The Effects of *Eisen IV* and Proposed Amendments of Federal Rule 23

SIDNEY B. JACOBY*
MICHAEL G. CHERKASKY**

> I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would go begging for justice without the class action but who could with all regard to due process be protected. Some of these are consumers whose claims may seem *de minimis* but who alone have no practical recourse for either remuneration or injunctive relief. Some may be environmentalists who have no photographic development plant about to be ruined because of air pollution by radiation but who suffer perceptibly by smoke, noxious gases, or radiation. Or the unnamed individual may be only a ratepayer being excessively charged by a utility or a homeowner whose assessment is slowly rising beyond his ability to pay.[1]

These are the words of Mr. Justice Douglas, partly dissenting and partly concurring in *Eisen v. Carlisle & Jacquelin*, the recent Supreme Court opinion which immediately experienced lively discussion in the popular press.[2]

Especially since amendment of Rule 23, Federal Rules of Civil Procedure, in 1966, the class action device has become a significant device of sociologically important litigation in the federal system.

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* Professor of Law, Case Western Reserve University.
** Research Assistant, J.D. 1975, Case Western Reserve University Law School.

1. Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140, 2156 (1974).

2. For an example of the popular press comments following the Supreme Court opinion, *see* NEWSWEEK, June 10, 1974, at 48 (vol. 83 no. 23).

That device has been described by Professor Hazard as a product of a changing social environment, "an attempt to provide something in the nature of a mass production remedy."[3] While pursuant to Professor Hazard's description the rules of common law sprang up hundreds of years ago as a legal response to individual transactions, administrative regulations are a present day response to the "mass production" of legal problems in the modern world and the class action device should be viewed "in relation to substantive legal problems of the 20th Century."[4] Similarly, Professor Miller suggests that

> . . . some of the procedural patterns that are considered fundamental when the litigation involves a single plaintiff and a single defendant will have to be abandoned or modified in certain actions under Rule 23(b)(3).[5]

Of course, definitely opposite viewpoints have also been expressed.[6] Thus, the fear has been expressed that the district courts may be "flooded" with class litigations, with the result that there may be an impairment, rather than an improvement, of judicial efficiency; also, the effect of excessive class action suits requiring the defendants to pay large costs of notice, and thereby imposing on them the practical necessity of entering into expensive settlements, was described as "legalized blackmail".[7]

In addition to very many law review articles, entire symposia[8] have been devoted to the subject of class actions and a special publication is now being issued which is restricted to class actions.[9] Our present study will be limited to dealing with one of the significant changes effectuated by the 1966 amendments to Rule 23, that is, the changed procedure for what was the "spurious" class action.

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3. Hazard, *The Effect of the Class Action Device Upon the Substantive Law*, 58 F.R.D. 307, 308 (1972).

4. *Id.* at 310.

5. Miller, *Problems of Administering Judicial Relief in Class Actions under Federal Rule 23(b)(3)*, 54 F.R.D. 501, 507 (1971); *see also* Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 323-24 (1973) (suggesting that certain adjustments should be made in order to reap the benefits of the class action procedure).

6. *See, e.g.*, Simon, *Class Actions—Useful Tool or Engine of Destruction?*, 55 F.R.D. 375 (1972).

7. Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971), *quoted with approval in* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1019 (2d Cir. 1973) (*Eisen III*, the decision affirmed by *Eisen IV* which is here discussed); *see also* Handler, *Twenty-Fourth Annual Antitrust Review*, 72 COLUM. L. REV. 1, 34-42 (1972).

8. *See, e.g., The Class Action—A Symposium*, 10 B.C. IND. & COM. L. REV. 496 (1969) and CLASS ACTIONS PRIMER (Fuchsberg ed. 1973).

9. The so-called CLASS ACTION REPORTER, published since 1972.

One of the reasons for changing from the previous procedure in handling spurious classes was to make more effective use of the so-called spurious class action. Formerly, a member of the "spurious" class could recover only if he took an affirmative step to participate in the action, so that the "spurious" class action in effect was merely a device of joinder of parties. Now, the member of a "spurious" class may obtain recovery, or conversely may be actively ruled to have no recovery, unless he affirmatively opts out of the litigation under Rule 23 (c) (2). Certain other Supreme Court decisions,[10] which will be mentioned, have had a limiting effect, but the recent *Eisen IV* decision deserves special consideration. We shall examine in this article the effects and implications of recent court cases, the most significant being the *Eisen* case, on this "new" spurious class action. We shall then suggest and discuss possible modifications of Rule 23, as well as other solutions, so as to make the newly created type of "spurious" class action more feasible while at the same time avoiding the pitfalls and dangers of excessive class litigation.

HISTORY OF LITIGATION IN THE *Eisen v. Carlisle & Jacquelin* CASE

In 1966 Morton Eisen commenced an action, on behalf of himself and all odd-lot purchasers and sellers on the New York Stock Exchange, against two major odd-lot dealers, Carlisle & Jacquelin and Decoppet & Doremus.[11] The suit was grounded on the allegation that the two firms had conspired to monopolize odd-lot trading and had allegedly combined to set an excessive odd-lot differential[12] and thereby had violated the Sherman Act, 15 U.S.C. §§ 1 and 2.

The defendants made a motion to dismiss the action on the ground that it was not maintainable as a class action. Judge Tyler granted the motion to dismiss the class action on the ground that

10. Snyder v. Harris, 394 U.S. 332 (1966); Zahn v. International Paper Co., 414 U.S. 291 (1973).

11. Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147 (S.D.N.Y. 1966). The two firms between 1962 and 1966 controlled 99% of all odd-lot trading. Eisen v. Carlisle & Jackquelin, 94 S. Ct. 2140, 2144 (1974).

12. An odd-lot is any number of shares less than the "round lot" of 100 shares. An extra charge besides the normal commission is charged for dealing in odd-lots and that extra charge is the "odd-lot differential."

Eisen could not " . . . fairly and adequately protect the interests of the class,"[13] a requirement for the maintenance of a class action under Rule 23,[14] as the size and diversity of interests of the members of the class as well as Eisen's comparatively small stake[15] would preclude adequate representation. Judge Tyler stated that

> . . . it is impossible to assume that he alone with a comparatively miniscule and limited interest in odd-lot transactions can represent that large a class, many of whose members necessarily have larger and different interests.[16]

Secondly, Judge Tyler held that notice to the class's members must meet the standards of Rule 23(c)(2)[17] as well as due process, citing *Mullane v. Central Hanover Bank & Trust*,[18] and that the notice proposed by Eisen, that of press advertisements plus notice to the stock exchange firms, would not be sufficient. Thirdly, Judge Tyler held that *Eisen* did not meet the requirements of Rule 23(b)(3)[19] as questions common to the members of the class had not been shown to predominate.

The court of appeals, in an opinion commonly referred to as *Eisen I*,[20] held that the decision dismissing the class action was fi-

13. Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147, 150 (S.D.N.Y. 1966). Eisen's individual cause of action was not dismissed.

14. One or more members of a class may sue or be sued as representative parties on behalf of all only if ". . . (4) the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4).

15. The amount of Eisen's individual claim was later determined to be only $70. *See* Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140, 2144 (1974).

16. Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147, 151 (S.D.N.Y. 1966).

17. (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. FED. R. CIV. P. 23(c)(2).

18. 339 U.S. 306 (1950).

19. (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 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. FED. R. CIV. P. 23(b)(3).

20. Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

nal under 28 U.S.C. § 1291, emphasizing the practical aspects that such a dismissal would have on Eisen's suit. "The alternatives are to appeal now or to end the lawsuit for all practical purposes . . . we can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen", and "[w]here the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed."[21]

Then, in what is known as *Eisen II*,[22] the court of appeals reversed the dismissal of the action. With respect to the issue of "adequate representation" the court noted that the suit was not a collusive suit, nor had the leader and the class antagonistic interests. The court of appeals rejected the district court's reliance on quantitative elements, such as size of the leader's claim compared to size of the class, and noted that

> . . . the new rule should be given a liberal rather than restrictive interpretation . . . [and that] the dismissal *in limine* of a particular proceeding as not a proper class action is justified only by a clear showing to that effect and after a proper appraisal of all the factors enumerated on the face of the rule itself.[23]

In reversing the district court, the court of appeals found that the class action was maintainable under Rule 23(b)(3) in that 1) the class and its leader had a "common nucleus of operative facts"[24] and that the only major differences were in ". . . the computation of damages, a factor which, by itself, does not justify dismissal of the class action";[25] and 2) noting the earlier finding that dismissal of the class action would be fatal to any individual suit, the court found the class action to be a "superior" method to adjudicate the interests involved. The court did have questions pertaintaining to Rule 23(b)(3)(D) on the manageability of the class action. As to the requirements of notice under Rule 23(c)(2), the court found the record to be inadequate to enable it to determine the ease of obtaining addresses of members of the class, and it

21. *Id.* at 120-21.
22. Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968).
23. *Id.* at 563. *See* 44 N.Y.U.L. REV. 198 (1969).
24. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 566 (2d Cir. 1968).
25. *Id., citing* Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42 (S.D.N.Y. 1966). For a discussion of the notice requirements laid down in *Eisen II, see* 43 TUL. L. REV. 369 (1969).

therefore remanded the question for an evidentiary hearing in the district court.[26]

In his dissent, Chief Judge Lumbard referred to the impossibility of plaintiff giving suitable notice and to the unmanageability of the suit as a class action. He stated:

> What could be less of a class action than a suit where there are more than 3,750,000 potential plaintiffs living in every state of the union and in almost every foreign country? . . . Obviously the only persons to gain from a class suit are not potential plaintiffs, but the attorneys who will represent them. . . . Even if all the difficulties inherent in the administration of the suit were overcome, the amount expended in filing and processing claims would probably exceed any recovery . . . . The appropriate action for this court is to affirm the district court and put an end to this Frankenstein monster posing as a class action.[27]

Next, Judge Tyler in 1971, in light of relevant facts found, concluded that the case was a proper one for class action litigation in that the three issues presented on remand, *i.e.* the adequacy of representation, manageability, and notice, could be handled properly within the framework of Rule 23.[28] There was a somewhat extensive discussion of manageability. While not finding a problem in estimating total damages, the court found significant difficulty in the distribution of the recovery to the members of the class, engendered by the prohibitively high cost of computing and awarding multitudinous small claims to each member of the class.[29] The court tentatively accepted the suggestion of plaintiff that after satisfying the individual claims filed the remainder of the recovery be set up in a fund which would be used to reduce the odd-lot differential in an amount to be determined by the court, until the fund is depleted. The benefits of this "fluid recovery"[30] would . . . flow in the main to those who bore the burden of defendants' allegedly illegal acts."[31]

The final issue dealt with was the type of notice required, and the question of who should pay for its cost. As to what was required by the Constitution, Judge Tyler viewed the test of the propriety of notice as being ". . . a flexible one [which] must be ap-

26. For general discussions of *Eisen II, see* 21 VAND. L. REV. 1124 (1968); 18 AM. U. L. REV. 225 (1968).

27. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 570-72 (2d Cir. 1968).

