Challenging Certification of a Class Action: A Hypothetical

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When a court of appeals renders three separate opinions in the same case in a period of six years on solely procedural issues, a judge is sometimes moved to philosophize. The experience prompted Judge Medina to make these, by now, well known observations:

> Class actions have sprouted and multiplied like the leaves of the green bay tree. No matter how numerous or diverse the so-called class may be or how impossible it may be ever to compensate the individual members of the class, a champion steps forth. Thus class actions have been brought 'on behalf of all subscribers to business telephones in New York County, all Master Charge credit card holders similarly situated, all consumers of gasoline in a given state or states, all homeowners in the United States, and even all people in the United States.' So far as we are aware not a single one of these class actions including millions of indiscriminate and unidentifiable members has ever been brought to trial and decided on the merits. But the preliminary mini-hearing on the

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> merits such as those conducted by Judge Tyler in order to decide whether or not this case was a proper class action, and the huge and unavoidable expense of producing witnesses and documents pursuant to discovery orders, have brought such pressure on defendants as to induce settlements in large amounts as the alternative to complete ruin and disaster, irrespective of the merits of the claim.[1]

Whether one shares these sentiments or not; whether one regards the class action device as legalized blackmail or an effective vehicle for problem solving; and, indeed, whether one's perspective is that of an aggrieved consumer or a persecuted member of management, the plain and simple truth for lawyers is that class actions have become and will remain a very permanent part of the practice.[2]

For this reason and because we do not regard ourselves as scholars, much less philosophers, it is not the purpose of this article to discuss the myriad of philosophical, consumer, economic and historical problems and issues inherent in any analysis of the class action device. Partially inspired by the painful experience of the Eisen case, much recent literature already exists on these subjects.[3] We intend to discuss *Eisen IV* but only because it provides the practitioner resisting class certification with case precedent for that which Rule 23 and the 14th Amendment plainly require: individual notice, paid for by the plaintiff, to class members whose identities

1. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1018-19 (2nd Cir. 1973), better known as *Eisen III*. The other Eisen decisions are 41 F.R.D. 147 (S.D.N.Y. 1966) and 370 F.2d 119 (2nd Cir. 1966), *Eisen I;* 391 F.2d 555 (2nd Cir. 1968), *Eisen II;* 52 F.R.D. 253 (S.D.N.Y. 1971), the district court's "mini-hearing" in *Eisen III*; and 42 U.S.L.W. 4804, decided May 28, 1974, which presumably will gain popular recognition as *Eisen IV*.

2. There were 4,622 Rule 23 class action cases pending as of December 31, 1973. Administrative Office of the U.S. Courts, Semi-Annual Report of the Director, at 35 (1974).

3. Writings critical of the device in damage actions include: Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 4-12 (1971); American College of Trial Lawyers, *Report and Recommendations of the Special Comm. on Rule 23 of the Federal Rules of Civil Procedure* (1972); and the *Motion and Brief of National Association of Realtors For Leave to File a Brief As Amicus Curiae*, in Kline v. Coldwell, *Banker & Co. Realtors* 73-2169 (9th Cir. 1974), the latter containing an excellent historical argument that the class action device never intended for damage actions. Writings favoring the (b) (3) suit include *Note*, 87 HARV. L. REV. 426 (1973); and Moore, *The A.B.A., The Congress and Class Actions: A Report*, 3 Class Action Reports No. 2 (1974).

are known or ascertainable in those actions maintained under 23 (b) (3).[4]

This, then, is intended to be an article for the lawyer whose client is suddenly confronted with one of these "Frankenstein monster[s] posing as a class action".[5] Our objective is to set forth the arguments and methods available to counsel in seeking to prevent a class from being certified. In order to sharpen the analysis and arguments we will use a hypothetical class action as a model. Since most of the criticism and praise of the class action device has been focused on complaints filed under section (b) (3), observations will be directed primarily at that part of Rule 23.[6] In the end, if this writing sounds more like a brief in support of a motion to dismiss a complaint as a class action, rather than a scholarly analysis of Rule 23, we will have accomplished our objective.

First, some background. The criteria for class determination contained in Rule 23(a) and (b) (3) do not fall into discreet categories. For example, if the issues raised by the complaint permit counsel to argue that common questions of fact and law do not predominate over questions affecting individual members, it is obvious that the same allegations may be used to show that the action is inherently unmanageable. Similarly, if the complaint clearly describes a class of sufficient numerosity, counsel may concede satisfaction of that requirement, but argue that the sheer size of the class would make the courthouse a coliseum[7] and the case incapable of judicial resolu-

4. Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140, 2152 (1974).
5. *Eisen I*, 391 F.2d 555, 572 (2d Cir. 1968) (dissenting opinion).
6. The pertinent parts of Rule 23 that concern us here are:
(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
(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.
7. City of Philadelphia v. Am. Oil Co., 53 F.R.D. 45 (D.N.J. 1973).

tion. Another prerequisite is that there be questions of law or fact common to the class. It is a rare case in which defense counsel cannot argue an absence of complete commonality, accentuate the differences and contend that the lack of sameness will make it impossible to adjudicate the dispute without confusion, separate proofs and great inefficiencies.[8] Similar overlap exists with respect to the other requirements of 23(a)——*i.e.*, that the claims of the representative parties are typical of the class[9] and that the representative parties will fairly and adequately protect the interests of the class.[10]

In marshalling these factors into a cohesive attack on a class action complaint, counsel must consider the requirements of Rule 23 with reference to the legal and factual theories pleaded, the applicable substantive law and any facts learned in discovery on the class issues. While each such complaint usually suggests a different approach from a defense standpoint, we believe that by using a hypothetical complaint and demonstrating how it can be challenged, the basic defense techniques will be disclosed.

THE MODEL

Class actions falling within the requirements of 23(b)(3) have been filed in many areas of substantive law. In order to properly focus upon the range of problems, we will select one such area—antitrust. Further, let us postulate a hypothetical fact situation. Five doorknob manufacturers have been indicted under section 1 and section 2 of the Sherman Act[11] for conspiring (a) to fix the price of doorknobs over a ten year period and (b) to restrain, monopolize and/or attempt to monopolize trade in interstate commerce. The relevant market for each violation is alleged to be the United States. A lawyer in Chicago happens upon two clients, both Illinois residents, who wish to sue. Purchaser A manufacures doors and installs doorknobs on fifty percent of them. He buys his requirements from a building materials wholesaler. In some

8. Shaw v. Mobil Oil Corp., 60 F.R.D. 566 (D.N.H 1973); Boshes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973).
9. Hackett v. General Host Corp., 1972 Trade Cas. ¶ 73,879 (E.D. Pa. 1970), *appeal dismissed*, 455 F.2d 618 (3rd Cir. 1972) *cert. denied*, 407 U.S. 925 (1972).
10. Chicago v. General Motors Corp., 332 F. Supp. 285 (N.D. Ill. 1971).
11. 15 U.S.C. §§ 1-2 (1890).

instances, quantity discounts are given; in others he buys off list. In no event does he make any direct purchases from any of the defendants and only three of the defendants sell to A's wholesaler. Purchaser B is a school teacher who purchases his doorknobs from a hardware store, which in turn purchased from a building materials supply house. Three years ago he bought a new house. In each case, the initial seller of the doorknobs acquired by A and B within the period was one or more of the defendants.

