generally shall be the 'best notice practicable,' and then 'including individual notice to all members who can be identified through reasonable effort.'"³¹⁷ It is unlikely that the *Eisen III* decision will significantly affect notice in environmental class action because, unlike the widely dispersed classes arising out of securities frauds and antitrust violations, classes in environmental cases tend to be geographically contiguous. Additionally, whereas in cases such as *Eisen* there is usually some record of the plaintiff-class member's transaction with the defendant which makes individual identification of the class members (or large numbers of them) possible, there is no "transaction" between class members and defendants in the typical case of environmental injury and, consequently, no basis for individual identification. Thus, the usual environmental class plaintiff, because of the contiguity of the class and the lack of a basis for individual identification, would seem to be in a much easier position to argue that the "best notice practicable" is notice by publication.³¹⁸ Nevertheless, the Second Circuit's strict adherence to the language of rule 23(c)(2) in *Eisen III* must not be ignored, nor should its attitude³¹⁹ toward large classes be overlooked, even by the environmental plaintiff.

316. *Id.* at 266.

317. Nos. 72-1521, 30934, at 3234 (quoting FED. R. CIV. P. 23(c)(2)). The court of appeals also cited the Advisory Committee's Note, which stated: "Indeed, under subdivision (c)(2), notice must be ordered, it is not merely discretionary. . . ." 39 F.R.D. 69, 106-07 (1966).

318. "The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." *Schroeder v. City of New York*, 371 U.S. 208, 212-13 (1962).

319. The court of appeals in *Eisen III* noted that while "amended rule 23 provides an excellent and workable procedure in cases where the number of members of the

In each of the three³²⁰ environmental cases that have considered the question, notice by publication has been found the "best notice practicable." In the *Nolop* case the district court ordered⁸ publication of notice in the University newspaper and over the University's radio and television stations "because of the high cost of individual mailing."³²¹ And in *Biechele*, the district court found as follows:

No list of the potential members of the class in the damage suit was available nor could one have been compiled. Therefore the Court determined that the best possible service would be by publication of its orders delineating the class and requiring the presentation of claims together with the notice required by Rule 23(c) (2) of the Federal Rules of Civil Procedure. It was, however, determined that the publication in the Sandusky Register would not be a standard legal notice, but would be prominently placed so that the class members would better have the attention drawn to it.³²²

Though in certain non-environmental cases the very notoriety of the case has been held to constitute adequate notice,³²³ prominent³²⁴ publication will normally be required in newspapers with wide circulation³²⁵ within the particular area involved. In addition to the notice required by rule 23(c)(2), the court may utilize a second notice under rule 23(d)(2) after the defendant's liability has been established. At this time the court may require each individual class member to file a statement of his claim or else be barred from any recovery.³²⁶

(5) *Determination and Distribution of Damages.* The most devastating argument that a defendant has against the maintenance of a class action for damages under rule 23(b)(3) is that a determination of damages requires separate trials as to each member of the class. This, the defendant will argue, demonstrates that common questions do not predominate and that the class action is unmanageable. Antici-

class is not too large," Nos. 72-1521, 30924, at 3243, the very large class actions amount to little more than procedures for "legalized blackmail." *Id.* at 3242. In such a situation, "[w]here there are millions of dispersed and unidentifiable members of the class," the use of notice by publication is "a farce." *Id.* at 3239.

320. *Nolop v. Volpe*, 333 F. Supp. 1364, 1367 (D.S.D. 1971); *Zahn v. Int'l Paper Co.*, 53 F.R.D. 430, 433 (D. Vt. 1971), *aff'd*, 469 F.2d 1033 (2d Cir. 1972), *cert. granted*, 93 S. Ct. 1370 (1973) (No. 72-888).

321. 333 F. Supp. at 1367.

322. 309 F. Supp. at 356.

323. *Johnson v. Robinson*, 296 F. Supp. 1165 (N.D. Ill. 1967), *aff'd per curiam*, 394 U.S. 847 (1969); *Snyder v. Board of Trustees*, 286 F. Supp. 927 (N.D. Ill. 1968).