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

29. The court found the cost of notice once damages had been assessed and of the processing of claims to be about $500,000. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 263 (S.D.N.Y. 1971).

30. The propriety of a fluid recovery is not reached by the *Eisen* Supreme Court opinion.

31. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 264 (S.D.N.Y. 1971).

plied on a case-by-case basis."[32] In determining what is the "best notice practicable," Judge Tyler observed that

> . . . 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.[33]

Further, the notice requirements must be shaped so as not to amount to an "insuperable tariff on prosecution of the case."[34] Judge Tyler ruled that individual notice be given to the 2,000 class members who had 10 or more transactions during the relevant period and to 5,000 class members selected at random from among the more than 2,000,000 class members readily identifiable; individual notice should be given to all members of the New York Stock Exchange; and there should be publication in the prominent papers in New York and California, such as the *Wall Street Journal.* The total cost of notice required under that plan was approximately $21,720. Noting that ". . . if I were to follow literally the earlier indication of the court of appeals that the plaintiff must always pay for the expenses of notice in the first instance . . . this litigation would come to an abrupt termination,"[35] Judge Tyler held that a preliminary hearing on the merts would be held to determine if the plaintiff was "more than likely to prevail at trial".

In his next opinion[36] Judge Tyler ruled, after holding a mini-hearing[37] on the merits, that Eisen was "more than likely" to prevail at trial, and he therefore ordered defendant to pay 90% of the notice costs.[38]

The next opinion in the *Eisen* case was handed down by the court of appeals in 1973, and is referred to as *Eisen III.*[39] The court of appeals reversed the district court, finding that a class action was not maintainable. The court based its opinion on three grounds. The first was that individual notice must be given to those mem-

32. *Id.* at 266.
33. *Id.*
34. *Id.* at 267.
35. *Id.* at 269.
36. Eisen v. Carlisle & Jacquelin, 54 F.R.D. 565 (S.D.N.Y. 1972).
37. Although the hearing allowed for oral testimony, none was taken; briefs, documents and affidavits were submitted in lieu thereof and oral arguments were had. A minimum of discovery was allowed.
38. Eisen v. Carlisle & Jacquelin, 54 F.R.D. 565, 573 (S.D.N.Y. 1972).
39. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973).

bers of the class who could be readily identified,[40] which the court found to be an unambiguous requirement of Rule 23(c)(2). Secondly, the court rejected the idea of a mini-hearing, as well as the apportionment of costs. The court held that such a hearing, which would make tentative findings without full safeguards, would be irreparably prejudicial, and that such a procedure was not authorized under Rule 23. The court would therefore require the plaintiff to pay the full cost of notice.[41] Finally, the court found the case to be unmanageable under Rule 23(b)(3)(D). Two reasons were given. First was the tremendous cost of notice which Eisen had refused to pay. Second was the difficulty of distributing the recovery. The court rejected the idea of a "fluid recovery" as unconstitutional in this case, as well as being outside of Rule 23.[42]

Snyder v. Harris and *Zahn v. International Paper Company*

Before discussing in detail the recent Supreme Court opinion in the *Eisen* case (*Eisen IV*), brief mention will be made of two other Supreme Court decisions, the *Snyder* case and the *Zahn* case.

Snyder v. Harris[43] was decided in 1969, three years after Rule 23 had undergone major revisions. The case, presenting two separate actions consolidated in the Supreme Court, dealt with the question of whether, under 28 U.S.C. § 1332, the plaintiffs had met the $10,000 sum in controversy requirement. One plaintiff, Snyder, was suing on behalf of herself in the sum of $8,740 and approximately 4,000 similarly situated shareholders whose aggregated claims were approximately $1,200,000. In the other action the plaintiff Coburn was suing for himself, alleging damages of $7.81, and for approximately 18,000 similarly situated Gas Service Company customers, whose aggregated claim was over $10,000.[44] The claims of the two classes were found to be separate and distinct, and the classes would have been categorized as a spurious class under old

40. *Id.* at 1015.

41. *See* 73 COLUM. L. REV. 1640, 1657 (1973), where it is suggested that the *Eisen III* court had rejected the method of a preliminary hearing to dedetermine who should pay the costs of notice, but had not clearly rejected the idea that the defendant be required to pay part of the cost depending on the probability that the plaintiff will prevail on the merits. *But see* Eisen v. Carlisle, 94 S. Ct. 2140, 2152 (1974).

42. *See* discussion of "fluid recovery", text accompanying notes 103 *et seq.*, *infra.*

43. 394 U.S. 332 (1969).

44. The court of appeals in Gas Service Company v. Coburn, 389 F.2d 831 (10th Cir. 1968), allowed aggregation of the claim while the appellate court in Snyder v. Harris, 390 F.2d 204 (8th Cir. 1968), did not.

Rule 23. Justice Black, writing for seven members of the Court, concluded that aggregation of separate and distinct claims could not be allowed under the court's interpretation of the statutory phrase "matters in controversy" and that the amendment of Rule 23 could not be read to cause a change in the jurisdictional requirements, as such a reading would conflict with Rule 82.[45]

The question not answered in *Snyder* was whether, if the claims of the class were separate and distinct and the class's representative met the jurisdictional amount, the members of the class would also each be required to have $10,000 in controversy. This was the fact situation and the issue dealt with in *Zahn v. Intertional Paper Co.*,[46] an environmental case, brought in diversity. Justice White, speaking for six members of the Court, held that the jurisdictional amount requirement was to be applied to each member of the class, as long as their claims were separate and distinct.[47] The opinion is based on a review of prior decisions, which Justice White held interpreted the meaning of the "matter in controversy" language of 28 U.S.C. § 1332 as requiring that each separate and distinct claim meet the jurisdictional amount.

Justice Brennan, writing in dissent,[48] suggested that the class claim be considered ancillary to that of its representatives, and that therefore if the jurisdictional requirement is met by the class representative, the class members need not show independent grounds for jurisdiction. Justice Brennan argued that the same practical reasons which allow ancillary jurisdiction in the case of compulsory counterclaims under Rule 13(a) or intervention as of right under Rule 24(a),[49] should be followed in regard to class actions. Justice Brennan backed up his argument for the use of ancillary jurisdiction by citing *Supreme Tribe of Ben-Hur v. Cauble*[50] where

45. These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or venue of actions therein. FED. R. CIV. P. 82.
46. 414 U.S. 291 (1973).
47. Though this opinion dealt only with the jurisdictional amount, it may suggest that diversity must also be complete throughout the class. *But see* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) which is distinguishable on the ground that it was a "true" class action.
48. Zahn v. International Paper Co., 414 U.S. 291, 302-12 (1973).
49. *Id.* at 306.
50. 255 U.S. 356 (1921).

the requirement of diversity was dispensed with, except as to the original plaintiff and defendant.

As is pointed out by Justice Brennan, "class actions were born of necessity"[51] and provided a device for recovery of damages that might otherwise be remediless. It may be suggested that the *Zahn* opinion unnecessarily restricts this important device, by ignoring the concept of ancillary jurisdiction which is used in construing compulsory counter-claims under Rule 13(a);[52] perhaps a similar position should have been taken with respect to the $10,000 requirement also for claims otherwise meeting the class action requirements of Rule 23.

Eisen IV

Following the brief description of the history of the *Eisen* case and of related matters, we now come to the culmination of the *Eisen* litigation by *Eisen IV*, which was decided by the Supreme Court on May 28, 1974.[53] Certain decisions of the Supreme Court since the 1966 amendment, previously discussed, served to limit the extent of Rule 23(b)(3) class actions. The *Snyder*[54] case and the later *Zahn*[55] case had the broad effect of limiting the use of class actions in the federal system; first, by requiring that in a proper case the leader of a class must himself meet the $10,000 requirement (no aggregation being permitted of the amounts claimed by the individual members of a class) and then, by demanding that to be a member of a class each individual must meet the statutory requirement of $10,000. Important as these specifications are, they might be remedied by congressional legislation. The *Eisen IV* limitation of class action conceivably, however, may be of greater significance in that it might be a constitutional due process limitation which would make it potentially impossible, without a constitutional amendment, to enact corrective legislation concerning the notice required by *Eisen IV*. Careful analysis of the various holdings of *Eisen IV* is therefore suggested.

First, the Supreme Court held that the broad interpretation given to the finality principle by *Cohen v. Beneficial Loan Corp.*[56] ap-

51. Zahn v. International Paper Co., 414 U.S. at 306 n.9, *citing* 3B J. MOORE, FEDERAL PRACTICE ¶¶ 23.02[1], 23.05 *passim* (2d ed. 1969).

52. *See* Horton v. Liberty Mutual Insurance Co., 367 U.S. 348 (1961), *aff'g* 275 F.2d 148 (5th Cir. 1960).

53. Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140 (1974).