A complaint is filed in the United States District Court for the Northern District of Illinois. The complaint defines the alleged class as follows:

> Plaintiffs are representatives of classes as defined by Rule 23(b)(3) and bring this action on behalf of all members of each class. The classes consist of all those persons similarly situated who have purchased, directly or indirectly, doorknobs from one or more of the defendants during the last ten years and have thereby sustained damages as a result of said purchases and will continue to sustain damages in the future. Specifically, the class wherein Purchaser A is a representative plaintiff includes all door manufacturers and all other persons who have purchased from wholesalers and resold. The class wherein Purchaser B, the school teacher, is a representative plaintiff includes all purchasers of doorknobs within the ten year period from retail outlets and all persons buying single family houses that were built within the period.

Tracking the indictment in the government criminal case, the complaint alleges the following acts in violation of the Act:

> 1. In furtherance of their combination and conspiracy to fix, maintain and stabilize the prices of doorknobs in the United States, the defendants have held meetings at various times, in various locations where they agreed (a) to increase the prices of doorknobs, (b) to issue identical price lists; and (c) to police adherence to the agreed upon published prices.
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> 2. Further, the defendants have contracted, combined and/or conspired among themselves and others to restrain, monopolize and/or attempt to monopolize trade in interstate commerce (a) by agreeing to fix, maintain, control, limit or discontinue the manufacture of doorknobs; and (b) by agreeing to allocate markets and divide customers for the sale of doorknobs.

After losing a motion to stay proceedings in the action pending final disposition of the government's criminal case, defendants seek to have the court determine whether any of the alleged classes can be certified.[12] The deposition of each individual plaintiff is imme-

12. It is clear that plaintiff bears the burden of alleging and satisfying the requirements of Rule 23, D & A Motors, Inc. v. General Motors Corp., 19 F.R.D. 365 (S.D.N.Y. 1956); 2 BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE, § 571, at p. 342 (Wright Ed. 1961). Nevertheless, defendants are usually forced (probably because plaintiffs believe that the requirements are satisfied by the complaint itself) to file a motion pursuant to

diately noticed and taken, with questioning confined to matters pertinent to the certification issues. Among other things, defendants learn the following facts:

1. Purchaser A, the door manufacturer, only began making doors three years ago. He is the father of the attorney who represents him. During that period he had purchased 100,000 doorknobs in 1000 separate transactions. While he has used different wholesalers, he has purchased doorknobs only in Illinois and from only three of the five defendants. A belongs to the National Doorknob Institute whose membership is limited to wholesalers and door manufacturers. There are fifty thousand members and the membership list is computerized. If individual notice is ordered for these individuals, A has offered to pay for it.

2. Purchaser B has no assets and earns $15,000 per year. In addition to the knobs acquired with the new house, B has bought six replacement knobs from a local hardware store in the last three years.

3. Although both have complained about the increasing price and shortage of doorknobs, neither A nor B knows or has any opinion of the causes of the shortage or price increases, nor has either asked their attorney what he believes are the cause or even what the complaint alleges to be the cause. Prior to their depositions, neither A nor B had seen a copy of the complaint. B could not identify any of the named defendants and A only knew two of them. B testified that he had no knowledge of the doorknob industry. Since A's experience with the industry had been limited to dealings with wholesalers, he stated that he knew little of the methods of production, distribution and marketing of doorknobs by the defendants.

4. The plaintiffs seek damages on behalf of themselves and the classes in the amount of $100,000,000.

5. It is also determined that two of the defendants have plants in Illinois and employ a total of 2000 persons. The defendants are all publicly traded corporations and each has several thousand shareholders in Illinois.

6. It is also determined that ten million doorknobs have been sold each year and that approximately one hundred million doorknobs have been sold during the period. Further, it is established that in the year 1973 only, there were two million new housing starts.

The defendants move jointly and request that the Court not certify either class and further request that the class allegations be dis-

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Rules 23 and 12 to dismiss the class allegations and for a determination that the action cannot proceed as a class action.

missed. They contend that the action cannot proceed as a class action for the following reasons:

> 1. The plaintiffs do not insure the adequate representation of the class; their claims are not typical; plaintiffs interests conflict with those of the class and they lack the financial resources and interest required for adequate representation.
>
> 2. Common questions of law and fact do not predominate over questions affecting individual class members.
>
> 3. The action is inherently unmanageable since it is brought on behalf of untold millions of people.

The defendants file a joint brief in support of that motion. It is that brief, with some editorial comment, that occupies the balance of this article.

The Named Plaintiffs Will Not Adequately Represent the Interests of the Absent Members of the Purported Class

A. *The Requirement of Adequate Representation*

No action may be maintained as a class action under Rule 23(a)(4) unless the "representative parties will fairly and adequately protect the interests of the class".[13] Thus, Judge Tyler in his first *Eisen* opinion said:

> Now that amended Rule 23 purports to obliterate the old distinctions between 'true', 'hybrid' and 'spurious' class actions, however, the requirement that plaintiff be able to fairly insure the adequate representation of all becomes considerably more significant since all members of the class are bound by the judgment unless they expressly ask to be excluded from the class.[14]

B. *The Respects in Which Representation By the Named Plaintiffs Is Inadequate*

The proposed class in the hypothetical case includes so many people with such a complexity of interests located throughout such a large geographical area that it is doubtful that any reasonable number of people could be found who would adequately represent all the members of the class. Clearly, the two named plaintiffs fall far short of providing adequate representation. Their interests are not coextensive with the interests of all the members of the class, their interests conflict with the interests of the class members and they lack the resources, knowledge and interest required for the prosecution of this action on behalf of this class.

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13. Fed. R. Civ. Pro. 23(a)(4).
14. Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147, 149-50 (S.D.N.Y. 1966).

