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Civil Procedure -- Class Actions -- Amending Rule 23 in Response to Eisen v. Carlisle & Jacquelin

Richard G. Chaney

If the learned professions are to enjoy immunity from liability when engaging in anticompetitive activities that would otherwise violate the federal antitrust laws, that immunity must be found in the *Parker* "state action" doctrine. *Parker*, however, requires much more than a stipulation that the legislature granted a state regulatory agency power to sanction generally price-fixing arrangements and an inference that failure to act amounts to "active supervision." If allowed to stand, the Fourth Circuit's decision in *Goldfarb* will mark a significant erosion of the scope of the Sherman Act.[70]

GEORGE T. ROGISTER, JR.

Civil Procedure—Class Actions—Amending Rule 23 in Response to Eisen v. Carlisle & Jacquelin

The federal class action[1] has been praised as a device that provides for the small claimant a means of obtaining redress for injuries to his legally protected rights.[2] Without this device many wrongs that are too small in relation to the cost of obtaining relief would go unremedied.[3] Recently, in *Eisen v. Carlisle & Jacquelin*[4] the United

70. The North Carolina State Bar and the North Carolina Bar Association have acted to foreclose antitrust suits similar to those in the instant case. In 1972, prior to the district court decision in *Goldfarb*, the State Bar repealed paragraph three of the Canon of Ethics Number 12 relating to the use by attorneys of minimum fee schedules. In addition, the State Bar rescinded all ethics opinions that discussed or related to minimum fee schedules. At the same time, the North Carolina Bar Association eliminated from its *Advisory Handbook on Office Management and Fees* the schedule of fees for specific services. Many local bar associations in North Carolina have followed suit and have also wisely eliminated minimum fee schedules. Sitton, *Professional Liability*, 25 BAR NOTES 84, 96-97 (1974).

1. FED. R. CIV. P. 23.

2. *See, e.g.*, Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); Booth v. General Dynamics Corp., 264 F. Supp. 465 (N.D. Ill. 1967); Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 501 (1969); Frankel, *Amended Rule 23 From a Judge's Point of View*, 32 ANTITRUST L.J. 295 (1966); Kaplan, *Class Action Symposium, A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497 (1969); Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 BUS. LAW. 1259 (1970).

3. *See, e.g.*, Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.) (Rosenn, J., dissenting), *cert. denied*, 407 U.S. 925 (1972); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

4. 94 S. Ct. 2140 (1974).

States Supreme Court sharply limited the extent to which the class action may be used. The *Eisen* case was a private antitrust suit initiated in 1966.[5] Because his claim was too small to make an individual suit profitable and because there were many other potential plaintiffs,[6] Morton Eisen sought to maintain the suit as a class action under Federal Rule of Civil Procedure 23(b)(3).[7] This created considerable litigation in the federal district and appellate courts.[8] In 1974

5. Eisen alleged that the defendant brokerage firms had conspired to fix the odd-lot differential at an excessive level in violation of the Sherman Act. (The odd-lot differential is the charge levied on the odd-lot trader in addition to the standard brokerage commission. An odd-lot trader is one who buys or sells securities in lots of less than a hundred.) Eisen claimed to represent all odd-lot traders on the New York Stock Exchange during a four-year period. The Exchange was also made a defendant. *Id.* at 2144.

6. *See* note 18 *infra.*

7. Rule 23(b) provides as follows:

> (b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
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> (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
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> (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
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> (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
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> (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. . . .

Eisen also tried to qualify under subdivisions (1) and (2), but the court of appeals held that they were inapplicable. *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968). *See also* text accompanying notes 21-25 *infra.*