54. Snyder v. Harris, 394 U.S. 332 (1969).

55. Zahn v. International Paper Co., 414 U.S. 291 (1973).

56. 337 U.S. 541 (1949). In that case the immediate appealability of a federal court's preliminary determination as to whether plaintiff in a stock-

plies to the district court determination involved in *Eisen*, namely the imposition upon the defendant of an extensive obligation to defray the expenses of the required notice to the individual members of the class. That affirmance of appealability settles an important question of the reviewability of class action determinations. The question arises, however, whether this affirmance of immediate appealability foreshadows immediate appealability of some other district court determinations in the handling of class actions. For instance, will the Supreme Court sanction the immediate appealability of a dismissal by the district court of a class action which permits the action to continue as an individual action, as was ruled in *Eisen I*?[57] While not as clearly analogous to the *Cohen* situation as *Eisen IV*, the answer should be in the affirmative.[58] Will the Supreme Court sanction immediate appealability of a district court determination reducing the size of a class? Also, should there be an immediate appealability of a district court determination which advises a member of a class under Rule 23(c)(2) that his request for an exclusion will not be honored?[59] Again, the answer should properly be in the affirmative. Rejection of a request to be let out from a lawsuit should be immediately appealable by the person wanting to be let out, in the same way as the denial of a claimed right to intervene is immediately appealable by the person seeking to intervene.[60]

Next, the significant issue decided by *Eisen IV* was that in a Rule 23(b)(3) class action the requirement of "individual notice to all

holder's derivative action must comply with a state statute requiring the posting of a substantial bond in stockholder's suits at the beginning of the litigation, was affirmed. Appealability was affirmed on the ground that that determination was ". . . a final disposition of a claimed right which is not an ingredient of the cause of action" on which the suit as such was based. *Id.* at 546-47.

57. Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967) (*Eisen I*) (affirming appealability on the ground that such determination was a "death knell" to the entire action); *see also* Winokur v. Bell Federal Savings and Loan Ass'n, 58 F.R.D. 178 (N.D. Ill. 1972), *petition for cert. denied*, after court of appeals decision, 42 U.S.L.W. 3666 (1973).

58. *See also* Gillespie v. U.S. Steel, 379 U.S. 148 (1964).

59. Such a problem might arise when considering whether the request for exclusion was properly made within the specified time.

60. Brotherhood of Railroad Trainmen v. B. & O.R. Co., 331 U.S. 519, 524-25 (1947); Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502 (1941).

members who can be identified through reasonable effort" must be strictly construed. The Supreme Court seems to have held that this provision means that individual notice must directly be sent to all class members "whose names and addresses may be ascertained through reasonable effort."[61] The question arises whether any less direct notification of the individual members of the class, though apparently not permitted by Rule 23(c)(2), would still be constitutional. Generally, the basic importance of the 1966 amendment of Rule 23 was its intention to broaden the scope of what were formerly called "spurious" class actions (former Rule 23(a)(3)). Formerly, it required members of a "spurious" class to appear in the action, usually within the limitation of a "bar" date, in order to participate.[62] Now, since 1966, there can be representation of, and recovery by, the members of a "spurious" class as long as they do not opt out of the class (new Rule 23(c)(2) and (c)(3)). In other words, the procedure has changed: formerly, it required affirmative action of the class members to participate; now it requires affirmative action of the members to be left out of a class. This change in policy results from the commendable legislative intent to broaden the use of class actions. The immediate problem is: despite *Eisen IV*, can the notice requirement of Rule 23(c)(2) be constitutionally lessened, perhaps by permitting indirect or less than complete notice, or can the notice requirement even be constitutionally dispensed with entirely, as long as there is a showing of adequate representation?[63]

Regardless of the answer to this problem, the immediate question is whether *Eisen IV* establishes a constitutional barrier. In *Eisen IV* the Court mentioned the comments of the Advisory Committee accompanying the 1966 amendment and the Committee's reference to the constitutional requirement of due process. The Court discussed *Mullane v. Central Hanover Bank & Trust Co.*[64] and the problems of service by publication, and stated that:

> [*T*]*he express language and intent of Rule 23(c)(2)* leave no doubt

61. Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140, 2150 (1974).

62. As the late Judge Frank described it, ". . . a proceeding under 23(a)(3) is, in effect, but a congeries of separate suits so that each claimant must, as to his own claim, meet the jurisdictional requirements." Steele v. Guaranty Trust Co. of New York, 164 F.2d 387, 388 (2d Cir. 1947).

63. These problems determine the extent to which amendments of the language of Rule 23(c)(2) should be suggested; *see* text accompanying notes 162 *et seq., infra.*

64. 339 U.S. 306 (1950); *see also* the reference in the *Advisory Committee Note*, 39 F.R.D. 69, 107 (1966), to Hansberry v. Lee, 311 U.S. 32 (1940), which created constitutional limitations for in personam class actions, primarily the requirement of adequate representation. The *Mullane* case was an in rem or a quasi in rem action.

> that individual notice must be provided to those class members who are identifiable through reasonable effort. In the present case, the names and addresses of 2,250,000 class members are easily ascertainable, and there is nothing to show that individual notice cannot be mailed to each.

This portion of the Court's opinion was concluded by stating that

> . . . *quite apart from what due process may require, the command of Rule 23 is clearly to the contrary* [of Eisen's position].[65]

This substantially recites the steps by which the Supreme Court reached its result, and the fundamental problem emerges: Is the specified requirement of notice a constitutional requirement of due process or is it merely a consequence and interpretation of Rule 23(c)(2)?

Constitutional due process is not mentioned in the *Eisen IV* opinion, but clearly the cases of *Mullane v. Central Hanover Bank & Trust Co.*[66] and of *Schroeder v. City of New York*,[67] both mentioned in *Eisen IV*, were cases of a different character than *Eisen*. *Mullane* was an in rem or a quasi in rem action, while *Eisen* involves an in personam class action. Both *Mullane* and *Schroeder* reached a particular result on the basis of constitutional law, but *Eisen IV* suggests that the result reached in *Eisen* was only an interpretation of Rule 23(c)(2). *Mullane* and *Schroeder* seem to be mentioned in *Eisen* only in connection with the description of the legislative history of Rule 23,[68] and were not discussed for the purpose of showing their specific applicability to the present situation. The above-discussed holding of *Eisen IV* was based on the "express language and intent of Rule 23(c)(2)", and reference was made to "the command of Rule 23", "apart from what due process may require."[69] Of course, the counterargument may be made that Rule 23 was selected by the Court as a more obvious basis, and the constitutional basis was considered an implied foundation. But,

65. Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140, 2151-152 (1974) (emphasis added).
66. 339 U.S. 306 (1950).
67. 371 U.S. 208 (1962).
68. For a discussion of the proposition that *Mullane* and *Schroeder* may in fact not be apposite to the *Eisen* situation, *see* text accompanying notes 70-78, *infra*; *see also* McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Class Action Issues*, 25 HASTINGS L.J. 1351, 1389-96 (1974).
69. 94 S. Ct. 2140, 2151-52 (1974).

clearly the constitutional requirement of due process did not serve as a foundation. Serious consequences will follow from such a recognition when we consider the possibility of drafting amendments remedying the result achieved by *Eisen IV*.

The next question is whether, aside from the manner in which they were utilized in the *Eisen IV* opinion, the cases of *Mullane*[70] and *Schroeder*[71] independently support the *Eisen* result, as they were believed to support the result in *Eisen III*,[72] (the Court of Appeals for the Second Circuit decision which was affirmed by *Eisen IV*). *Eisen III* extensively discusses *Mullane* and fully sets forth the constitutional difficulties inherent in service by publication, elaborating upon the statement that a "mere gesture is not due process" and that published notice alone is not adequate.[73] But the *Eisen IV* opinion fails to mention the *Mullane* facts, which were very different from the *Eisen* facts, and fails to state that the *Mullane* facts were found to be determinative in the *Mullane* opinion. Thus, the *Mullane* opinion generally stated:

> A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified.[74]

Under the due process clause, the case ruled invalid a New York statute which permitted trust companies to give notice by publication of their petition for judicial settlement of the companies' small trust estate accounts. These accounts were pooled into one common trust fund for investment purposes, in a situation in which the individual trustees periodically transmitted to the individual beneficiaries the income due to them. Emphasizing that due regard must be paid to the "practicalities and peculiarities of the case",[75] the Court recognized "the practical difficulties and costs that would be attendant on frequent investigations into the status of great numbers of beneficiaries, many of whose interests in the common fund are so remote as to be ephemeral," and concluded that such "impracticable and extended searches are not required in the name of due process."[76] In particular, the *Mullane* Court stressed with respect to the position of the individual income beneficiaries:

> The trustee periodically remits their income to them, and we think that they might reasonably expect that with or apart from their

70. 339 U.S. 306 (1950).
71. 371 U.S. 208 (1962).
72. 479 F.2d 1005 (2d Cir. 1973).
73. Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140, 2151 (1974).
74. 339 U.S. 306, 313-14 (1950).
75. *Id.* at 314.
76. *Id.* at 317-18. In view of the possible small individual interests of the members of a Rule 23(b)(3) class action, this latter quotation particularly

> remittances word might come to them personally that steps were being taken affecting their interests.[77]

Accordingly, the *Mullane* holding, as such, does not seem to lend support to a ruling that the *Eisen* device of notice, adopted by the district court,[78] was unconstitutional. Nor can the *Eisen* individual notice requirement independently be derived from the doctrine of *Hansberry v. Lee*.[79] In that case, enforcement of restrictive covenants allegedly binding on areas of the City of Chicago was at issue. It was decided that absent persons involved with respect to city blocks, other than those affecting the parties in the litigation, could not constitutionally be bound by a class action. The Court frowned upon a solution whereby

> . . . all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group, merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far.[80]

Thus, the issue in *Hansberry v. Lee* really becomes one not of individual notice requirement, but of "adequate representation." And in the *Eisen* situation, as well as in the normal consumer class actions, there seems to be no problem of "adequate representation."