1. Plaintiffs' Interests Are Not Coextensive With Class Interests

In order for a named plaintiff adequately to represent a class, it is necessary that the plaintiff's interests be coextensive with the interests of the class members.[15] That is to say, a class is not adequately represented if the claims of the named plaintiffs are not typical of the claims of all the members of the class.[16]

In the present case, the claims of the named plaintiffs are not typical of the claims of the majority of class members. Although the classes include potentially millions of purchasers of doorknobs, there are only two named plaintiffs. The classes include almost all purchasers of doorknobs throughout the United States, and their claims are predicated upon purchases of doorknobs under the peculiar conditions prevailing in each geographical locality in which they made purchases. Plaintiffs' only doorknob purchases in Illinois occurred in a small area of metropolitan Chicago. Purchaser A has only purchased from three of the five defendants and Purchaser B does not even know which of the five defendants manufactured the doorknobs that he bought.

Moreover, Purchaser B purports to represent all persons buying new housing units in the past ten years, and their claims are predicated upon the peculiar conditions existing in the geographic areas where their units were bought at each point in time during the ten year period. On the other hand, Purchaser B acquired his house in Chicago three years ago. Purchaser A has only been buying doorknobs for the last three years, only in the Chicago area and then only indirectly from three of the defendants.

Plaintiffs claims are, therefore, not typical of the claims of a great number of purported class members. And, in pressing their claim concerning purchases of some of the relevant doorknob products from an unknown number of the five defendants in a limited area during a limited period of time, plaintiffs will provide no representation for class members whose purchases were made at different times.[17]

15. *See* 3B Moore, FEDERAL PRACTICE, ¶ 23.07[2] (2d Ed. 1974).
16. *See, e.g.*, Pelelas v. Caterpillar Tractor Co., 113 F.2d 629, 632 (7th Cir. 1940), *cert. denied*, 311 U.S. 700 (1940).
17. *See, e.g.*, Hettinger v. Glass Specialty Co., 59 F.R.D. 286, 290, 296 (N.D. Ill. 1973).

2. Plaintiff's Interests Conflict With Class Interests

Purchaser A cannot provide adequate representation for the class whose claims he seeks to assert because his interests are in direct conflict with the interests of the class members in several respects. The primary conflict arises from the fact that the attorney for the purported class is the son of one of the named plaintiffs. Courts have often ruled that the conflict between an attorney's interest in obtaining a large legal fee and the class members' interest in maximizing the damage recovery precludes an attorney from acting in the dual role of plaintiff and attorney for a class. In *Graybeal v. American Savings & Loan Association*,[18] for example, the court ruled that such a conflict of interest precluded the attorney-plaintiff from meeting the requirement of adequate representation.[19] It held:

> Plaintiffs have placed themselves in the dual roles of attorneys for, and representatives of, the proposed class. These dual roles are inherently fraught with potential conflicts of interests. In any class action there is always the temptation for the attorney for the class to recommend settlement on terms less favorable to his clients because a large fee is part of the bargain. The impropriety of such a position is increased where, as here, the attorney is also the representative who brought the action on behalf of the class, and where, as here, the potential recoveries by individual members, including representatives, of the class are likely to be very small in proportion to the total amount of recovery by the class as a whole. *Thus Plaintiffs may stand to gain little as class representatives, but may gain very much as attorneys for the class.*[20]

Similarly, the court in *Cotchett v. Avis Rent A Car System, Inc.*,[21] found a member of the law firm representing plaintiffs an inadequate representative, stating:

> The difficulty I have with this situation lies in the fact that the possible recovery of Mr. Cotchett as a member of the class is far exceeded by the financial interest Mr. Cotchett might have in the legal fees engendered by this lawsuit. The propriety of this arrangment is cast further into doubt by the consideration that the individual members of the class are unlikely to receive any significant personal benefit from a successful prosecution of this suit and, indeed, may ultimately have to pay for it through subsequently increased costs of car rental.
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> Thus, it may well be '. . . that plaintiff has interests antagonistic to those of the remainder of the class.'[22]

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18. 59 F.R.D. 7 (D.D.C. 1973).
19. *Accord*, Eovaldi v. First Nat'l Bank of Chicago, 57 F.R.D. 545, 546, (N.D. Ill. 1972); Kriger v. European Health Spa, Inc., 56 F.R.D. 104, 105-06 (E.D. Wis. 1972); Shields v. Valley National Bank, 56 F.R.D. 448, 449-50 (D. Ariz. 1971).
20. Gabreal v. Am. Savings & Loan Ass'n, 59 F.R.D. 7, 13-14 (D.D.C. 1973) (emphasis added).
21. 56 F.R.D. 549 (S.D.N.Y. 1972).
22. *Id.* at 554.

This problem of conflicting interests is by no means alleviated in a case such as the present one where the named plaintiff is not the attorney himself but rather a relative of or other person closely allied with the attorney. This is so because the primary economic interest of Purchaser A's family resides in the legal fees and not in the relief sought on behalf of the class.[23]

But even apart from the relationship between one of the named plaintiffs and his counsel, there are other respects in which the interests of the named plaintiffs conflict with the interests of class members. For example, the class includes thousands of people who are shareholders or employees of defendants, manufacturers' representatives selling defendants' products and many others who, it can be presumed, are not in sympathy with the goals of this action. Plaintiffs cannot represent a class containing persons whose interests are so directly in conflict with their own.[24]

The plaintiff in *Chicago v. General Motors Corporation*,[25] sought to represent all the residents of Chicago in an automobile air pollution action against numerous defendants. The Court held that plaintiff could not adequately represent the class because the class included a group of people not in sympathy with the aim of the litigation:

> We do not believe that plaintiff City adequately represents the class it purports to represent. Although plaintiff and its class exist in a common atmospheric condition, we do not think this action could be said to be in the interest of all Chicago corporate and individual residents. There are many motor vehicle dealerships, repair and service stations, and gasoline outlets that would be adversely affected by some of the relief plaintiff seeks. Obviously, some unemployment would result if plaintiff successfully per-

23. It is remarkable how often such a relationship exists between plaintiff's counsel and the named plaintiff in Rule 23(b)(3) suits. Such a relationship combined with deposition testimony to the effect that the named plaintiff had not read the complaint or did not understand the theories asserted or could not remember how, why or when the idea to file the complaint had arisen, have led a few courts to be extremely skeptical of the motives of plaintiff and, thus, his capacity to represent the class. *See, e.g., Graybeal* and *Cotchett* and the cases cited therein.

24. *See, e.g.*, Chicago v. General Motors Corporation, 332 F. Supp. 285, 288 (N.D. Ill. 1971), *aff'd on other grounds*, 467 F.2d 1262 (7th Cir. 1972); Crawford v. Texaco, Inc., 40 FRD 381, 385 (S.D.N.Y. 1966); Gray v. Reuther, 99 F. Supp. 992, 993-94 (E.D. Mich. 1951), *aff'd per curiam*, 201 F.2d 54 (6th Cir. 1952).