8. The district court originally denied class action status for three reasons: (1) The plaintiff could not adequately protect the interests of the class. (2) Common questions did not predominate over questions of interest to only certain members of the class. (3) The requirement of individual notice to all known class members could not be fulfilled. Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147, 150-52 (S.D.N.Y. 1966), *rev'd*, 391 F.2d 555 (2d Cir. 1968). On remand from the Court of Appeals for the Second Circuit, however, the district court allowed the suit to proceed as a class action. Despite the specific notice requirement of subdivision (c)(2) of rule 23, the court proposed a scheme of notification that fell short of complete individual notice. The elements of the notice were as follows: (1) individual notice to all member firms of the New York Stock Exchange and to commercial banks with large trust departments; (2) individual notice to identifiable class members with at least ten odd-lot transactions during the period; (3) individual notice to five thousand additional class members selected at random; and (4) publication notice in the *Wall Street Journal* and other newspapers in New York and California. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 267-68 (S.D.N.Y. 1971). Defendants appealed, and the court of appeals reversed, holding that rule 23 required individual notice to all members who could be identified with reasonable effort. Eisen v.

the controversy reached the Supreme Court.[9] The Court held that subdivision (c)(2)[10] of rule 23 requires that individual, mailed notice of a class action brought pursuant to subdivision (b)(3) of the rule must be provided to every member of the class who can be identified with reasonable effort.[11]

The Court supported its literal reading of the rule by observing that the notice requirement for (b)(3) class actions had been added by the Rules' Advisory Committee in 1966 in order to satisfy what the Committee perceived as the requirements of due process[12] established in *Mullane v. Central Hanover Bank & Trust Co.*[13] The Court, however, expressed no opinion on whether due process requires individual notice to all known class members.[14]

In light of the history[15] and the express language of rule 23,[16]

Carlisle & Jacquelin, 479 F.2d 1005, 1015 (2d Cir. 1973), *vacated*, 94 S. Ct. 2140 (1974). In addition, the court of appeals held that Eisen was required to bear the initial cost of such notice as part of the usual burden of financing his own suit. *Id.*

9. In challenging the notice requirement, Eisen contended that the cost of individual notice was so prohibitive that it would preclude him from proceeding with the class action. 94 S. Ct. at 2151. In addition, he argued that individual notice was unnecessary because no class member would desire to proceed individually and because, in any event, he would adequately represent their interests. *Id.*

10. Subdivision (c)(2) provides as follows:

> (2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

The mandatory notice requirement does not apply to subdivisions (b)(1) and (b)(2).

11. 94 S. Ct. at 2152. The Court also agreed with the court of appeals that the representative was required to pay for the notice. It distinguished lower court cases holding otherwise on the ground that they presented situations in which the defendant owed a fiduciary duty to the class members. *Id.* at 2153. A case discussing exceptional circumstances under which the defendant may be required to pay some or all of the cost of notice is Dolgow v. Anderson, 43 F.R.D. 472, 498-500 (E.D.N.Y. 1968), *rev'd*, 438 F.2d 825 (2d Cir. 1971).

12. 94 S. Ct. at 2150-51.

13. 339 U.S. 306 (1950). "Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Id.* at 318; *see* Schroeder v. City of New York, 371 U.S. 208, 212-13 (1962). See note 29 *infra* for the facts of the *Mullane* case.

14. 94 S. Ct. at 2152. The Court's opinion gives the impression that at this point it tends toward agreeing with the Committee's analysis of *Mullane*. *See id.* at 2150-52. This analysis, however, is not necessarily correct. *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 313 (2d ed. 1970). This Note will attempt to demonstrate that *Mullane* does not control.

15. Originally the rule was designed to provide a method for consolidating a large number of existing or imminent claims into one action. Because the 1938 version of

the *Eisen* decision as it pertains to the notice requirement is undoubtedly correct. Nevertheless, the decision will certainly have a significant impact upon the use of the federal class action.[17] Requiring individual notice to all known class members will dramatically increase the cost of the procedure,[18] thus reducing the number of people who can afford to bring a class action. Because the procedure is most needed when the expense of litigation is greater than the size of any potential individual recovery,[19] the effect will be to deny a remedy to small claimants who cannot afford to sue individually.[20] Pressure will undoubtedly develop to avoid the consequences of the decision.