Similarly, the individual notice requirement cannot be derived as a constitutional obligation from the case of *Schroeder v. City of New York*,[81] also cited and quoted in *Eisen IV*.[82] The facts of the

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serves to evidence the inapplicability of *Mullane* and its holding of unconstitutionality to the present situation. *See also* the concurring opinion of Mr. Justice Harlan in *Sniadach v. Family Finance Corp.*, in which he adhered to the majority's view holding deprivation of the use of garnished wages a violation of due process, as follows: "Since this deprivation cannot be characterized as *de minimis*, she [the wage earner] must be accorded the usual requisites of procedural due process: notice and a prior hearing." 395 U.S. 337, 342 (1969) (concurring opinion).

77. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318 (1950).

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

79. 311 U.S. 32 (1940).

80. *Id.* at 45.

81. 371 U.S. 208 (1962).

82. 94 S. Ct. 2140, 2151 (1974).

Schroeder case are so different from the *Eisen* facts that *Schroeder* can be easily distinguished. *Schroeder* involved the question of whether notice was adequate in a condemnation proceeding affecting property owned by one individual which consisted of a house and three acres of land. The condemnation proceeding was necessitated by the city's planned diversion of a portion of a river some 25 miles upstream from the individual's property. The only notices given were publications in certain newspapers (not even the newspapers in the larger towns nearby), and of notices on trees and poles in the general vicinity of, but not on, the individual's property. Although the individual's name and address were readily ascertainable from both deed records and tax rolls, neither the newspaper publications nor the notices on the trees and poles contained the name of the individual. It was on these facts that the Supreme Court concluded as follows:

> We hold that the newspaper publications and posted notices *in the circumstances of this case* did not measure up to the quality of notice which the Due Process Clause of the Fourteenth Amendment requires.[83]

These facts demonstrate that the due process ruling of *Schroeder* cannot constitute a precedent for a due process argument in *Eisen IV*. Nor should any comfort therefor be derived from the fact that Mr. Justice Stewart, writing the unanimous opinion in *Schroeder*, used the following language:

> 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.[84]

In quoting from this language of *Schroeder*, Mr. Justice Powell's opinion singles out the words "general rule", thereby creating the impression that the general statement constituted Mr. Justice Stewart's *holding*. That this was not so is apparent from the above-quoted paragraph of Mr. Justice Stewart's opinion in which he specifically stated that his holding was restricted to the particular facts of the present case.[85]

The next portion of the *Eisen IV* opinion dealt with the fact

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83. Schroeder v. City of New York, 371 U.S. 208, 211 (1962) (emphasis added).

84. *Id.* at 212-13.

85. In addition, Mr. Justice Powell's statement in *Eisen IV* that *Schroeder* was decided "prior to the promulgation of amended Rule 23", 94 S. Ct. at 2151, though of course accurate, is not very meaningful if it seeks to convey the impression that the rulemakers were incorporating such a "general rule" into amended Rule 23. Not only did the so-called "general rule" fail to

(which the district court opinion by Judge Tyler had discussed[86]) that 90% of the notice cost were placed on defendants, after a preliminary hearing by the District Court concluding that it was "more than likely" that plaintiff would prevail.[87] That holding of *Eisen IV* was clearly predicated on an interpretation of Rule 23, the Court stating that such procedure "contravenes the Rule." No constitutional arguments are relied upon directly, though it should be noted that Mr. Justice specifically stated:

> Additionally, we might note that a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the *traditional rules and procedures applicable to civil trials.*[88]

But after that broad statement the opinion concluded as follows:

> In the absence of any support under Rule 23, petitioner's effort to impose the cost of notice on respondents must fail.[89]

It would seem that that portion of Mr. Justice Powell's opinion does not assume constitutional impact. As shown by the context, his reference to "traditional rules and procedures applicable to civil trials" apparently was not intended to carry overtones of constitutional dimensions of due process; at least, if it should have such overtones, the statement was intended to be nothing more than an obiter dictum. Accordingly, the result seems to be clear that in Mr. Justice Powell's view, a proper amendment of Rule 23 could be sufficient to provide a basis for a court determination imposing the costs of notice on a defendant in an appropriate case. Later on, we shall attempt to draft amendatory language for Rule 23 to accomplish such a result.

Certain issues were intentionally left undecided in *Eisen IV*. While the court of appeals decision of *Eisen III* headed an entire portion of its opinion as dealing with manageability,[90] and concluded that the proposed class action was unmanageable under

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establish a rule of law, but the *Schroeder* case was not even mentioned in the *Advisory Committee Notes* to amend Rule 23. *See* 39 F.R.D. 69, 98 (1966).

86. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 269 (S.D.N.Y. 1971).
87. Eisen v. Carlisle & Jacquelin,, 94 S. Ct. 2140, 2152-53 (1974).
88. *Id.* at 2153 (emphasis added).
89. *Id.*
90. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1016-18 (2d Cir. 1973).

Rule 23(b)(3)(D),[91] *Eisen IV* did not specifically determine the question of "manageability." Obviously, no such specific determination seemed to be necessary in view of the result reached by *Eisen IV* that the requirement of specific notice to each individual member of the class, at the expense of the plaintiff, was not complied with.[92] However, it is fair to assume that *Eisen IV* would share the finding of "unmanageability." In fact, "unmanageability" would seem to have been the most appropriate reason for dismissing the *Eisen* case as a class action,[93] or at least for reducing the *Eisen* class to a more manageable subclass.[94] In this way, a class action involving 2,250,000 members who could be identified with reasonable effort would not have burdened the courts, and there would have been no occasion for the Supreme Court to issue an opinion like *Eisen IV*, which raised questions as to the kind of notice requirement and as to the propriety of a minihearing in Rule 23(b)(3) class actions. Perhaps a case of a more limited class would have reached results favoring class actions more broadly.

Finally, *Eisen IV* brushed aside the issue of "adequate representation." It had been urged that adequate representation, rather than notice, is the real touchstone of due process in a class action and therefore satisfies Rule 23. The Court refuted this argument by noting that Rule 23 speaks of notice as well as adequate representation,[95] and furthermore that such contention would read the requirement out of the Rule because it would probably lead to the conclusion that in the present case no notice at all would be required.[96] Of course, objections may be raised to this line of reasoning, principally on the ground that in view of the language of Rule 23(c)(2) of "best notice practicable under the circumstances," the notice device advanced by Judge Tyler would simply involve an adjustment of Rule 23(c)(2) to the practicalities of the situation,

91. *Id.* at 1018 (the portion was headed "VI *As a Class Action the Case is Unmanageable*").

92. In its pertinent part, Rule 23(b)(3) authorizes the district court to order maintenance of the action as a class action if the court finds that the questions of law or fact common to the members of the class predominate and that a class action is superior to other available methods. In this regard, the following was specifically listed as a matter pertinent to the findings of the court: "(D) the difficulties to be encountered in the management of a class action."

93. *See* Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140, 2150-52 (1974).

94. *See* the dissent of Judge Lumbard in *Eisen I*, 391 F.2d 555, 570, 572 (2d Cir. 1968).

95. *See* the dissent of Mr. Justice Douglas in *Eisen IV*, 94 S. Ct. 2140, 2153 (1974); *see also* the opinion of the District Court for the Northern District of California in *In re* Memorex Security Cases, 61 F.R.D. 88, 101 (N.D. Cal. 1973), which distinguished *Eisen III* on the basis of the size of the class.

96. In listing the general prerequisites of class actions, Rule 23(a)(4)

and not to its abolition.[97] Whatever the merit of such an argument, it would seem that *Eisen IV* suggests that any amendatory language of the Federal Rule should be directed to subsection (c) (2).

A few words may be appropriate for describing Mr. Justice Douglas' partial dissent, concurred in by Mr. Justice Brennan and Mr. Justice Marshall. Mr. Justice Douglas commenced his dissent by stating:

> While I am in general agreement with the phases of this case touched on by the Court, I add a few words because its opinion does not fully explore the issues which will be dispositive of this case on remand to the District Court.[98]

These words of Mr. Justice Douglas show that his dissent is rather limited. Specifically, he seems to disagree with the kind of remand which should be ordered, although he is apparently in general agreement as to the requirement of notice in class actions under Rule 23(b) (3).

His dissent seems to be clear as to how he would handle the actual remand in the Eisen litigation. The majority remanded the cause "with instructions to dismiss the class action as so defined,"[99] noting specifically that that dismissal is "without prejudice to any efforts petitioner may make to redefine his class either under Rule 23(c) (4) or Fed. Rule Civ. Proc. 15."[100] In other words, there will be a dismissal but the plaintiff may take defined steps to save the action. Mr. Justice Douglas, on the other hand, would not dismiss the action. He makes it clear that in his opinion the District Court should itself, for the purpose of manageability, consider restricting the case to a smaller subclass. Clearly Mr. Justice Douglas does not disagree with the majority view requiring some kind of individual notice to each class member under Rule 23(c) (2).[101]

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specifies that one or more members of a class may sue as representative parties on behalf of all only if "the representative parties will fairly and adequately protect the interests of the class." And Rule 23(c) (2) specifies the details of the notice required in Rule 23(b) (3) actions.

97. Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140, 2152 (1974).

98. *Id.* at 2153.

99. *Id.*

100. *Id.* at 2153 n.16. To this direction to dismiss, the majority added that the record did not reveal whether a smaller class of odd-lot traders could be defined but that, in any event, the Court did not intimate any view yhether any such subclass would satisfy the requirements of Rule 23.

101. *Id.* at 2154.

But contrary to the majority which expresses no view in this regard, Mr. Justice Douglas makes it clear that the *manner* of such notice can be arranged differently. Mr. Justice Douglas specifically mentions that in the *Eisen* case certain subclasses might be economically manageable; that, for instance, certain brokerage houses regularly correspond with the members of a class participating in a so-called "Monthly Investment Plan" or in a payroll deduction investment plan, and that the marginal cost of

> . . . providing the individual notice required by Rule 23(c)(2) might be nothing more than printing and stuffing an additional sheet of paper in correspondence already being sent to the investor, or perhaps only programming a computer to type an additional paragraph at the bottom of monthly or quarterly statements regularly mailed by the brokers,[102]

i.e. the imposition of only a minimal expense upon the defendants, a solution which would obviously be considered constitutional by Mr. Justice Douglas. But, nevertheless, a clarifying amendment of Rule 23(c)(2) would seem to be desirable.