25. 332 F. Supp. 285 (N.D. Ill. 1971).

suaded this Court to issue an order banning the sale of certain motor vehicles. At least these local residents and citizens have an interest adverse to that of the City. Moreover, we doubt whether the plaintiff, charged with a community health problem, adequately represents those residents and citizens who are strongly attached to the motor vehicle as a recreational or luxury item and would not want their individual activities curtailed or made more expensive.[26]

Similarly, in *Gray v. Reuther*,[27] the court ruled that a member of a local union could not represent the membership in an action seeking to overturn an election which ousted him from union office. This ruling was based upon the existence within the class of a faction which had opposed the named plaintiff in the election:

> . . . [P]laintiff was ousted from office after an election in which approximately two thousand union members voted. Whether or not the election was valid, it shows that a substantial body of the membership of the Local is opposed to the plaintiff's position. *The strength of the faction antagonistic to the plaintiff is immaterial; its existence indicates that the identity of interest that would qualify plaintiff to represent the members of Local 12 is lacking.*[28]

A final problem of conflict of interest arises from the fact that the alleged class undoubtedly includes judges of this Court and many members of their families, every clerk or other employee of this Court and most of their families and will probably include every member of the jury and members of their families.

3. Plaintiffs Lack the Resources, Knowledge and Interest Required to Protect Class Interests

There can be no doubt that vigorous prosecution of the present action on behalf of the purported class will be an expensive proposition. Thus, substantial funds will be required in order to conduct discovery of the many defendants concerning the tremendous number of issues raised in the complaint. And the complexity and sophistication of the isues concerning the doorknob industry will undoubtedly require analysis and eventual expert testimony from economists and other expert witnesses. Beyond this, however, is the obvious fact that the cost of notice to class members would itself be staggering. In *Eisen v. Carlisle & Jacquelin*,[29] the Supreme Court held that the named plaintiffs in an action brought under Rule 23(b)(3) must pay for the cost of individual notice to those class members whose identities are readily identifiable. While Purchaser A has said that he is willing to pay for the cost of notifying

26. *Id.* at 288.
27. 99 F. Supp. 992 (E.D. Mich. 1951).
28. *Id.* at 993-94 (emphasis added).
29. 94 S. Ct. 2140 (May 28, 1974).

members of the National Doorknob Institute, this group is not the only class whom he seeks to represent. Further, the homeowner purchaser class that Purchaser B seeks to represent can to some extent be identified from the tax rolls. Yet Purchaser B obviously has no assets to pay for notice to any such person.[30]

It is clear that Purchaser B possesses no assets which could be used to finance the expenses of this litigation. He lives on a small fixed income, has no investments and the total of his liquid assets is less than $1,000. It is therefore perfectly clear that he would be unable to finance the vigorous prosecution of the lawsuit; or to pay defendants' court costs should he be unsuccessful.[31] Plaintiffs' lack of financial resources precludes them from representation of this gigantic class.[32]

The financial resources of the plaintiffs in *Ralston v. Volkswagenwerk A.G.*,[33] were far greater than those of both of the named plaintiffs in the present case. Yet the court ruled that they were inadequate for the task of representing a class of approximately 18,000 Volkswagen purchasers. The court reviewed the potential expenses for discovery, expert witnesses and other litigation costs and concluded:

> Seeking to represent a large group of people as a class representative in a lawsuit is a very heavy responsibility. It should never be undertaken lightly, and the court should allow such representation only upon a firm foundation that the named plaintiffs are willing and financially able to shoulder that burden. Such a

30. Note that *Eisen IV* may or may not eliminate the "consumer" class action. Here, for example, a large quantity purchaser is a plaintiff and may well be willing to pay for individual notice. On the other hand no notice problems will be presented if the "consumer class" is admittedly large but not capable of individual identification. What *Eisen IV* will do is eliminate the large class consisting of persons, whose identities are available from computer records in the possession of the defendants. Thus, defense counsel will still have to rely substantially on the traditional arguments to defeat certification.

31. That the Court may owe a duty to defendants to make sure that plaintiffs are financially responsible for the costs of litigation is suggested by Fed. R. Civ. P. 55(d), which permits the Court to tax costs in appropriate situations. Additionally, Rule 23(d)(3) might be used as the basis for requiring security for costs where appropriate. *See also* Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140, 2152-53 (May 28, 1974).

32. *See, e.g.*, Miller v. Standard Fed. Savings & Loan Ass'n, Civil Action No. 37901 (E.D. Mich., Oct. 30, 1972); Ralston v. Volkswagenwerk A.G., 61 F.R.D. 427 (W.D. Mo. 1973).

33. 61 F.R.D. 427 (W.D. Mo. 1973).

> lawsuit should never be undertaken in the hope that at some future date the existence of a class will aid the plaintiffs in carrying the case to completion, because nobody knows whether other unidentified members of the class are able or willing to finance the action. Inadequate financing threatens the procedural and substantive interests of all members of the class.
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> All of this is not to say that large numbers of persons should not coalesce their finances in supporting a class action. But the pooling should be made before the suit is filed, thereby assuring sufficient resources, rather than relying upon court processes to coagulate a class who may be willing and unable to underwrite the action.
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> It is my conclusion that the named plaintiffs have not shown their ability to protect adequately the interests of the class.[34]

Finally, the named plaintiffs could not adequately represent the class because they lack the requisite knowledge and interest to vigorously prosecute this action. They have, for example, testified to having no knowledge concerning the alleged nationwide conspiracy described in their complaint or the millions of persons who may be included or excluded from the class. Prior to their depositions, the plaintiffs had never seen a copy of the complaint, had no idea of the nature of the allegations made therein and did not even know the identity of the named defendants. Neither of the plaintiffs has ever had any discussion with their attorneys with respect to the nature of the substantive allegations of the complaint or their purchases of doorknobs or their damages. They admit that they have no knowledge of the industry.

In such circumstances, they are unable to provide the knowledge or judgment necessary to guide their attorney in the conduct of this litigation, and they are inadequate to represent the absent members of the class. "The class is entitled to more than blind reliance upon even competent counsel by uninterested and inexperienced representatives."[35]

Common Questions of Law and Fact Do Not Predominate over Questions Affecting only Individual Class Members

A. *The Predominance Requirement*

An action may not be maintained as a class action under Rule (b)(3) unless the court finds, not only that there are questions of fact or law common to the members of the class, but also that the common questions *predominate* over any questions affecting only

34. *Id.* at 434.