324. *See Herbst v. Able*, 49 F.R.D. 286 (S.D.N.Y. 1970).

325. *See, e.g., Contract Buyers League v. F & F Investment*, 48 F.R.D. 7 (N.D. Ill. 1969).

326. 309 F. Supp. at 359.

pating this argument, the plaintiffs must demonstrate to the court a manner in which damages can be determined and distributed without overtaxing the court's capabilities.

One approach, adopted in an environmental class action context in *Biechele*³²⁷ and *Foster*,³²⁸ has been the appointment of a special master. The court in the former case appointed a local resident as master and charged him with fixing a deadline by which time all claims against the defendant should be filed in the form of a written statement. The master was to work with counsel in preparing forms and instituting procedures for the filing and processing of claims, "with the objective of reducing to a minimum the number of claims which will have to be heard upon the evidence."³²⁹ Where the claim could not be stipulated, the court required that the claimant pay the cost of the master's hearing if his recovery did not exceed one hundred dollars.³³⁰

While such a procedure may be adequate for comparatively small classes, it clearly is no answer where the class numbers in the thousands, and even millions. To deal with the problem of damage recoveries in large classes, a number of recent litigants have sought to remind the courts that the class action was "an invention of equity" and that under the merged system federal courts are free to utilize equitable powers even where the remedy sought has been traditionally denominated as "legal."³³¹ To this end, plaintiffs have asked the courts to award a single damage recovery, consonant with the total injury inflicted by the defendant on the class or with the amount of his unjust enrichment. Once damages have been determined in this manner, their distribution can take one of two forms.

The first is the "lump sum recovery." After the total amount of damages is determined, the court, with the aid of counsel, determines an appropriate means of apportioning that amount among class members. The approach was adopted in a court-approved settlement under rule 23(e) in *West Virginia v. Chas. Pfizer & Co.*³³² Defendants offered a settlement of one hundred million dollars. The court then requested, and plaintiffs responded with, plans for distribution of that

327. See text accompanying notes 247-49 and 285-90 *supra*.

328. See note 203 *supra*.

329. 309 F. Supp. at 359.

330. *Id.*

331. Sedler, *Conditional, Experimental and Substitutional Relief*, 16 RUTGERS L. REV. 639 (1962).

332. 440 F.2d 1079 (2d Cir.), *cert. denied sub nom.* Cotler Drug Co. v. Chas. Pfizer & Co., 404 U.S. 871 (1971).

sum. Despite these plans some individual purchasers of drugs from defendant never presented their claims, leaving part of the lump sum undistributed. Plaintiffs, however, had also anticipated this problem by devising a notice procedure by which consumers who did not come forward with their claims were held to have assigned them to the attorneys general of the various states who had also been plaintiffs in the action. The utilization of a similar device in environmental class actions for damages would seem equally useful. Courts may however, wish to alter the so-called *cy pres*³³³ remedy that was utilized in *Pfizer*. One possibility is to divide damages among the individual members of the class who do, in fact, present claims; however, since it would result in a windfall to the plaintiff, it "might encourage the bringing of class actions likely to result in large uncollected damage pools."³³⁴ A more beneficial distribution would probably result from an assignment to the state conditioned on its use of such funds³³⁵ for purposes specified by the court, such as maintenance of state environmental protection agencies or research into new techniques of pollution control.

A second apportionment technique for distribution of a single fund damage award has been termed the "fluid class recovery." It is, essentially, only an additional variation of the *cy pres* remedy for distribution of the excess portion of the damage fund not claimed by individual class members. Although first utilized in *Darr v. Yellow Cab Co.*³³⁶ to distribute damages after a settlement was reached, the most notable attempt to use this distribution technique was in *Eisen v. Carlisle & Jacquelin*.³³⁷ The district court, in determining whether the action was maintainable as a class action, recognized that no procedure that envisaged presentation of personal claims would be manageable under the terms of rule 23(b)(3). Only some type of single-

333. The "cy pres" remedy, as it is used in the class action context, is an analogy to the *cy pres* doctrine that is used by courts to effectuate testamentary charitable gifts which would otherwise be invalid. See Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448, 452-53 (1972) [hereinafter cited as *Cy Pres*].