"Fluid Recovery"

One of the questions raised during the eight years of litigation in the *Eisen* case was the procedure by which damages would be calculated and distributed in a large class action case. Judge Tyler held that general class damages, an aggregate of all individual damages of class members, would be an acceptable and reliable way to calculate the amount of defendants' liability. He further held that, if liability was ultimately found, the awards would be made by a so-called fluid class recovery, *i.e.*, that after all individual claims had been settled a fund would be set up to reduce the odd-lot differential.[103] The court of appeals rejected the concept of fluid recovery as being both outside Rule 23[104] and outside the Constitution. The Supreme Court's *Eisen* opinion failed to deal with this issue, which had been the subject of heated debate.[105]

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102. *Id.* at 2154 n.1.

103. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 264-65 (S.D.N.Y. 1971). The odd-lot differential is the extra commission charge for dealing in less than 100 shares of stock.

104. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1018 (2d Cir. 1973). The court of appeals in fact went so far as to call fluid class recovery a "fantastic procedure", *id.* at 1018.

105. *See, The Case for Fluid Class Recovery,* 1 Class Action Reporter 70 (1972). *But see* Simon, *Class Action—Useful Tool or Engine of Destruction?*, 55 F.R.D. 375 (1972) and Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1, 9 (1971), where, after discussing his belief that individual damage claims must be proven, and noting the enormous

As is made clear by Judge Tyler's opinion, fluid recovery is a two stage procedure. First, the class damages are to be aggregated and the issue of liability is to be tried once, with a single award to the whole class. Secondly, the damages will be given to the members of the class who notify the court of their claim, with the unclaimed remainder going to the next best class.

For large class actions to be manageable, fluid recovery should be allowed. Otherwise the massive number of individual damage claims that would have to be litigated would make the case, indeed, a "Frankenstein monster."[106] An example of what could happen is the electrical equipment cases,[107] in which 25,600 separate claims were originally made, and six years of litigation resulted.[108] Further, even if the large class actions could be managed by the courts, the costs of administering the distribution of funds to individuals directly would make such a procedure unacceptable.[109]

The question arises whether it is possible to have aggregated damages and a next best class recovery under Rule 23. It was argued by the court of appeals in *Eisen III*,[110] as well as by others,[111] that allowing fluid class recovery under Rule 23 would be making substantive law, which is prohibited by the Enabling Act under which the Federal Rules of Civil Procedure were promulgated.[112] For example, it was contended that section 4 of the Clayton Act[113]

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amount of time and money that would be required, the author says: "Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure —it is a form of legalized blackmail."

106. Chief Judge Lumbard, dissenting, in Eisen v. Carlise & Jacquelin, 391 F.2d 555, 572 (2d Cir. 1968).

107. *See, e.g.*, Atlantic City Elec. Co. v. I-T-E Circuit Breaker Co., 247 F. Supp. 950 (S.D.N.Y. 1965).

108. Professor Handler used this case to back up his argument that such large suits were "blackmail". *See* note 105 *supra*, at 9.

109. *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 567 (2d Cir. 1968). *See also* Miller, *Problems in Administering Judicial Relief in Class Actions Under Federal Rule 23(b)(3)*, 54 F.R.D. 501, 506 (1972).

110. 479 F.2d 1005, 1014 (1973).

111. Simon, *Class Action—Useful Tool or Engine of Destruction?*, 55 F.R.D. 375, 383 (1972).

112. 28 U.S.C. § 2072 (1970) which provides in part that, "[s]uch rules shall not abridge, enlarge or modify any substantive right . . . ."

113. 15 U.S.C. § 15 (1970): "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . ."

specifically restricts its remedy to the person who proves an "injury in his business or his property"[114] and that fluid recovery would cause a substantive change by allowing some who had not suffered injury to recover. It is our belief that as long as the correlation between the damaged class and the class that recovers is proportionally high, the argument of a "substantive change" should be considered ill-founded.[115] If the correlation is great, then the intent of the statute under which the class action is brought, presuming it is similar to 15 U.S.C. § 15, is being carried out and fluid recovery has not caused a substantive change. However, if the correlation is low, then fluid recovery is not acceptable as the procedure itself would have made a substantive change from the legislative desire that those who actually suffered the injury be given the damages.[116] The reason for this conclusion is that section 4 of the Clayton Act[117] with its treble damages provision was meant to be a deterrent to certain undesirable business practices,[118] and but for allowing fluid recovery many worthwhile class actions would become unmanageable. Individual recovery would be precluded by the cost of the litigation involved as compared to the size of each individual injury.[119] This would allow those entrepreneurs who wisely choose to victimize large numbers of citizens, small amounts each, to retain "the 'pot of gold' created by their illegal activities."[120] To allow this would be to ignore the broad deterrent and prophylactic intent of the statute.[121]

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114. *Id.*

115. *See* Note, *The Manageability Crisis of Consumer Class Actions: The Severe Example of Eisen III*, 7 IND. L. REV. 360, 382-83 (1973).

116. *See* Note, *Eisen v. Carlisle & Jacquelin—Fluid Recovery Mini-Hearing and Notice in Class Actions*, 54 B.U.L. REV. 110, 121-22 (1974), which suggests that all damages are awarded to those who are injured, and that therefore fluid recovery satisfied the Clayton Act. It is only upon administration of the award, so it is contended, that others than those damaged may benefit.

117. 15 U.S.C. § 15 (1970).

118. *See* Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481, 494 (1968); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

119. In 1966 when the *Eisen* litigation was initiated, it was estimated that the minimum cost for litigating an antitrust case would be $5,000. Alioto, *The Economics of a Treble Damage Case*, 32 ANTITRUST L.J. 87, 93 (1966).

120. *In re* Antibiotics Antitrust Actions, 333 F. Supp. 278, 287 (S.D.N.Y. 1971).

121. If the statute involved is worded so as not to specifically require damages to go to the individual harmed, then the only possible substantive change would be the limited number of undamaged persons who are enriched. When balanced against the fairness to the majority of the class which could otherwise not recover and in light of the fact that the defendant is giving up only ill-gotten gains, the consequent unjust enrichment seems acceptable and effects the desired substantive result, *i.e.*, the deterrence of such activity in the future.

The degree of correlation between the class injured and the class that recovers seems to have been the deciding factor in two recent cases on the issue of whether or not to allow fluid recovery. In *City of Philadelphia v. American Oil Company*,[122] the district court held that the correlation between the class of motorists who purchased gas between 1955 and 1965 and those who would benefit by a reduction in gasoline prices in the 1970's was not sufficient to allow for a fluid type of damage recovery. In *Eisen*, on the other hand, Judge Tyler held that there was a sufficient correlation between the class damaged and the class to benefit by a possible fluid recovery, as the activitiy of odd-lot purchasing was thought to be sufficiently repetitive.[123]

Another argument used by the court of appeals to back up its rejection of fluid recovery, was the citation of *Snyder v. Harris*[124] for the proposition that the claims of a class cannot "be treated collectively or as 'the class as a whole'."[125] But the *Snyder* case was dealing with the issue of whether for *jurisdictional* purposes the claims of the class can be aggregated, and in doing so the Supreme Court was interpreting the meaning of a statute, 28 U.S.C. § 1332. For the purpose of allowing aggregation of *damages* under Rule 23 no statute, but only the Rule itself, need be interpreted, so that no substantive change is made.[126]

Finally, it has been argued that one of the reasons for the Clayton Act providing for treble damages is that Congress recognized that many injured parties would not sue, and that the Act there-

122. 53 F.R.D. 45, 72 (D.N.J. 1971); and *see* Note, *Federal Rule 23(b)(3)(D): Manageability Requirement in the Treble Damage Consumer Class Action*, 31 MD. L. REV. 354 (1971).

123. 52 F.R.D. 253, 264 (S.D.N.Y. 1971).

124. 394 U.S. 332 (1969). For a discussion of the case *see* text at 8, *supra*.

125. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1014 (2d Cir. 1973) (*Eisen III*).

126. *See, e.g.*, Note, *Managing the Large Class Actions: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426, 450 (1973). *But see* Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Action and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 870 (1974) [hereinafter cited as Landers], who criticizes the Harvard Note, on the ground, *inter alia*, that a court must interpret section 4 of the Clayton Act so that, as in *Snyder*, the court is interpreting a statute. But even if this were correct, the court would have no reason to interpret 15 U.S.C. § 15 as excluding aggregation of class damages.

fore provided for treble damages to make the penalty sufficiently strong so as to be an effective deterrent. Thus, it has been contended that, if the class action procedure were to allow all injured parties to collect, then the congressionally set balance would be distorted and as a result business conduct would unintentionally be changed and in that way a substantive change would be effected.[127] This final argument succumbs when balanced against the total nullification of the deterrent effect of a statute, which would occur if small claims are involved and class actions were not permitted.

Constitutional Problems

The court of appeals in *Eisen* noted that there would be a constitutional violation if fluid recovery were allowed.[128] The court did not elucidate upon the nature of the supposed constitutional violation, but it could be based on the contention that the defendant has been deprived of a lump sum without proof of individual damages. This argument seems weak. Damages may be assessed as long as they are not

> . . . based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.[129]

Under these circumstances there is apparently no due process violation. The other constitutional argument could be that under the fluid recovery doctrine those persons who were injured but were not notified would be precluded from recovery; this, it would be contended, would be a deprivation of property without due process.[130] Such an argument was rejected in the case of *State of West Virginia v. Chas. Pfizer & Co.*[131] Furthermore, in a situation where persons not notified[132] would, in any event, for statute of limitations or monetary reasons be precluded from suing, the property lost by them would seem to be de minimis.[133]

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127. *See* Landers, *supra* note 126, at 868-69, for an excellent discussion of this point.

128. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1014 (2d Cir. 1973) (*Eisen III*).

129. Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946), where the Supreme Court decided that wrongdoers must bear certain risks of uncertainty in damage calculations. *See also* Feit v. Leasco Data Processing Equip. Corp., 332 F. Supp. 544, 587 (E.D.N.Y. 1971).

130. It should be noted that by the end of the *Eisen* case the statute of limitations had run and no individual suits could have been commenced, so that no property rights were infringed upon.

131. 440 F.2d 1079 (2d Cir. 1971).

132. Of course all parties with substantial interests should be notified.

133. *See* Justice Harlan's concurring opinion in Sniadach v. Family Fi-

Additionally, there are a number of factors that compel usage of fluid recovery within the framework of Rule 23. First, as will be shown later,[134] class actions were born out of equity,[135] and under such circumstances it is proper for the court to go as far as possible to ensure that damages be redressed and to recognize that but for large class actions few if any of small claimants damaged would recover. Illustrative of this same line of reasoning is the following statement of the Reporter to the Advisory Committee on the Civil Rules at the time of the 1966 amendment:

> Yet imagination and even daring may be required of counsel and courts in devising abbreviated but fair procedures leading to hand-tailored relief which may well be quite novel in form.[136]

The basic problem remains whether and to what extent in considering legal claims for damages the courts should be permitted to engage in such equitable considerations as finding ways of ensuring compliance with statutory mandates by framing and modeling the particular relief and, consequently, using the system of a fluid recovery in class actions. Such equitable considerations should be allowed in class actions, even though the basic remedy is a legal remedy. It should be recognized that, while the action, as such, is at law, the distribution of the damages awarded, when in the form of a class action, obtains an equitable character. It is not unknown in our system that equitable considerations play a part although the remedy involved, as such, is at law. For instance, the equitable device of reformation of a contract, when needed, may be used and then damages be secured on the contract as reformed;[137] clearly, in such situations equitable considerations are used even though the ultimate relief sought, damages, is legal. Perhaps a more pertinent example is the practice of the U.S. Court of Claims,

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nance Corp., 395 U.S. 337, 342 (1968), which suggests that due process does not attach to de minimis interests.

134. *Infra* note 173.

135. *See* CHAFEE, SOME PROBLEMS OF EQUITY 285 (1950) suggesting that one of the problems of class actions is joining an equity device with money damages.

136. Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497, 499-500 (1969). *See also* Judge Medina's statement in *Eisen II*: "Indeed we hold that the new Rule should be given a liberal rather than restrictive interpretation." 391 F.2d at 563.

137. *See* the practice as followed, for instance, in Imperial Shale Brick Co. v. Jewett, 169 N.Y. 143, 62 N.E. 167 (1901).

which by statute possesses only jurisdiction to grant legal, not equitable, relief against the United States.[138] Nevertheless, the Court of Claims was permitted in a contract action to reform a contract.[139] Also, in a taking action where the relief is only for damages, the Court of Claims will equitably impose an easement on the land for whose taking a money judgment was awarded.[140] Similarly, in proper cases the equitable device of "fluid recovery" should be allowed in legal actions for damages when they are in the form of class actions. Perhaps, amendatory language of Rule 23 should be drafted to permit such "equitable" considerations in awarding damages in class actions.

Secondly, recovery of the unused funds by the next best class[141] would not be unique to class actions. This fluid recovery procedure of giving damages to the next best class can be analogized to the widely accepted cy pres doctrine. The cy pres doctrine is a rule of construction whereby the courts effectuate the overriding charitable intent of a testamentary gift which would otherwise fail because the purpose to which the gift was directed had become impossible, impractical or inexpedient. Many courts will give the gift to a closely related charity, the next best class, thereby effectuating the general charitable intent of the testator.[142] By analogy, the courts could effectuate the legislative intent to deter anti-social behavior and reimburse those who are damaged, by giving a portion of the recovery from a class action to the next best class composed largely of those damaged, where to do otherwise would negate the general intent of the legislation.[143]

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138. United States v. Jones, 131 U.S. 1 (1889); *see also* 28 U.S.C. § 1491 (1970).

139. United States v. Milliken Imprinting Co., 202 U.S. 168 (1906).

140. Jensen v. United States, 158 Ct. Cl. 333, 305 F.2d 444 (1962); *see generally* 2 WEST'S FEDERAL PRACTICE MANUAL, § 1833 (2d ed. Volz 1970); D. SCHWARTZ & S. JACOBY, ALI LITIGATION WITH THE FEDERAL GOVERNMENT § 7.109 (ALI-ABA 1970).

141. In the case of utility or credit card refunds or any like area where records are available, this fund would be nominal. *See* Ill. Bell Tel. Co. v. Slattery, 102 F.2d 58, 61-62 (7th Cir. 1939), where all but $1,688,295 of $18,798,980 overcharged was refunded.

142. *See generally* on the cy pres doctrine E. FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES (1950). *See also* Jackson v. Phillips, 14 Allen 539 (Mass. 1867).

143. In Hawaii v. Standard Oil Co., 405 U.S. 251 (1972), the Supreme Court determined that the State may not sue as *parens patriae* for damages done its citizens under the Clayton Act. This would exclude the State being the next best class. For an excellent discussion of the cy pres analogy, *see Comment, Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448 (1972). *See also* Miller, *Problems in Administering Judicial Relief in Class Actions Under Federal Rule 23(b)*, 54 F.R.D. 501, 510 (1972).

Finally, even if Rule 23 cannot be read to include fluid recovery, it has been suggested,[144] though perhaps without much justification, that an implied remedy doctrine, such as was announced in *J. I. Case Co. v. Borak*,[145] could appropriately be applied here. The implied remedy doctrine holds that federal courts have the power and duty to provide remedies in order to protect federally created rights. The use of the doctrine has been argued to be governed by equitable considerations,[146] and it has been urged that Rule 23, which was born in equity, should under the *Borak* doctrine be utilized for granting this kind of equitable relief in legal actions.

CONSUMER PROTECTION LEGISLATION

In the light of *Eisen IV*, the question arises how to give widespread relief to large classes of persons for whom individual suits are not a legitimate alternative because of the cost of litigation. There are two possible answers, either enactment of substantive consumer legislation or amendments to Rule 23 and to the federal jurisdictional statutes.

Enactment of substantive consumer legislation[147] should take the form of setting up a consumer protection agency (CPA). It would be the most desirable solution if this agency were to have standing to join consumer classes as a party in interest before the federal courts and agencies,[148] where it could provide the expertise and financial backing that would make suits such as *Eisen* manageable under the present Rules. An example would be that

144. Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426, 451 (1973). *But see* Landers, *supra* note 126, at 872.

145. 377 U.S. 426 (1964).

146. *See* Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426, 452 (1973).

147. Our discussion of consumer legislation will be restricted to possible steps that Congress could take to enable *Eisen* type suits to be manageable.

148. If a bill such as the Class Action Jurisdiction Act, S. 1980, 91st Cong., 2d Sess. (1969), were passed, all consumer class actions could be brought in federal courts regardless of the amount in controversy or diversity of citizenship. This would increase the importance of the proposed intervention power of the CPA, as cases which now could only be brought in state courts could then be brought in federal court. For an interesting note on the proposed Class Action Jurisdiction Act, *see* 69 MICH. L. REV. 710 (1971); *see also* proposed amendments to 28 U.S.C. § 1332 (1970), text accompanying notes 158 *et seq.*, *infra*.

while an individual class representative might not be able to afford the necessary costs of notice, the CPA could provide such funds.[149] The expenses of the Government could be reimbursed from the award with the remainder going to a "fluid type" of recovery, and in this form, preferably in a context more manageable than the actual *Eisen* facts, a situation broadly similar to the *Eisen* situation could be handled properly.[150] At this writing, many bills have been introduced in Congress proposing the setting up of a CPA which would have varying responsibilities. The House of Representatives has passed[151] H.R. 13167, 93d Cong., which would set up a CPA to represent consumer[152] interests. The new agency would have the restricted right to request federal agencies to subpoena information and to participate in the hearings of federal agencies or in federal court proceedings.[153] If the Bill should be enacted into law it would not provide relief in the *Eisen* type situation, as the Bill does not provide for financial assistance by the CPA.[154]

The Senate is currently considering various proposals for a CPA, the strongest being S. 707. S. 707 specifically states as a "Finding" that consumers each year suffer economic harm in the course of using goods and services. Its definition of "consumer" (section 4 (7)) is so broad as to include the acquisition of services and of tangible or intangible property for personal services, and "interest of consumer" (section 4(11)) includes any economic concern of consumers involving tangible or intangible goods, or services, which may become the subject of any transaction. Despite these broad definitions, the CPA would not be able to obtain court relief for the individual consumer in the *Eisen*-type situation. However, a very desirable and appropriate result which would generally remedy the situation in the future for the class as a whole might be

149. It might also be possible to solve the problem of "adequate representation" by means of the CPA.

150. *See* the discussion of our preference for a more manageable situation than the *Eisen* facts presented, text accompanying notes 106-09, *supra.*

151. Passed on April 3, 1974, by a vote of 293 to 94. *See* CONG. Q., April 6, 1974, Vol. 32, No. 14, at 899.

152. The term "consumer" is given a relatively narrow definition in this Bill: "The term 'consumer' means any person who uses for personal, family or household purposes goods and services offered or furnished for a consideration." H.R. 13167, 93d Cong., 2d Sess., § 15 (1974).

153. Under H.R. 13167, the CPA may only ask for a subpoena from another federal agency in order to protect consumer interest. The federal agency will issue the subpoena only if the information substantially affects consumer interest, the information is relevant, and the subpoena is not burdensome to that agency or the person subpoenaed. *See* H.R. 13167, 93d Cong., 2d Sess. § 10(a) (1) (1974).