35. In Re Goldchip Funding Co., CCH 1974 Fed. Sec. L. Rep. ¶ 94,382 at 95, 322 (M.D. Pa. 1974).

individual members. In the leading state class action case of *Freeman v. State-Wide Carpet Distributors, Inc.*,[36] the Michigan Supreme Court refused to permit an action which failed to meet the predominance requirement to be maintained as a class action. Although common questions of law and fact were clearly present, the court found that the common questions did not predominate:

> The rule requires that . . . there must be 'common questions of law or fact affecting the several rights and a common relief' must be sought. . . . Although the bank's status as a holder of various promissory notes may be involved in each of the plaintiffs' claims and although each plaintiff was subjected to the same advertising or other uniform pattern of conduct, the defendants' liability to each plaintiff will depend upon specific facts which, by the nature of these transactions, cannot be common to all plaintiffs or to any substantial number of them.[37]

The court concluded that in the absence of predominant common questions any effort to adjudicate the claims of the class members simultaneously would prove impossible:

> In short, the very substantial disparity of issues of law and facts between the multiple plaintiffs' claims would render any judicial proceeding in which all were sought to be adjudicated simultaneously, incomprehensible to the litigants, their counsel and the chancellor as well.[38]

In *Robiner v. General Motors Corporation*,[39] a state court of general jurisdiction had to consider the application of the predominance requirement to a proposed class action on behalf of more than 700,000 owners of Corvair automobiles. Plaintiffs predicated their complaint upon alleged fraudulent concealment of heating and exhaust systems defects in automobiles sold to the class, and they asserted that common questions were presented concerning the existence of defects and fraudulent concealment of them. Circuit Judge Blair Moody, Jr. concluded, however, that the common issues did not predominate over individual issues. He stated:

> Nevertheless, sound administration of justice compels this Court to conclude in its discretion that the complexity of legal issues . . .

36. 365 Mich. 313 (1961).
37. *Id.* at 320.
38. *Id.*
39. Civil Action No. 172865 (Cir. Court, Wayne County, Mich., July 21, 1971). Despite its parochial limitations, the case is cited because the opinion, written by a state trial court judge, provides illuminating insight into these kinds of problems from a perspective not often available.

(not to mention 700,000 possible factual distinctions) forecloses and outweighs the Plaintiffs' claim of sufficient commonality of the legal issues of fraud, if such exists.

Likewise, this cause does not involve common questions of fact with respect to the possible claim of each member of the class of 700,000 owners. Independent factual determinations would be necessary regarding such matters as the design and manufacture of the direct air heating unit for each of the nine years the vehicle was in production, the use of Corvair vehicles by individual members of the class, the alleged exposure of class members to exhaust fumes, the factual differences with respect to implied and express warranties of fitness and safety, the factors relating to maintenance and condition of the vehicles, the manner of purchase of the vehicles and the effect of the differing environments upon the subject vehicles, among many others.[40]

After reciting the holding on predominance from the *Freeman* case, Judge Moody concluded that the failure to meet the predominance requirement precluded class treatment:

The diversity of probable legal and factual issues envisioned at the present posture of this case combined with management encumbrances reveal the pragmatic inappropriateness of such a broad guaged proposed class action by the three Plaintiffs. [citations omitted].[41]

The complaint in this hypothetical action alleges that there exist questions of law and fact which are common to the members of each class and which predominate over any questions affecting only individual members of either class. In order for defense counsel to attack this allegation, he must argue that the individual issues to be decided under the substantive legal principles (here, antitrust) on which plaintiffs' claims are predicated, far outweigh any common issues.

B. The Elements of an Antitrust Damage Claim

In order for a plaintiff to recover in an action for damages under the antitrust laws, he must establish:

(1) That a violation of the antitrust laws has in fact occurred;

(2) That the anticompetitive impact of the violation proximately caused an injury to his business or property; and

(3) That such injury represents a certain dollar amount of damages.

These requirements are not altered by the fact that a group of claimants seeks to proceed by means of a class action. A procedural rule, such as Rule 23, cannot vitiate the substantive requirement

40. *Id.* at 9-10.
41. *Id.* at 10-11.

that each person seeking to recover damages must prove each substantive element of his own cause of action. A mere showing that defendants have violated the Sherman Act is insufficient to establish a claim for damages under section 1 or 2 of the Act. The plaintiff must also establish his proximately caused injury and the amount of such injury.

Thus, for example, in *Billy Baxter, Inc. v. Coca Cola Co.*,[42] the Second Circuit stated the underlying rationale, as follows:

> *While any antitrust violation disrupts the competitive economy to some extent and creates entirely foreseeable ripples of injury which may be shown to reach individual employees, stockholders or consumers, it has long been held that not all of these have the requisite standing to sue* for treble damages and thereby take a leading role in the enforcement of the prohibition in question. The private action, intended as 'an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws' can only serve as an effective deterrent if the courts are able to administer it with some degree of certainty. Contourless rules of causation would pose the threat of parallel relaxation of the standard of business behavior enforced by the allowance of treble recovery.[43]

And, in *Calderene Enterprises Corp. v. United Artists Theatre Circuit, Inc.*,[44] the court stated:

> It [the test for standing] acknowledges that while many remotely situated persons may suffer in some degree as the result of an antitrust violation, their damage is usually much more speculative and difficult to prove than that of a competitor who is an immediate victim of the violation. Furthermore, if the flood-gates were opened to permit treble damage suits by every creditor, stockholder, employee, subcontractor, or supplier of goods and services that might be affected, the lure of a treble recovery implemented by the availability of the class suit *** would result in an overkill.[45]

And the necessity of proof of impact or the fact of injury as to *each* individual class member has been cited by several federal courts in recent decisions denying class action treatment in antitrust actions. For example, in *Shumate & Co., Inc. v. National Association of Securities Dealers, Inc.*,[46] the court held:

42. 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).
43. *Id.* at 187 (emphasis added).
44. 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).
45. *Id.* at 1295.
46. 1973 Trade Cas. ¶ 74, 512 (N.D. Tex. 1973).

> In any antitrust action issue of injury is a critical component of the determination as to liability and should not be confused with still another issue requiring individual analysis, i.e., calculation of the amount of damages. Recovery is not based on the conspiracy itself but on the injury to the plaintiff. Even assuming that a conspiracy could be proved, liability could not be imposed until it was shown that *each* individual class member would have traded in listed securities but for their exclusion from the NASDAQ system or that but for Rules 394 and 396 *each* individual nonexchange broker would have traded off the floor with exchange members. This inquiry would extend to 3,000 purported class members and in effect would make these three cases completely unmanageable as class actions.[47]

In the hypothetical action, plaintiffs allege that members of the classes have sustained a total of $100,000,000 in damages (of course, that is to be trebled). They predicate this damage claim upon two separate counts alleging numerous violations of sections 1 and 2 of the Sherman Act. Clearly, in order to recover damages each member of the class will be required to establish in a jury trial the fact of each violation, the impact of each such violation upon him and the amount of his damages resulting from each such impact.