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the rule did not accomplish this objective consistently (primarily because of problems in determining who was bound by a decision), *see* Carroll v. American Fed'n of Musicians, 372 F.2d 155, 162 (2d Cir. 1967), *vacated*, 391 U.S. 99 (1968), the Committee drafted the present version to give the court power to determine the scope of a judgment. They provided that all members of a class would be included in any judgment, favorable or unfavorable. FED. R. CIV. P. 23(c)(3). The Committee felt, however, that in a (b)(3) class action the individual class members' interests in conducting their own suits were likely to be so great that due process would not allow them to be bound unless they were first given a chance to exclude themselves from the class or to participate in the proceeding. Relying on *Mullane*, the Committee decided that the minimum acceptable notice to known (b)(3) class members was individual, mailed notice. *Proposed Amendments to Rules of Civil Procedure for the United States District Courts, Advisory Committee's Note*, 39 F.R.D. 69, 104-05 (1966) [hereinafter referred to as *Committee's Note*]. They did not feel, however, that the other categories of the rule were subject to the same requirement, although it is difficult to find a distinction of any substance in regard to the rights being affected. It is true that (b)(1) and (b)(2) are aimed at situations in which the class members' interests are more likely to be intertwined. That factor, however, should determine whether the suit is eligible for class action treatment, not what form of notice is required once such treatment is found proper.

It is also true that (b)(1) and especially (b)(2) are designed for situations in which some type of injunctive or declaratory relief is appropriate. *See id.* at 100. The right to such relief, however, is just as real as the right to compensatory relief. There is no reason to require stricter notice as a prerequisite to foreclosing one right than the other. The rule gives the court discretion to order whatever notice it deems necessary to protect the (b)(1) and (b)(2) class members. No more is necessary to protect the (b)(3) class members.

16. *See* FED. R. CIV. P. 23(c)(2), *quoted in* note 10 *supra*.

17. *See* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1022 (Oakes, J., dissenting from denial of rehearing *en banc*); Pomerantz, *supra* note 2, at 1263.

18. There were over six million members in *Eisen*, of whom 2,250,000 could be identified with reasonable effort. 94 S. Ct. at 2147. The cost of providing notice would have been $315,000. *Id.* at 2147 n.7. Eisen's individual claim was only seventy dollars. *Id.* at 2144.

19. Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968), *rev'd*, 438 F.2d 825 (2d Cir. 1971); Ford, *supra* note 2, at 501; Frankel, *supra* note 2, at 295; Kaplan, *supra* note 2, at 497; Pomerantz, *supra* note 2, at 1259.

20. This effect will be greatest in areas of the law where litigation is likely to be lengthy and complex—for example, in the antitrust and securities areas. Because of the great amount of federal law in these areas, they are likely candidates for class actions brought under rule 23.

The fact that attorneys' fees are often allowed in this area may not help the indi-

One possible course available to future class action plaintiffs[21] would be to attempt to qualify their suits under one of the other categories of rule 23(b),[22] for which the rule does not require individual notice. These categories, however, will not prove helpful in the majority of cases in which numerous small claimants are seeking compensatory relief. For example, subdivision (b)(1)(A) was designed to cover the situation in which separate suits might establish incompatible standards of conduct for the defendant.[23] Similarly, subdivision (b)(1)(B) was intended to cover situations in which separate actions would, in effect, either dispose of the interests of class members not parties to the actions or substantially impair their ability to protect their own interest.[24] Neither subdivision will apply in the typical suit for damages. Furthermore, although it would be possible in many instances to qualify under subdivision (b)(2), the only remedy available under that subdivision is injunctive or declaratory relief.[25] The possibility of qualifying the suit under one of the other categories of subsection (b), therefore, offers little promise to those who seek an alternative to the (b)(3) class action.

In light of the problems presented by this and other possible alternatives,[26] the best way to avoid the consequences of *Eisen* is to

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vidual, because the court will probably not award a very large fee in a case where the recovery is very small. Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426, 436 (1973).

21. Although rule 23 allows a class to be either a plaintiff or a defendant, this Note is primarily concerned with the former situation, which has generally been more common.

22. *See* note 7 *supra*.

23. *See Committee's Note* at 100. The defendant usually must owe a duty to the class members, not merely be guilty of having injured them in the past.