334. *Cy Pres* 453.

335. See, e.g., *Market St. Ry. v. Railroad Comm'n*, 28 Cal. 2d 363, 171 P.2d 875, cert. denied, 329 U.S. 793 (1946).

336. 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967). In the *Daar* case, the defendant made illegal charges to persons using its services. The case was settled under an agreement that such overcharges were to be returned to the injured customers by way of a reduction in fares that would deplete the agreed-upon settlement fund over a period of years. However, "*Daar* is an uncertain authority outside the settlement context since the court stated that the individuals injured by the overcharge would ultimately have to prove their individual claims." *Cy Pres* 460 n.52.

337. 52 F.R.D. 253 (S.D.N.Y. 1971), *rev'd*, Nos. 72-1521, 30934 (2d Cir., May 1, 1973). See text accompanying notes 221 and 311a-17 *supra*,

sum damage recovery was possible. The district court rejected defendant's argument that a separate calculation of damage was required for each individual plaintiff. The court said that the gross amount of damages to the entire class could be determined from defendant's records and public documents. But a new problem had to be faced; could it be expected that any significant portion of the class, which by 1971 numbered over six million, would come forward to claim their individual damages? If not, was this not merely a lawsuit of substantial benefit only to the attorneys whose fees came off the top? To escape this dilemma the court designed a "fluid class recovery."³³⁸ Under the procedure outlined by the court, individual class members would have a period of time in which to prove and collect damages after a determination of defendants' liability and the award of gross damages. After individual damages were collected, the odd-lot differential in transactions involving defendants would be reduced by an amount determined by the court until such time as the amount of reductions in the odd-lot differential equaled the amount of uncollected damages.³³⁹ The Second Circuit termed such a method of damage distribution "fantastic" and, even if permitted by rule 23, unconstitutional because violative of due process.³⁴⁰ That court further stated:

. . . As it now reads amended Rule 23 contemplates and provides for no such procedure. Nor can amended Rule 23 be construed or interpreted in such fashion as to permit such procedure. We hold the "fluid recovery" concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper.³⁴¹

With the dismissal of *Eisen*, the use of the fluid class recovery will likely be relegated once more to the drawing boards of the com-

338. Judge Tyler said:

Distribution of an eventual recovery to the class members in a case such as this one need not be viewed solely in terms of personal and individual damages and recoupment thereof

. . . I think it appropriate, as plaintiff urges, to consider distribution of damages to the class as a whole rather than to adopt, at this initial, planning stage, an inflexible mold of recovery running to specific class members. To emphasize individual recovery is to unduly stress considerations not totally relevant to the conditions of this case, especially the small amounts of potential recoveries by most class members, which, absent the class device, would effectively bar suit by the majority of odd-lot investors. Perhaps fortuitously, the repetitive activity of the principals in odd-lot transactions makes it possible to fashion a procedure which will assure that the benefits of any recovery will flow in the main to those who bore the burden of defendants' allegedly illegal acts.

52 F.R.D. at 264-65.

339. *Cy Pres* 459-60.

340. Nos. 72-1521, 30934, at 3241.

341. *Id.*

mentators. Were it permitted, the advantages of the fluid class recovery are readily apparent. In class actions where members of the class are difficult, if not impossible, to identify, it provides a method by which members of the class who continue to deal with the defendant can share in the recovery. It also has the advantage of preventing defendant from retaining illegal profits. But the fluid class recovery, at least in the form utilized by the *Eisen* court, is inapplicable to the environmental class action for damages. Take the example of the factory that injures plaintiffs by polluting the air where plaintiffs reside. Plaintiffs have engaged in no "transaction" with defendant as had the plaintiffs who bought stock through the *Eisen* defendants. Their misfortune was to live near defendant's factory. As a geographically defined class, they will not necessarily benefit from a reduction of the price of goods that defendant produces. Although a gross damage award may strip defendant of illegal profits by forcing him to "internalize" the external costs that his actions might cause others to bear,³⁴² the fluid class recovery technique does not guarantee any relief to plaintiffs and certainly not in the amount which they have actually been harmed. While some commentators would perhaps consider such a method of apportionment despite this weakness,³⁴³ most courts, given a choice between lump-sum recovery and fluid class recovery, will more likely choose the former in an environmental class action. If the state is allowed to receive whatever residue remains after individual damages are collected, the court can condition the use of those funds so as to more likely ensure benefit to the class than if the uncollected damages were distributed through the market system.