1. Violation and Impact

As hypothesized above, our mythical complaint tracks the government indictment and makes extensive allegations of violations of the Sherman Act by both joint and unilateral activities of the defendants. Plaintiffs challenge the operation of several phases of the doorknob industry over the past ten years, and therefore have put in issue defendants' nationwide activities in manufacturing, distributing and marketing of doorknobs. Proof of the alleged violations of price fixing and monopolization would involve this Court in the supervision of discovery and trial of complex issues of the structure and practices of the doorknob industry at every stage of its operations throughout the United States. It is likely that a jury trial of the issue of violation alone would take over a year.

While the complaint appears to allege a monolithic nationwide conspiracy, there is no "nationwide market" for manufacturing, distributing, or marketing of doorknobs. Because of the geographically and functionally fractionalized structure of the doorknob industry, no proof of the allegations of the complaint would succeed unless the plaintiffs established the existence of numerous localized

47. *Id.* at 94,298. *Accord,* Shaw v. Mobil Oil Corp., 60 F.R.D. 566, 568 (D.N.H. 1973); Gneiting v. Taggares, 1973 Trade Cas. ¶ 74, 440, at p. 93,997 (D. Ida. 1973); Nat'l Auto Brokers Corp. v. General Motors Corp., 60 F.R.D. 476, 489-90 (S.D.N.Y. 1973).

conspiracies at each functional level of the industry; yet any such endeavor by the plaintiffs would necessarily further complicate this litigation.

The necessity of proving the impact of the alleged conspiratorial and unilateral activities upon each class member raises even more significant individual questions. As demonstrated above, *impact or fact of injury* is a wholly separate and distinct element from proof of the *amount of damages*. Proof that the alleged unlawful activity injured or had an impact on each of the members of the alleged class would raise separate and distinct individual issues with respect to each of the hundreds of thousands of class members.

The actual alleged impact of the defendants' activities appears to focus upon the plaintiffs and other class members having to pay artificially high prices for doorknobs and the reduction in the supply of doorknobs available to plaintiffs. This is consistent with the deposition testimony of both plaintiffs, who claimed that their concerns were "high prices" and "shortages". Proof of impact by each class member, *i.e.*, that the defendants' activities injured him, would therefore require a showing that he paid artificially increased prices for doorknobs as the proximate result of defendants' illegal activities or that he sustained measurable economic loss from an unavailability of doorknobs proximately resulting from illegal activities by defendants. Proof of this essential element of impact will necessarily vary for each class member, resulting in a series of separate trials of each claim encompassed within the alleged class. Whether the alleged agreements, conspiracies and practices had any effect upon the price paid by a particular class member requires an evaluation of multiple factors with respect to each transaction upon which a claim is based. Thus, a myriad of individual questions of fact and law will be raised with respect to each purchase of each doorknob by each class member and, in resisting class certification, defense counsel must identify and discuss each such issue. Discussion of one such issue, nature of the seller and the pass on of any overcharges, will serve to illustrate.

PROOF OF ARTIFICIAL OVERCHARGES IN PRICES OF DOORKNOBS WILL RAISE INDIVIDUAL QUESTIONS WITH RESPECT TO EACH TRANSACTION OF EACH CLASS MEMBER

Once the illegal activity has been shown to have had an effect

upon the price of a particular doorknob at some level of the production or distribution system, the class member will then have to establish the identity of the person from whom he made each purchase and trace the illegal price increment down the distribution chain, through that seller to him.

The marketing of doorknobs is conducted through an extremely complex distribution system. The class members could have purchased doorknobs from (1) an independent distributor of the product of defendants or another doorknob manufacturer in wholesale bulk quantities; (2) a retail dealer selling a defendant's branded products which were supplied to him by a third party, *i.e.*, an independent jobber or distributor; (3) a retail dealer selling the branded products of another manufacturer which were supplied to him by either the other company or a distributor; or (4) a wholesaler purchasing from one of the defendants. The possibilities are endless.

Obviously, different problems of proof arise depending on the nature of the seller in each transaction. Proof of the claim of a large volume consumer who purchased directly from a defendant in large quantities at a negotiated or bid price (*e.g.*, Purchaser A) will involve a different factual showing and raise issues different from the proofs of an individual consumer like our school teacher who purchased a defendant's branded product (1) as part of a house; or (2) from a retail dealer, who in turn may have purchased either from a defendant or from an independent distributor, who in turn purchased from a defendant.

Since the vast majority of purchaser claims in the proposed class would be based on purchases from a seller other than one of the defendants, there is substantial question as to whether such remote purchasers have the requisite standing to recover in an action under the antitrust laws. In *Hanover Shoe, Inc. v. United Shoe Machinery Corporation*,[48] the Court held that the fact that the first purchaser who had paid an illegal overcharge to an antitrust defendant had in turn raised the price of his own product and thereby passed on the overcharge was not a valid defense to a claim by the first purchaser so long as the first purchaser made an independent pricing decision with respect to his own product and did not merely resell at a price based on a pre-existing cost-plus contract. It has been held that *Hanover Shoe* precludes recovery by a buyer subsequent in the chain of distribution to the first purchaser so long as the latter has made an independent pricing decision.[49]

48. 392 U.S. 481 (1968).

49. Philadelphia Housing Authority v. Am. Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd sub nom*, Mangano v. Am. Radiator

Even should the Court hold that remote purchasers such as plaintiffs are not precluded as a matter of law from bringing an antitrust action, plaintiffs and each class member must introduce evidence to demonstrate that any conspiratorial overcharge was passed on by each intervening seller in the chain of distribution. For example, in *In Re Western Liquid Asphalt Cases*,[50] the court, while finding that the mere presence of intermediate purchasers does not deprive a consumer of standing as a matter of law, held:

> On the other hand, the problems of damages and causation are questions of fact for the jury. Evidence that a price advantage was 'passed on' . . . provides sufficient substance for the question of causation to be submitted to the jury.[51]

Thus, the requisite individual showing by each class member that the alleged illegal overcharge was passed on through each intermediary in the distribution chain, and therefore was added to his purchase price, precludes class action treatment. The recent decision in *Boshes v. General Motors Corporation*,[52] is directly in point. There, the court rejected a proposed class of purchasers of General Motors automobiles, holding:

> As defendant pointed out in its motion to dismiss, and in its response to plaintiffs' class action motion, several important factors might either mitigate or eliminate a damage claim of any individual plaintiff. For example, even if monopolization and price-fixing resulting in 'excess profits' for GM were proven, plaintiffs would still have to prove that retail dealers passed on the 'overcharge' to them. *Although on an individual basis the foregoing would not be impossible, it would be an endless task on a class-wide basis.*[53]

Because of the complex chain of distribution for doorknobs, any attempt to show such a passing on of overcharge in the instant case would similarly be an "endless task." For example, assuming that the plaintiffs could show that the defendants have conspired and agreed to raise the price at which they sold doorknobs by 2

& Standard Sanitary Corp., 438 F.2d 1187 (3rd Cir. 1971); *see* City & County of Denver v. Am. Oil Co., 53 F.R.D. 620 (D. Colo. 1971).