154. For a more complete discussion of the provisions of H.R. 13167, *see* CONG. Q., April 6, 1974, Vol. 32, No. 14, at 899.

accomplished by the broad authority of the CPA to intervene on behalf of consumers in any formal or informal proceedings of administrative agencies and to seek review and to enjoin the illegal practice. Although it is true that the notice requirements of Rule 23(c)(2) apply only in a Rule 23(b)(3) situation—and therefore are inapplicable when merely an injunction is sought under Rule 23(b)(2)[155]—in practice, the individual consumer in an *Eisen*-type situation probably could not even be expected to have, or expend, funds sufficient for obtaining the costly injunctive relief. To that extent, S. 707 could serve a valuable purpose.[156]

Most recently, Senator Mondale has proposed an amendment to S. 707 which would allow the CPA to give

> information and financial assistance to private organizations of consumers representing a substantial number of individuals for the purpose of assisting such organizations in intervening or participating in any agency or judicial proceedings which substantially affect consumer interests.[157]

This might allow continuation of cases such as *Eisen*, at least in a more reasonable form, since money to finance notice would be available.

PROPOSED AMENDMENTS

Congressional Amendment

As indicated previously,[158] the *Snyder* and *Zahn* cases have seriously limited the effectiveness of Rule 23(b)(3) class actions in the federal system by requiring, absent specific statutory language, that the leader of the class and each member of the class individually meet the $10,000 requirement. In view of the fact that the *Snyder* and *Zahn* cases based their conclusions largely upon jurisdictional grounds[159] and specifically mentioned the principle of Rule 82 that the rules shall not be construed to extend the jurisdiction of the district courts, it would seem proper that the remedy be provided by an Act of Congress.

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155. Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140, 2152 n.14 (1974).
156. For a more complete discussion of the provisions of S. 707, *see* CONG. Q., March 31, 1973, Vol. 31, No. 13, at 719.
157. *See* S. 707, 93d Cong., 2d Sess. (1974), proposed amendment No. 1521 of § 17 (June 24, 1974).
158. *See* text accompanying notes 43 *et seq.*, *supra*.
159. *Id.*

The enactment of the Ohio Rules of Civil Procedure in 1970 may furnish a valuable example in this regard. In 1970 Ohio promulgated new Rules of Civil Procedure which were largely modeled after the Federal Rules. On the subject of class actions Ohio pretty much copied[160] Federal Rule 23 as amended in 1966, but Ohio Civil Rule 23 added a subdivision (F) reading as follows: "The claims of the class shall be aggregated in determining the jurisdiction of the court." That provision was added in order to convey jurisdiction of class actions more generally upon the Ohio Common Pleas Courts, rather than entrusting them largely to the Ohio Municipal Courts.[161] A similar statute may be added to 28 U.S.C. ch. 85, regulating the jurisdiction of the United States district courts. Section 1331 and section 1332 generally establish the $10,000 minimum requirement for federal question and diversity cases, respectively. To the extent that the jurisdiction of a class action is generally based only on those provisions, the following provisions might be added:

> *In determining the original jurisdiction of the district courts under sections 1331 and 1332 of this title the claims of the members of a class proceeding under Rule 23(b)(3), Federal Rules of Civil Procedure, shall be aggregated for the purpose of ascertaining the amount in controversy.*

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160. It should be noted that prior to 1970, Ohio had only the general provision of former OHIO REVISED CODE § 2307.21 according to which, when a question was one of common or general interest of many persons, or the parties were very numerous and it was impracticable to bring them all before the court, there could be a suit or defense by one for the benefit of all. In other words, the Ohio Code provision was even much less specific than old Federal Rule 23 before its amendment in 1966. *See* 1 JACOBY, OHIO CIVIL PRACTICE UNDER THE RULES 207 (Banks-Baldwin 1970).

161. The monetary jurisdiction of the Ohio Municipal Courts throughout the state is generally limited to claims not exceeding $5,000, in certain counties to claims not exceeding $7,500 or $10,000. OHIO REVISED CODE § 1901.17.

It should be noted that the Supreme Court's interpretation of the notice requirements under Federal Rule 23(c) has important consequences in state class actions as well. For example, both Ohio and Kentucky have class action rules that substantially copy Federal Rule 23, and it would now seem possible that the notice requirements under these state rules would be interpreted to be the same as under the Federal Rule. *See* 1 JACOBY, OHIO CIVIL PRACTICE UNDER THE RULES 205 (Banks-Baldwin 1970); 1 RUSSEL'S KENTUCKY PRACTICE AND FORMS 62 (Banks-Baldwin, 1971). Further, in California, the statute under which class actions are brought, CAL. CIV. PRO. CODE § 382 (West 1973), has been given a broad interpretation, resulting in some provisions being interpreted much like Federal Rule 23. The effect of *Eisen IV* may possibly be as great as in those states which copy the Federal Rules verbatim. *See*, Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967). Finally, in certain states, such as New York, *Eisen IV*'s notice requirements, unless they are held also to be constitutional requirements, would probably not have a great impact, as its statutory interpretation has been more limited. *See* N.Y.C.P.L.R. § 1005 (McKinney 1963). *See also* Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433 (1960).

Amendment of Federal Rule 23

This article's discussion of *Eisen IV* has demonstrated the desirability of certain amendments in order to make class actions under Rule 23(b)(3) more readily available. An attempt was made to demonstrate that probably no constitutional objections prohibit such amendments, except that perhaps some notice to each member of the class is constitutionally required; clearly, regulation as to who should bear the costs of such notices is not constitutionally limited.

First, it should be clarified that there is broad power in the district courts on their own motion to reduce a class action to a smaller subclass, even if only for the purpose of reducing the cost of any notice. As discussed earlier, it was apparently on this basis that Mr. Justice Douglas dissented from the mandate in *Eisen IV*.[162] In his dissent, Mr. Justice Douglas finds authority in Rule 23(c)(1) for the reduction of a class action to subclasses, and he calls this conclusion "as plain as words can make it."[163] Nevertheless, clarifying language may be desirable, specifying that such determination may be on the court's own motion. Language concerning appealability may also be desirable.

The amendatory language adding a third and fourth sentence to Rule 23(c)(1) may read as follows:

> *Such determintion may be made upon the motion of either party or upon the court's own motion. In addition to other orders, such determination may be one of reducing the size of the class to a smaller subclass, and the determination may have the express purpose of decreasing the expense of giving the required notice to the members of the class under Federal Rule 23(c)(2). When substantially reducing the size of a class, such order shall be considered a final order.*

Next, the question arises as to the desirability of qualifying the manner of the notice required under Rule 23(c)(2). In his dissent in *Eisen IV*, Mr. Justice Douglas specifically suggested a solution

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162. *See* text accompanying notes 98 *et seq., supra.*

163. Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140, 2155 (1974). Rule 23(c)(1) reads as follows:

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

whereby in a smaller subclass action notice may be effected by the defendant brokerage houses which would have regular contact with the individual members of the subclass during their course of business.[164] Such a solution clearly seems constitutionally permissible and proper in light of the text of the Rule, the "practicalities" of *Mullane*, and de minimis considerations.[165] For the purpose of clarifying the present situation, the following language may be inserted after the first sentence of Rule 23(c)(2):[166]

> *Notice shall normally be provided by the party suing on behalf of the class unless the court, on the basis of evidence, finds that the other party can supply the notice with relatively minimal expense, in which event the court shall order that other party to do so.*

The proposed amendments of Rule 23 discussed thus far, are largely of a clarifying nature. Next, we will suggest amendments which are of a more fundamental, policy-making character. These suggestions deal with three large questions: (1) whether there might be a qualification of the individual notice requirement of Rule 23(c)(2); (2) whether there might be a minihearing, possibly imposing certain notice costs on the defendant and, if so, when and under what circumstances; and (3) whether the court might have the power generally to provide for a system of "fluid recovery" in a proper case.

With regard to the second question, it was suggested earlier there are no constitutional objections to imposing costs of notice upon defendant, although certain limitations as to the mechanics seem desirable. As a matter of sound policy, the imposition upon the defendant of some reasonable costs of the notice seems wise, especially in consumer class actions where the expected recovery by the individual may be minute and where, without such imposition, class actions may not be economically possible. But care should be taken to assure that the costs do not become an excessive burden for the defendant.

It was also suggested earlier that a sentence be added after the first sentence of Rule 23(c)(2), to the effect that minimal costs of notice may be imposed upon defendant even without a hearing. Here costs would be more than minimal. Mr. Justice Powell's opinion held that the use of such a procedure in the *Eisen* case "contra-

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164. Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140, 2154 n.1 (1974).
165. *See* text accompanying note 133, *supra.*
166. The first sentence of Rule 23(c)(2) reads as follows:
> 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. FED. R. CIV. P. 23(c)(2).

venes the Rule"[167] but it would seem possible to amend Rule 23. What is suggested is that in particular circumstances the court determination whether an action should be a class action be postponed, that certain conditions for holding a preliminary hearing be established, and, finally, that conditions be laid down for imposing the costs on the defendant. Support for the latter suggestion may be found in the general equity powers. In the field of injunctions, Rule 65(c) specifically provides that the court require security from the applicant ". . . for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Nevertheless, there are quite a few cases brought by indigents or cases instituted as public interest litigation where no security, or only a nominal amount, was required.

For instance, a preliminary injunction to restrain cut-backs in benefits under New York's Medicaid Program was granted without requiring the applicant to post a bond under Rule 65(c).[168] Similarly, in big environmental cases only nominal security has been required. While the potential injury a company may suffer each day that a pipeline or power plant is prevented from operating may be extensive, courts have permitted injunction suits to continue though only "inadequate" security is posted; in suits by classes of individual neighbors, it was felt that no plaintiff or group of plaintiffs had sufficient resources to post an adequate bond. Thus, in an injunction suit against the Government[169] in which the Government asked for a $750,000 bond for the first month and $2,500,000 for each month thereafter, the court instead imposed a nominal bond of $100, stating that:

> [T]he requirement of more than a nominal amount as security would in the Court's opinion stifle the intent of the [1969 National Environmental Policy] Act, since these three 'concerned private organizations' [three nonprofit environmental organizations] would be precluded from obtaining judicial review of the defendant's actions.[170]

167. 94 S. Ct. 2140, 2152 (1974).
168. Bass v. Richardson, 338 F. Supp. 478, 490 (S.D.N.Y. 1971).
169. Natural Resources Defense Council, Inc. v. Morton, 337 F. Supp. 167 (D.D.C. 1971), *aff'd on other grounds*, 458 F.2d 827 (D.C. Cir. 1972). *See also* Sierra Club v. Froehlke, 359 F. Supp. 1289, 1385 (S.D. Tex. 1973).
170. Natural Resources Defense Council, Inc. v. Morton, 337 F. Supp. 167, 169 (D.D.C. 1971).