This distinction between lump sum and fluid class recovery, while valid for the discussion above, may ultimately prove useless if the reasoning of the Second Circuit in *Eisen III* is followed. In using the term "fluid recovery," the court of appeals seemed to object to the procedure of assessing damages to "the class as a whole" rather than to the manner of distribution to the class once such gross damages have been calculated.³⁴⁴ Such a determination of gross damages is common to both the lump sum and fluid class recovery, and the two methods can be distinguished only by the way in which the damages are distributed once the gross damage figure is ascertained. If the assessment of damages to "the class as a whole" is beyond the scope of rule

342. See text accompanying notes 35-56 *supra*.

343. *Cost-Internalization* 419.

344. Nos. 72-1521, 30934, at 3225-9.

23 then any method of damage distribution utilizing the *cy pres* technique would be possible only in a case such as *Pfizer* where the defendants' willingness to settle the case yields a fund determined by the parties themselves and not by the court via rule 23.

Even if the lump sum recovery were allowed by other circuits, two significant problems are raised by the use of these types of damage determinations; one is common to all class actions that utilize them, and the second, to the environmental class action in particular. Whether defendant has a right to jury trial in a class action seeking damages is a question faced by all subsection (b)(3) litigants. The Supreme Court seemingly resolved the issue in *Ross v. Bernhard* when it said that "it now seems settled in the lower federal courts that class action plaintiffs [and, presumably, defendants as well] may obtain a jury trial on any legal issues they present."³⁴⁵ Although this statement was only dictum, it now seems clear that where plaintiff sues on an historically legal cause of action, such as a suit for money damages, the jury trial right is preserved even if the claim is brought in the form of a class action.³⁴⁶ Thus, where defendant has a right to jury trial, it would seem possible that he could defeat damage determination by a master, lump-sum recovery, or fluid class recovery simply by demanding his seventh amendment right.³⁴⁷ Professors Wright and Miller are convinced that separate submission of the liability and damage issues to a jury does not violate the seventh amendment, nor, they believe, is the submission of issues separately to different juries constitutionally proscribed.³⁴⁸ They warn, however, that

separate trial of a particular issue cannot be ordered in the first instance where the issue is so interwoven with the other issues that it cannot be submitted to the jury independently of the others without confusion and uncertainty which would amount to a denial of a fair trial.³⁴⁹

Subject to the above warning, plaintiffs will probably be able to satisfy the seventh amendment demands in cases where the lump sum or fluid class recovery devices are utilized. These devices can probably escape any seventh amendment challenge simply by allowing a

345. 396 U.S. 531, 541 (1970).

346. See *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

347. It should be noted that the jury trial right also calls into question the use of the class action on particular issues which rule 23(c)(4) affords to the court to help facilitate manageability.

348. 9 WRIGHT & MILLER § 2391, at 302-03; 7A WRIGHT & MILLER § 1801, at 269.

349. 9 WRIGHT & MILLER § 2391, at 303.

single jury to determine liability and award the damage sum as well; there appears to be no reason why two juries are required. A different question is presented when the use of special masters is involved. Such a procedure very clearly denies defendant his right to a jury determination of damages. "Thus, it must be used only in the most exceptional circumstances to be certain that the policies of the Seventh Amendment are not violated."³⁵⁰

The most crucial problem that plaintiffs must face in convincing a court to utilize the single damage award is demonstrating how a total damage figure can be calculated. Unlike the consumer class action, such as *Eisen*, the plaintiffs cannot point to defendants' records and public documents as a reliable indicator of their total damages. While it is true that courts have not required certainty of damages where there is injury in fact and reasonable evidence upon which to estimate total injury, the plaintiffs must produce proof sufficient to make a "just and reasonable inference" as to the amount of their damages.³⁵¹ For the environmental plaintiff this will undoubtedly be a difficult and expensive task, if it is possible at all.