50. 1973 Trade Cas. ¶ 74,733 (9th Cir. 1973), *cert. denied*, — U.S. — (1974).

51. *Id.* at 95,220 (footnotes omitted).

52. 59 F.R.D. 589 (N.D. Ill. 1973).

53. 59 F.R.D. 589, 600 (N.D. Ill. 1973) (emphasis added). *Accord*, Bill Minnieli Cement Contracting, Inc. v. Richter Concrete Corp., 1973 Trade Cas. ¶ 74,591 at 94,615-17 (S.D. Ohio 1973).

cents a doorknob, a purchaser of a defendant's branded doorknob from an independent retail dealer who was supplied directly by the defendant would be required to show that the dealer merely added the two cent overcharge to his sales price. Even more significant problems would be raised by a class member who purchased from a retail dealer, who had purchased from an independent distributor, who in turn had been supplied by a defendant. Proof of the claim for such a class member would require a showing of the passing on of the conspiratorial overcharge both by the distributor and the dealer. This proof would require each class member to subpoena each seller in the chain of distribution to testify as to the factors he considered in establishing his prices. And the complex proof on behalf of one class member based on one transaction would have to be repeated for every one of his other transactions—and for every transaction of every other class member.

While it is extremely doubtful whether any individual consumer could make the showing necessary to sustain his standing to bring the instant case, that question need not be decided at this stage of the litigation. What must be recognized now is that the question of standing and proof of passing on would be an individual issue with respect to liability of the defendants to each individual class member. As the court held in *City & County of Denver v. American Oil Co.*:

> We do not disagree that the ultimate decision on the standing/remoteness/pass-on issues must await development of the facts, but we believe that at least where the apparent facts are such as here exist, the factual differences among potential class members—differences affecting liability—should be recognized before a case is determined to be a class action.[54]

Recognition of these individual issues involved in each and every indirect purchaser claim in itself demonstrates the inherent unmanageability of this action and the predominance of uncommon, highly individualized questions of fact and law.

In sum, even if either purchaser could adduce evidence that defendants' alleged violations had an impact upon his purchases at his level, this evidence could not be used with respect to another purchaser residing in Springfield or San Diego. Indeed, it is most unlikely that the evidence concerning one of the named plaintiff's transactions could be used to prove an impact upon any other of his transactions—not to mention the transactions of his next door neighbor, or even those of his wife.

54. 53 F.R.D. 620, 633 (D. Colo. 1971).

2. Damages

In addition to proving all of the factors necessary to establish violation and impact, each class member must also prove the elements of his damage claim. From the above discussion of impact, it is evident that if the issue of impact does not raise common questions, the same is true *a fortiori* of the issue of the amount of damages. Damages could not be established by the mechanical application of any formula. To the contrary, proof of individual damages for each of the claims asserted here would require a full-scale separate trial for each class member even if it be assumed *arguendo* that violation and impact did present common questions. And in an antitrust case such as this, where the questions of damages are not easily separable from the questions of violation, the issues are so interwoven that they must all be decided by the same jury, and it would be unfeasible and fundamentally unfair to separate them for trial.[55]

With respect to claims based on purchases of doorknobs, each class member, to establish measurable damages, would be required to show: (1) the price he paid for each purchase which he claims was affected by defendants' violations; (2) what the price would have been were there no violations; and (3) the amount of his purchase.

In sum, the claim of each purchaser in the proposed class is a function of his doorknob purchasing history. The obligation to prove this claim separately as to each transaction of each claimant may not be circumvented by lumping consumers into huge amorphous classes. The individual questions raised by these millions of claims clearly predominate over any conceivably common questions, and, accordingly, class treatment is inappropriate.

THIS CASE IS INHERENTLY UNMANAGEABLE AS A CLASS ACTION AND WOULD CREATE AN INSURMOUNTABLE BURDEN OF JUDICIAL ADMINISTRATION FOR THIS COURT

Lastly we come to that requirement of Rule 23 which defense counsel so often find is fatal to the (b)(3) suit: manageability.

55. *See* Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 500 (1931); United Airlines, Inc. v. Wiener, 286 F.2d 302, 306 (9th Cir.),

The decisions involving large classes of individual consumers of equal or more limited scope than the instant case have almost uniformly dismissed the class allegations because such a litigation would be unmanageable. Therefore, we intend to show here why the hypothetical class would present insuperable management difficulties, both because of the sheer number of the persons involved and because of the proliferation of separate issues with respect to each class member's claim.

A. Inherent Unmanageability Alone Renders Class Treatment Improper As A Matter Of Law

Federal Rule 23(b)(3) requires a court to consider the demands on its resources that a broad class action would impose and provides that a class action should not go forward if the size of the class or the complexities of the issues presented render the action judicially unmanageable. This principle was affirmatively stated in *D & A Motors, Inc. v. General Motors Corp.*[56] There, the court held that even though there were common questions, those common questions did not predominate over the several independent factual issues that must be determined with respect to each claimant. Such individual determinations, the court sensed, would create an undue burden on the resources of the bench and the participants.[57]

In *Robiner v. General Motors Corporation*,[58] the court based its refusal to allow a class action in part on severe manageability problems. Plaintiffs instituted a purported class action in behalf of 700,000 to 900,000 Corvair owners throughout the nation, alleging fraud, concealment, breach of express and implied warranty and negligence arising out of a claimed unsafe heater system in Corvairs. Judge Moody observed that courts must carefully scrutinize the demands on judicial time made by large class actions:

> There can be no question that the awesome task of overseeing and managing a proposed class action involving upwards of 700,000 members cannot lightly be undertaken by any trial court whose primary responsibility is to preside over trials in open court and to make just determinations upon repetitive assignment from bulging urban dockets.[59]

Upon finding that individual issues existed as to the claims of each of the 700,000 class members, the court dismissed the class action because of substantial manageability problems:

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cert. denied, 366 U.S. 924 (1961), Lah v. Shell Oil Co., 50 F.R.D. 198, 200 (S.D. Ohio 1970).

56. 19 F.R.D. 365 (S.D.N.Y. 1956).

57. *Id.* at 366.

58. Civil Action No. 172865 (Circuit Court, Wayne County, Michigan, decided July 21, 1971).

59. *Id.* at 5.