In another substantial environmental injunction case, the court simply required security "equivalent to One ($1.00) Dollar."[171] Similarly, with respect to discovery, another device of equitable origin, a court has ordered prepayment of counsel fees and expenses by the non-moving party in a proper case.[172]

Like the institutions of injunctions and discovery, the device of class actions has its source in equity, and is described as an "invention of equity."[173] Therefore, in a proper case, a court handling a class action should have the preliminary authority to impose costs on the defendant. A defendant enjoined without obtaining any security, or only a nominal security, may suffer substantial loss because he is enjoined, perhaps improperly, from operating his business. But this loss by a possibly innocent defendant is justified in so-called public interest litigation by general equity principles. In the same way, in the device of class actions, especially those of consumer litigation, equitable principles appear to justify the court in imposing on defendant costs which occur in the handling of class actions, as long as care is taken that such costs remain reasonable. This suggestion has nothing to do with the exceptional situations, like shareholder derivative actions, where a fiduciary duty pre-exists between plaintiff shareholder and defendant corporation and where, consequently, the defendant corporation may be ordered to advance costs.[174] Application of that exceptional rule to the *Eisen* situation was specifically brushed aside by the Supreme Court in *Eisen IV* on the ground that, different from the situation of a pre-existing fiduciary duty in stockholders derivative actions, the relationship between the parties in *Eisen* is "truly adversarial."[175] But the relationships between the parties in the public interest field of environmental injunction litigation, of course, are also "truly adversarial."

Accordingly, the following amendatory sentence may be suggested at the end of Rule 23(c)(2):

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171. Environmental Defense Fund v. Corps of Eng. of U.S. Army, 331 F. Supp. 925, 927 (D.D.C. 1971).

172. River Plate Corp. v. Forestal Land, Timber & Ry. Co., 185 F. Supp. 832, 838 (S.D.N.Y. 1960). *See also* Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin,* 87 HARV. L. REV. 426, 445 (1973).

173. Hansberry v. Lee, 311 U.S. 32, 41 (1940):

> The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable.

174. *See, e.g.,* Dolgow v. Anderson, 43 F.R.D. 472, 498-500 (E.D.N.Y. 1968).

175. 94 S. Ct. 2140, 2153 (1974).

> *In cases where the expense of the notice appears to exceed nominal amounts, the court on the basis of equitable principles may in a proper case impose the costs in whole or in part on defendant, but only after a preliminary hearing in which the court has found (1) that even after reduction of the class action to that of a subclass the notice expenses still exceed bearable amounts, (2) that as a matter of law the complaint will survive motions by the defendant either to dismiss or for summary judgment, and (3) that, on the basis of evidence, recovery by the members of the class is more than likely.*

Also, the following sentence may be added to Rule 23 (c) (1):

> *Such determination shall be postponed until after the court has completed any preliminary hearing it may hold in accordance with the fourth sentence of subsection (c)(2) of this Rule.*

The first question postulated[176] was whether the "individual notice" requirement of Rule 23(c)(2) should be qualified by amendment. As explained earlier,[177] the dismissal of the class action by *Eisen IV* was based upon an interpretation of Rule 23(c)(2) but apparently not directly upon constitutional principles of due process. However, caution should be exercised in view of the fact that the Advisory Committee Note to the 1966 amendments of Rule 23 specifically referred to the *Mullane* case when it described Rule 23(c)(2) as being "designed to fulfill requirements of due process to which the class action procedure is of course subject."[178] Any qualification to permit service by publication only should be avoided, especially when it is realized that the *Mullane* Court found service by publication unconstitutional even in the in rem or quasi in rem action involved in *Mullane*, whereas the typical Rule 23(b)(3) class action is an in personam action where service by publication is even more suspect. Still, certain qualifications of the "individual notice" requirement of Rule 23(c)(2) seem desirable, such as permitting notification to the members of the class directly or indirectly, or to the leaders of a group, who can be expected to forward the notification to the members of the group. Such qualifications are not as questionable as service by publication, but they should be understood to modify *Eisen IV*'s strict interpretation of Rule 23(c)(2). Accordingly, the concluding portion

176. *See* text at 31, *supra*.
177. *See* text accompanying notes 56 *et seq.*, *supra*.
178. 39 F.R.D. 69, 107 (1966).

of the first sentence of Rule 23(c)(2) should be amended to read as follows:

> *. . . including notice to the members who can be identified through reasonable effort, either notice individually to each member of the class, or in a proper case notice to a leader of a group, who can be expected to forward the notification to each member of the group, or by other direct or indirect notice.*

Finally, an amendment to Rule 23(c)(1) might be suggested specifying that in a proper case the court may determine that the recovery in a class action shall be by the device of "fluid recovery."[179] Care should be taken to assure that the device be employed only in cases where in the court's opinion recovery by means of a class action is the only method by which the legislative purpose of the law under which the damages are awarded, can properly be effectuated, and where the correlation between the class actually damaged and the persons likely to receive damages under the "fluid recovery" doctrine is extremely high.

It has previously been shown that the equitable mechanism of a fluid recovery seems proper in class actions. Accordingly, it is suggested that the following concluding sentence be added to Rule 23(c)(1):

> *After a hearing the court may determine that the recovery in a class action under subdivision (b)(3) be by means of a so-called fluid recovery, i.e., that (1), without proof of the extent of the damages suffered by each individual member of the class, there be a single ruling as to the total amount of damages due from the defendant to the class as a whole, that (2), then, the individual members of the groups by proper notification and proof to the court of their damages obtain recovery, and (3) that any remaining funds of the recovery, finally, be awarded to the class of persons closest in character to the class originally described; but such a determination can be made by the court only if the correlation between the class as originally described and the class which can ultimately be expected to recover pursuant to notification is extremely high and if the court finds that the legislative purpose of the law under which damages are awarded in the action can only be effectuated properly by means of a class action.*

Conclusion

This article was written for the purpose of revitalizing Rule 23(b)(3) class actions following the rulings of *Snyder, Zahn* and especially *Eisen IV*. These three Supreme Court opinions were analyzed carefully in order to determine whether such effort is possible without any constitutional amendment. The principal innovation of the "spurious" class action in 1966 was the rule that, while

179. *See* text accompanying notes 103 *et seq., supra* for the discussion of "fluid recovery".

formerly class members had to take affirmative steps to participate in the class, now they are bound by the class action unless they opt out.[180] In the authors' view, this 1966 change of policy was sound especially in the fields of consumer, environmental, and mass tort litigation, and it should be preserved.[181] Without it some of that litigation would be most difficult to handle.[182]

What are the statutory and rule changes necessary to accomplish the purpose? First, the limiting results of *Snyder* and *Zahn* seem to require statutory amendment. Many matters implicit in *Eisen IV*, however, could be remedied by amendments to Rule 23. In order to avoid certain restrictive interpretations of *Eisen IV*, several clarifying amendments were suggested, namely (a) the addition of a third sentence to Rule 23(c)(1) and (b) the insertion of a second sentence into Rule 23(c)(2). These two amendments would not solve all of the basic problems of class actions but they would assist future courts in following Mr. Justice Douglas' dissenting opinion.

Some of these basic problems are whether a mini-hearing can be held to impose costs of the required notice on the defendant, whether the requirement of individual notice should be qualified somewhat, and whether there should be a fluid recovery in certain class actions. To remedy these problem areas, amendments to Rule 23(c)(2) and Rule 23(c)(1) were suggested which would, among other things, establish a procedure for imposing substantial costs on the defendant and which would qualify the notice requirement. By these amendments, it is hoped, some larger class actions would be made more feasible. But it should be understood that even these amendments would not make it possible to entertain a class action of the size intended by *Eisen*. The imposition of costs on the defendant is intended to remain within reasonable limits, and the

180. *See also* 3B J. MOORE, FEDERAL PRACTICE ¶ 23.02[1] (2d ed. 1974): "As to the old, the call of the barn dance would be: the doe hop in; and as to the mod, the doe hop out."

181. *See* the quotation of Mr. Justice Douglas' remarks in *Eisen IV*, 94 S. Ct. 2140, 2156 (1974) with which this article began.

182. It should be noted that the limiting effect of the Supreme Court rulings may not be as severely felt in the environmental field as in consumer litigation because in the environmental field injunctive relief very frequently is the appropriate relief, and we are here not concerned with that type of action; *see* FED. R. CIV. P. 23(b)(2).

notice solution would not permit service by publication; consequently, the *Eisen* suit could not be handled even if the amendments were adopted. Moreover, relief of the type and extent under the *Eisen* facts is, in any event, not appropriate for private class actions. Rather, activities of the kind suggested for the proposed Consumer Protection Agency may be more appropriate.

It is the authors' view that *Eisen* should have been dismissed as unmanageable under Rule 23(b)(3)(D). If in *Eisen II*[183] the dissenting opinion[184] of Chief Judge Lumbard had prevailed, the *Eisen* case would have reached the Supreme Court on the basis of a district court's dismissal on the ground of unmanageability, and perhaps some of the problems of class actions here discussed would have been presented to the Supreme Court in subsequent cases in a more favorable light. The imposition of costs on the defendant and the problem of a mini-hearing might have encountered a more sympathetic reaction. It is the authors' hope that these proposed amendments will assist in salvaging proper class actions. While adoption of all the proposed amendments to Rule 23 is the ultimate goal, it is suggested that at least the two clarifying amendments to Rule 23, first considered in our discussion of the proposed amendments,[185] be considered expeditiously.

183. 391 F.2d 555 (2d Cir. 1968).
184. *Id.* at 570-72.
185. *See* text accompanying notes 162 *et seq.*, *supra.*