Suppose a factory were emitting pollutants into the air. Even if plaintiffs could prove how much of the pollutant had been emitted during the period in which damages are to be calculated, how could they determine the amount of damages? Certainly traditional methods of proof are of no avail. Where the individual damages issues are to be handled by a master, plaintiffs could offer scientific testimony as to the types of damage that could be caused by the particular pollutant and the area that such a pollutant would be likely to affect. Such testimony would serve as independent verification of the asserted claims.³⁵² This approach was employed in the *Biechele* case, in which expert witnesses were used to establish a model of pollution dispersion to aid the court in determining the membership of the class. Further

350. 7A WRIGHT & MILLER § 1801, at 269. Even if the damage determination procedure were found to be violative of the traditional concept of right to jury trial, Professors Wright and Miller suggest that such concepts should be modified where the class action would otherwise be disallowed. They argue as follows: Simplifying the process of establishing individual claims may be the only way of making it economically feasible for class members to come forward and assert their rights and some of the procedural patterns that are considered fundamental when the litigation involves the single plaintiff and a single defendant will have to be abandoned. *Id.* § 1784, at 122-23.

351. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).

352. The use of expert witnesses to corroborate proffered testimony is discussed in 2 J. WIGMORE, EVIDENCE §§ 445-60 (3d ed. 1940).

expert testimony in *Biechele* was utilized to indicate the boundaries of actual causation.³⁵³ This approach is useful, however, only when individual class members present their claims before any determination of the amount of damages is made. It would not be useful in projecting damages for a lump-sum damage award.

Two possible approaches for projecting a gross damage figure in environmental class actions are indicated by the Federal Judicial Center's *Manual for Complex and Multidistrict Litigation*. The court may attempt to approximate a damage sum based on statistical sampling techniques.³⁵⁴ The Coordinating Committee for Multidistrict Litigation has concluded:

Scientifically designed samples and polls, meeting the tests of necessity and trustworthiness, are useful adjuncts to conventional methods of proof and may contribute materially to shortening the trial of the complex case.³⁵⁵

If such a sample can be accurately designed, plaintiffs might argue that individual claims need not be analyzed.³⁵⁶ Whether or not a court would admit such evidence, by itself, as proof of the amount of damages to a large class, especially when large sums of money are involved, must be seriously doubted.

Plaintiffs may also attempt to make use of computer analysis. Models of adverse health effects in various urban environments have already been extensively developed.³⁵⁷ These include estimates of damages. Such a model might be used in combination with geographically particularized pollution dispersion evidence, such as that relied upon in *Biechele*,³⁵⁸ and the statistical sampling method discussed above. A computer might be able to analyze these various types of data. The Coordinating Committee for Multidistrict Litigation recognized the possible usefulness of such an approach when it stated:

353. See text accompanying notes 289-90 *supra*.

354. Such proof is admissible, if its reliability can be adequately demonstrated, within exceptions to the hearsay rule "where otherwise great practical inconvenience would be experienced in making the desired proof." *United States v. Aluminum Co. of America*, 35 F. Supp. 820, 824 (S.D.N.Y. 1940).

355. FEDERAL JUDICIAL CENTER, *MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION* § 2.612 (rev. ed. 1970).

356. McCoid, *The Admissibility of Sample Data Into a Court of Law: Some Further Thoughts*, 4 U.C.L.A. L. REV. 233, 236 n.11 (1957). See generally Sorensen & Sorensen, *The Admissibility and Use of Opinion Research Evidence*, 28 N.Y.U.L. REV. 1213 (1953); cf. *Zippo Mfg. Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670, 680-81 (S.D.N.Y. 1963).

357. See, e.g., OFFICE OF RESEARCH AND MONITORING, U.S. ENVIRONMENTAL PROTECTION AGENCY, *COMMUNITY HEALTH ENVIRONMENTAL STUDIES* (1972).