24. An example of such a situation is where defendant is unable to satisfy all of plaintiffs' claims. *See id.* at 100-01.

25. *Id.* at 102. The court of appeals in *Eisen* suggested that this may be preferable to suing for damages. 479 F.2d at 1019-20. This view is questionable if the desire is to use the class action to provide redress for injuries. (The fact that the rule was not created for such purpose should not prevent it from being used in that manner when it is the best method.)

26. Another possible course is to petition the court for an order directing the defendant to pay for some or all of the notice. As a result of *Eisen*, however, this would require proving the existence of a fiduciary relation between the defendant and the class. *See* note 11 *supra*. Even if the relation can be established, the Supreme Court has not indicated whether it will allow the cost of notice to be allocated. *See* 94 S. Ct. at 2153 n.15.

A more interesting alternative was suggested by Justice Douglas in his partial dissent in *Eisen*. He suggested dividing the class into smaller subclasses pursuant to subdivison (c)(4) of rule 23. Although Justice Douglas was optimistic about the possibility of success with this option, he raised several unanswered questions with regard to its use. For example, he noted the existence of questions concerning the collateral estoppel effects of a judgment in the first action on subsequent suits by other class members or

amend rule 23 to eliminate the mandatory notice requirement for actions brought under subdivision (b)(3). This alternative is not without problems, however. Many seem to share the Advisory Committee's apparent belief that the rule's notice requirement is constitutionally compelled, agreeing with the Committee's interpretation of *Mullane*.[27] This interpretation, however, is not necessarily correct for two reasons. First, the Supreme Court in *Hansberry v. Lee*[28] recognized that, if absent class members were adequately represented by the plaintiff in a class action, they could be bound by the judgment rendered. Secondly, the *Mullane* situation can be distinguished in two critical respects from the typical class action situation, and, therefore, *Mullane* may not control the type of notice that rule 23 must require.

The first distinction is that, although *Mullane* did, in a nontechnical sense, involve a party representing a class,[29] the representative had no interest in common with the class members. As a result, there was less assurance that he would adequately represent their interests.[30] The philosophy of rule 23, on the other hand, is that the

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subclasses. He also pointed out that it is not clear whether an action initiated by a subclass will toll the statute of limitations for the entire class. *Id.* at 2153-57 (Douglas, J., dissenting in part).

There are also potential problems that Justice Douglas did not mention. For example, the only situation mentioned by the Advisory Committee in its comments to subdivision (c)(4) was one in which different segments of the class had divergent interests, so that both segments could not be adequately represented by the same individual. Although the rule does not expressly limit the use of subclasses to such situations, the danger exists that the courts may formulate a judicial limitation.

Some additional questions concern whether the representative of the first subclass could also represent the second after a judgment is reached in the first suit; whether the recovery from a favorable judgment in the first suit could be used to finance the required notice to the remaining class members; and whether the defendant, having been found liable once, could be required to pay for notice to the remaining class members. None of these questions have been answered. Therefore, this alternative is of questionable value at this time.

27. *See, e.g.*, Ward & Elliott, *The Contents and Mechanics of Rule 23 Notice*, 10 B.C. IND. & COM. L. REV. 557, 560 (1969).

28. 311 U.S. 32, 42-43 (1940). Because *Mullane* can be distinguished from *Hansberry*, the former cannot be said to have overruled the latter. *See* text accompanying notes 29-31 *infra*.

29. In *Mullane* the trustee of a large trust fund brought an action pursuant to a New York statute to have the trust accounts covering a prior period approved. The court appointed a special guardian as directed by the statute to represent the interests of absent beneficiaries of the fund. The representative contested the action, contending that the form of publication notice of the proceeding prescribed by the statute did not comply with the requirements of due process because it was not reasonably calculated to provide them with actual notice of the proceeding. The Supreme Court held that, as to known and locatable beneficiaries, individual, mailed notice was required by due process. 339 U.S. at 318.

30. *See* Comment, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement*, 29 MD. L. REV. 139, 145 (1969).

representative can be counted upon to protect adequately the interests of the class members because he shares common interests with them.[31]

Secondly, the suit in *Mullane* was brought by a potential *adversary* of the class in order to extinguish the class members' rights to sue him. The class action, however, is brought by a *proponent* of the class in order to satisfy the class members' rights to a day in court.

Cases applying *Mullane* and adhering to a strict notice requirement[32] can even more easily be distinguished from the typical class action. Like *Mullane*, they involved adversary situations in which notice was necessary to ensure that the individual's case would be pressed before the court.[33] Those cases are further distinguishable from the class action, because there was no one to represent the individual not receiving notice in the event that he did not appear himself. In the class action, however, the individual's case is argued before the court by the representative of the class. If the representation is inadequate to protect the individual's interest, redress can be afforded collaterally without requiring individual notice in every situation.[34]

Because *Mullane* and its line of cases developed the notice requirement without reference to the class action, that requirement should not be blindly applied to the procedure. Such an application is inconsistent with the general flexibility of due process.[35] Rather, a due process notice requirement should be formulated that is consistent with the goals of the class action and the interests of the parties involved. To do this, the interests of the public, the absent class mem-

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31. *Committee's Note* at 100.

32. *See, e.g.*, Robinson v. Hanrahan, 409 U.S. 38 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972); Groppi v. Leslie, 404 U.S. 496 (1972); Bell v. Burson, 402 U.S. 535 (1971); Boddie v. Connecticut, 401 U.S. 371 (1971); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); *In re* Gault, 387 U.S. 1 (1967); Armstrong v. Manzo, 380 U.S. 545 (1965); Schroeder v. City of New York, 371 U.S. 208 (1962); Lambert v. California, 355 U.S. 225 (1957); Walker v. City of Hutchinson, 352 U.S. 112 (1956); City of New York v. New York, N.H. & H.R.R., 344 U.S. 293 (1953); Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951).

33. *See, e.g.*, Bell v. Burson, 402 U.S. 535 (1971) (suspension of uninsured motorist's driver's license); Armstrong v. Manzo, 380 U.S. 545 (1965) (adoption proceeding against the interest of the natural father); Walker v. City of Hutchinson, 352 U.S. 112 (1956) (condemnation proceeding); City of New York v. New York, N.H. & H.R.R., 344 U.S. 293 (1953) (bankruptcy reorganization affecting creditors).

34. *See* Hansberry v. Lee, 311 U.S. 32 (1940); Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 46 (1967); Note, *Class Action Treatment of Securities Fraud Suits Under the Revised Rule 23*, 36 GEO. WASH. L. REV. 1150, 1166-67 (1968).

35. The Supreme Court itself recognized this flexibility in *Mullane* by allowing mailed notice instead of the more expensive personal service. Note, 87 HARV. L. REV., *supra* note 20, at 438.

ber, and the defendant should be considered. The public's interest is to encourage the use of class actions as a procedure through which the small claimant can obtain redress for his injuries.[36] The absent class member's interests are to sue separately, to participate in the conduct of the class action, or, if he does neither, to be adequately represented by those actively involved in the suit. Finally, the interest of the defendant is to know—at the time the suit begins—the probable extent of the judgment.[37]

In balancing these interests, the rule should provide for the public interest to the greatest extent possible without sacrificing the necessary protection of the individuals involved. The most effective way in which the rule can further the public interest is to decrease as much as possible the costs involved in bringing a class action. This can be done by requiring, in appropriate cases, a less expensive form of notice or even no notice at all.

In considering what notice is necessary to protect the absent class member's interest in suing separately, the size of his claim and the expense of litigation are the most important factors. If the expense is greater than the potential recovery,[38] the class member's interest, if he has one, in suing separately is minimal. Because he cannot expect to profit by suing individually, the existence of a class action is, in a sense, a windfall to him.[39] Therefore, his need to participate directly or to question the adequacy of representation in the class action is likewise minimal. Under such circumstances, notice, as an absolute condition to maintenance of the class action, should not be required for him. In the unlikely event that he does desire to sue separately, it is more consistent with the balancing concept of due process to allow him to raise the issue of lack of notice or of inadequate representation in a later proceeding than to abort the class action because the repre-

36. *But see* note 52 *infra*.