358. See text accompanying notes 289-90 *supra*.

Computer analyses of masses of raw data are becoming increasingly valuable sources of evidence and their use and admissibility should be promoted and facilitated in complex cases.³⁵⁹

The use of such devices for projecting a single sum recovery in environmental class actions is completely untested,³⁶⁰ at least as far as the reported cases reveal. Their success or failure depends largely on the ingenuity of counsel and the attitude of the courts. If the social costs of pollution and other environmental hazards become more widely recognized, courts may be willing to consider such arguments. However, as the *Eisen* case demonstrates problems of guaranteeing the accuracy of such techniques and insuring the fairness to the defendant of the procedures developed appear to be almost insurmountable. The use of the lump sum and fluid class recovery in environmental class actions is, at best, a dark horse—worth a try, but not expected to win.

IV. CONCLUSION

In a period of increasing concern about the despoilation of the environment, the class action has great potential as a tool to slow the process of degradation and to make accountable those primarily responsible for environmental harm. Unfortunately, in the federal courts this potential is largely illusory and may never be realized. A major threshold burden is the jurisdictional amount requirement as it has been interpreted in several recent decisions. Indeed, if the Supreme Court affirms *Zahn v. International Paper Co.*,³⁶¹ the representative suit for damages is effectively dead.

Even if the jurisdictional hurdles can be surmounted, plaintiffs contemplating a class suit for damages must contend with the difficulties inherent in rule 23. Delineation of the class and the adequacy of representation by the named plaintiffs are the most troublesome requirements under rule 23(a), and the class will face even more trying problems in establishing the predominance of common issues, the manageability of the suit, and the adequacy of notice under rule 23(b)(3). Nevertheless, the authors believe that some class suits for damages are appropriate for class treatment. A good example is the *Zahn* case it-

359. FEDERAL JUDICIAL CENTER, *supra* note 350, at § 2.614.

360. The authors wish to acknowledge the contribution to the discussion of damage distribution made by a brief prepared by the National Moot Court team of the Georgetown University Law Center and submitted in the 1972 National Moot Court Competition, sponsored by the Association of the Bar of the City of New York. This brief was especially suggestive of methods for calculating gross damages.

361. 469 F.2d 1033 (2d Cir. 1972), *cert. granted* 95 S. Ct. 1370 (1973).

self, in which a relatively compact and clearly identifiable group of waterfront property owners alleged direct harm to property caused by one industrial polluter. A court willing to give a liberal, but not unreasonable, reading of rule 23 could further significant economic and social goals—cost internalization, relief for small claimants, and more rapid reduction in pollution—by allowing such a suit to proceed as a class action. Responsible environmental litigators must choose their cases with care and educate rather than intimidate the courts if any class actions for damages are to succeed.

The class action for injunctive relief under rule 23(b)(1) or (2) is more likely to succeed under the present state of the law. The jurisdictional amount requirement can probably be sidestepped by using the “defendant’s viewpoint” or the right to a clean environment as the matter in controversy. Plaintiffs need not worry about the requirements of predominance, manageability, and best possible notice in injunctive suits. Nevertheless, skilled defense counsel could still delay a trial for months and add considerably to its cost by raising other procedural objections to a given class suit. More significantly, its use also encourages adverse determination by hostile judges, who are sometimes only too glad to cloak substantive dismissal in the garb of procedural defect.

While several justifications for the use of class actions to secure injunctive relief have been suggested, the problems mentioned above compel responsible litigators to consider substitutes for the representative suit. In the typical suit to enjoin official action or halt pollution, a single plaintiff can obtain relief of exactly the same scope as could a plaintiff class of thousands. There is little possibility of less than total relief and hence, unlike the damages action, less need for a large group of complaints. If the weight of numbers is considered essential convince a judge that he faces a significant issue or to prevail in the “balancing of equities,” an organizational plaintiff such as the Sierra Club or the Environmental Defense Fund might be enlisted. *Sierra Club v. Morton*,³⁶² though initially decried, may actually have opened the door for more suits by such organizations.

The full flowering of the environmental class action may eventually occur in the state courts. The greatest single obstacle to federal class suits, the jurisdictional amount requirements, has no parallel under state law. Victories have recently been reported for plaintiffs in

362. 405 U.S. 727 (1972).