37. The defendant also has an interest in not being subjected to frivolous suits by plaintiffs hoping to force settlements. *Cf.* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1018-19 (2d Cir. 1973). This consideration, however, does not go to the question of what notice should be required once the suit is begun. Other safeguards may need to be developed to protect defendants from this very real danger.

38. This determination could be made at a preliminary hearing. If the court is unable to satisfy itself that a potential class member has no practical interest in suing separately, it should proceed as if he did have such interest.

39. It is a windfall to him only in the sense that, as the law is now, without the class action he cannot effect a net recovery. To the extent that he has a legitimate claim, the class action merely affords him the opportunity to assert his existing right to recover. However, given the fact that the class member cannot recover without the class action, inadequate representation will leave him in no worse position, from a practical standpoint, than he would have been had the class action never been brought.

sentative cannot afford the cost of providing notice. On the other hand, if the potential recovery exceeds the cost of litigation, the class member's interest in suing separately, in participating, or in being adequately represented is substantial. For him some type of notice should be required. Although publication notice has its shortcomings,[40] the rule should, nevertheless, give the court discretion to decide whether, in a given situation, such notification satisfies due process.[41] Furthermore, when the class is very large, the need for complete individual notice may be less significant because of the greater possibility that something less will reach people representative of all views within the class.[42] There may also be situations in which the class is so homogeneous that a particular form of notice—such as individual notice to organizations or individuals who can reasonably be expected to communicate directly with all or a great majority of the class members—will be adequate.[43]

By providing notice to those class members with substantial potential interests in suing separately and by ensuring that the representative adequately protects their interests, the court will protect the interest of the defendant as well. He will know that those members who might be expected to sue separately or to object to the representation have been given an opportunity to do so, and, therefore, are bound by the judgment unless they excluded themselves from the class. In addition, he will know that the only class members not given individual notice are those who would find it unprofitable to sue individually. Although those class members would not be bound by the judgment, there is little danger that they would attempt to sue separately after an

40. *See, e.g.*, Walker v. City of Hutchinson, 352 U.S. 112, 117 (1956); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1017 (2d Cir. 1973), *vacated*, 94 S. Ct. 2140 (1974).

41. The court is presently given that discretion with respect to class actions brought under subdivision (b)(1) or (b)(2), so the Advisory Committee has demonstrated that it does not consider such discretion beyond the province of the court. *See* FED. R. CIV. P. 23(d).

42. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 396 (1967). There is also language in the opinion in *Mullane* that recognizes that less than perfect notice may be acceptable. *See* 339 U.S. at 319.

43. Dolgow v. Anderson, 43 F.R.D. 472, 501 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1971); Comment, 29 MD. L. REV., *supra* note 30, at 148. This is the theory upon which the district court based its notification scheme in *Eisen*. *See* note 8 *supra*. The court reasoned that, because all class members had invested in securities, individual notice to brokerage firms and banks with large trust departments, plus publication notice in financial newspapers, would be adequate to notify those class members with substantial interests in suing separately.

unfavorable judgment.[44]

The possibility of foreclosing without notice a person's right to conduct his own suit, however insubstantial this right may be, is, without doubt, unacceptable to some. The answer to such objections is that the present rule causes a much greater inequity. It forecloses the substantial rights of an entire class to protect the relatively insubstantial rights of a segment of that class.[45] Furthermore, there are other areas of the law in which individual rights are foreclosed without notice or with less than perfect notice. For example, statutes of limitations operate without notice to cut off rights of action. Yet they have been upheld against due process challenges.[46] In addition, people are charged with knowledge of criminal and civil statutes, although they may have received no actual notice of their existence.[47] Furthermore, the rule of *stare decisis* affects the rights of absent individuals without notice.[48] Also the Uniform Commercial Code allows creditors to repossess goods from the allegedly defaulting buyer-debtor without notice or a prior hearing.[49] Even in *Mullane* the possibility of less than one hundred percent individual notice was accepted by the Supreme Court.[50] Thus, there is adequate precedent for limiting individual rights without perfect individual notice.

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44. There is evidence that a very small percentage of those class members who have received notice under rule 23(c)(2) have asked to be excluded from the class. Furthermore, not one of the individuals who requested exclusion brought his own suit. This is a strong indication that no rights would actually be affected by not providing notice in limited circumstances. Pomerantz, *supra* note 2, at 1266; *cf.* Berland v. Mack, 48 F.R.D. 121, 129 (S.D.N.Y. 1969).

45. In fact, under the guise of protecting the members' rights to sue, the rule takes away from them the only realistic method presently available for recovering at all. The right to sue individually is worthless if it cannot be afforded. The rule also "vitiate[s] the class action device in situations where application thereof as a matter of public policy can be important, such as private antitrust, consumer, and environmental litigation." Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 266 (S.D.N.Y. 1971).

46. *See, e.g.*, Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945); Order of R.R. Telegraphers v. REA, 321 U.S. 342 (1944); Atchafalaya Land Co. v. F.B. Williams Cypress Co., 258 U.S. 190 (1922); Blinn v. Nelson, 222 U.S. 1 (1911); Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 288. The class action shortens the limitation period somewhat, but does not take away the right to recover.

47. Lambert v. California, 355 U.S. 225 (1957) (Frankfurter, J., dissenting); North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925); Ballard v. Hunter, 204 U.S. 241 (1907).

48. Frankel, *supra* note 34, at 46.

49. UNIFORM COMMERCIAL CODE § 9-503. Recent decisions have put the constitutionality of this provision in doubt . The reason, however, is not the lack of notice so much as the fact that it allows the debtor to be deprived of property without the benefit of any representation in a judicial proceeding. *See* Fuentes v. Shevin, 407 U.S. 67 (1972). The situation in the class action is different. There is a full judicial proceeding, and the members of the class must be adequately represented.

50. *See* note 42 *supra*.

Although the Supreme Court will have to retreat somewhat from the absolute wording of *Mullane* to uphold the constitutionality of a rule that does not require individual notice in all cases to known persons, rule 23 should, nevertheless, be amended,[51] and the Court should uphold it.[52] Cases such as *Eisen*, although decided correctly under the present rule, demonstrate the need for a device that will help to create "a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth."[53]

RICHARD G. CHANEY

Constitutional Law—Executive Privilege: Tilting the Scales in Favor of Secrecy

Executive privilege is a concept invoked by members of the executive branch of the government to justify withholding evidence and other communicative materials from the legislative and judicial branches.[1] Since 1792[2] debate surrounding the doctrine has been pre-

51. The amended rule should make no distinction between subdivision (b)(3) and subdivisions (b)(1) and (b)(2) with regard to the notice requirement. It would still be appropriate, however, to require the court to find that the class action is the best available means for handling the controversy. *See* note 52 *infra*. The court will also have discretion under subsection (d) to direct that notice be provided to the class members when the court feels it is necessary.

52. Not everyone agrees that the class action is the best method for dealing with antitrust and securities actions involving a very large number of potential claimants. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1019-20 (2d Cir. 1973), *vacated*, 94 S. Ct. 2140 (1974); Kaplan, *supra* note 42, at 394; H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 118-20 (1973). Although arguments against such use of the class action may have merit, they should not be determinative of the notice required by due process once the court has determined that no better method exists for handling the controversy, as it must under subdivision (b)(3). One factor in the determination may be the possible necessity for future notice to the class members for the purpose of filing proofs of loss after the defendant is found liable. *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 567 (2d Cir. 1968). This possibility alone, however, should not preclude use of the class action. Siegel v. Chicken Delight, Inc., 271 F. Supp. 722, 726 (1967). In fact, in such a situation it may be possible to require the defendant to finance the notice. Comment, 29 MD. L. REV., *supra* note 30, at 157.

53. Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140, 2157 (1974) (Douglas, J., dissenting).

1. *Cf.* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), *aff'd per curiam sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

2. In refusing to turn over documents requested by Congress in its inquiry into a disastrous military expedition against a tribe of Indians, President Washington con-