> The diversity of probable legal and factual issues envisioned at the present posture of this case combined with management encumbrances reveal the pragmatic inappropriateness of such a broad guaged proposed class action by the three Plaintiffs.[60]

No matter how the ambiguous class allegations of the hypothetical complaint are construed, the instant case involves a class of in excess of hundreds of thousands of members. Moreover, because of the complex individual questions involved in the proof of each class member's claim, the problems of manageability are equally, if not more, severe than were present in each of those cases. If for no reason other than inherent unmanageability, therefore, the instant class action should be dismissed.

City of Philadelphia v. American Oil Co.,[61] involved an alleged class of approximately six million purchasers of gasoline in the states of New Jersey, Pennsylvania and Delaware. The complaint alleged a horizontal price fixing conspiracy and followed a government indictment and civil case. The court rejected the motorist purchaser class as totally unmanageable. The court reviewed the difficulties in litigating such a class action to judgment, particularly the inherent difficulties in determining the claims of individual motorists even assuming liability and an overall damage figure were established:

> In discussing the motorist who purchased gasoline from retail stations between 1955 and 1965, the Court is speaking by and large of a class that made cash purchases at many different stations, at many different times, at many different prices. Credit card statements would be helpful, but they are not available from either plaintiffs or defendants during most of the relevant period. The proposed committee of counsel, who are supposed to evaluate the claims of each motorist against the damage award, would be given an almost impossible task to resolve. Even if this committee could ultimately relate damage awards to the amount of miles one drove within the trading area between 1955 and 1965, the committee would still need some records upon which to base an award. Affidavits would not be sufficient by themselves. The only common document which could satisfy the barest essentials of due process in awarding damages to individuals would be income tax returns for the relevant years. However, use of this type of record could only result in unjustifiably prejudicing the rights of people who did not itemize deductions. Simply stated, this Court is not satisfied that the motorist who purchased from a retail service station between 1955 and 1965 within the states of Delaware, New Jersey and

60. *Id.* at 10.
61. 53 F.R.D. 45, 72-3.

> Pennsylvania has available to him the type of records necessary to make any meaningful distribution of damage awards if liability and general damages are established. As a consequence, the Court concludes that this portion of the Philadelphia—New Jersey class is unmanageable, and hence, should not be certified.[62]

Based on this analysis, the court held the proposed class was unmanageable:

> Despite the commendable ends sought to be achieved by these and other cases to reach millions of ultimate consumers of a variety of products by the technique of class representation, *this Court believes that the line must be drawn somewhere in those cases involving untold numbers of members of the general public.* The manageability requirement of Rule 23 is a significant factor that must be given due weight in reaching a determination on the propriety of class representation in any given case. It is recognized, of course, that each case must turn on its own facts. Numbers alone would not necessarily be determinative as to whether a particular class should be certified. Methods of marketing, price structures, availability of records, economic data, and other considerations enter into the picture. In cases pending in this Court, members of the public who purchased gasoline from retail outlets between 1955 and 1965 in the three state area are legion in number. The individual purchases made by them would run into astronomical figures. It is hardly to be expected that such individual members of the motoring public would have records or other supporting indicia of their many purchases. *By any reasonable standard, it is difficult for this Court to believe that Rule 23, as presently written, was intended to reach the overly broad non-governmental class sought to be represented by Philadelphia—New Jersey in the pending actions.*[63]

More recently, in *Devidian v. Automotive Service Dealers Assn.*,[64] a California appellate court held that a class suit limited to 250,000 purchasers of gasoline in a two county area during a nine month period was unmanageable and therefore must be dismissed. The plaintiffs alleged a price fixing conspiracy in violation of the California Antitrust Law. The defendants were members of an association of service station dealers which had previously been indicted and convicted on the same charges of price fixing as alleged in the complaint. The court noted the problems in management which would arise from the large size of the class (which is certainly smaller than the size of the instant class), the difficulty of establishing an overcharge, in view of "the frequent [price] fluctuations so universally common to the gasoline industry", the small size of individual purchases with the resulting maximum damages of 30 cents per purchase, and the lack of written records to substantiate individual purchases.[65] The court, assuming *arguendo* the existence

62. *Id.*
63. *Id.* at 73-4.
64. 1973 Trade Cas. ¶ 74,852 (Cal. Ct. of App. 1973).
65. *Id.* at 94,800.

of an illegal two cents a gallon overcharge, then discussed further obstacles to efficient management of the action:

> But even if we have established that the gasoline was purchased from one of the members of the conspiracy we are confronted with the well known fact that very frequently service stations give trading stamps, drinking glasses, etc., all of which would have a monetary value and would serve to reduce the 2-cent margin on the increased price. We would also have to ascertain whether the transaction occurred on a day such as Monday when it is customary to give additional trading stamps as a bonus. The proliferation of situations in which the 2-cent increase would have to be examined to determine whether it truly reflected an increase of 2 cents is virtually endless.
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> * * *
>
> As to each of these purchases evidence would have to be received as to whether the actions of the defendants caused any increases in the prices, and if they did, the amount of such increases, whether such increases were offset in whole or in part by the giving of trading stamps or other things of value, and a multitude, of other evidentiary determinations, on purchases numbering in the millions, with the vast majority involving purchases in which the overcharges could not exceed 30 cents.[66]

The class alleged in the instant complaint dwarfs those in the *Devidian* case which involved only a small percentage of the number of class members here. The number of separate transactions, and the difficulties of individual proof of the numerous separate and distinct questions with respect to the claims of each class member raised by the hypothetical complaint are therefore infinitely greater. The conclusion that the class actions in those cases were unmanageable leads inevitably to a similar conclusion in the instant case.

Judicial rejection of attempts to aggrandize the claims of a single plaintiff by attempting to bring class actions on behalf of large numbers of individual consumers have by no means been limited to the gasoline industry. In fact, in almost every litigated class action decision involving a large class of consumers, the class has been rejected on manageability grounds. See, for example, *Boshes v. General Motors Corporation*,[67] (rejecting a class of purchasers of GM automobiles from 1965-1973); *United Egg Producers v. Bauer International Corp.*,[68] (finding a class of all consumers of eggs in

66. *Id.* at 95,801.
67. 59 F.R.D. 589 (N.D. Ill. 1973).
68. 312 F. Supp. 319, 321 (S.D.N.Y. 1970).

the United States unmanageable); *Hackett v. General Host Corp.*,[69] (dismissing as unmanageable a purported class action on behalf of some six million consumers and 1.5 million purchasers of bread in the Philadelphia area); *Ralston v. Volkswagenwerk, A.G.*,[70] (where the court rejected on manageability grounds a class of some 18,000 purchasers of Volkswagen automobiles in the Kansas City area).

These cases establish that class actions on behalf of large numbers of individual consumers are unmanageable as a matter of law and should not be permitted. In most of the above cases, the number of class members was smaller than in the instant case and in every one the claims asserted were narrower. The problems of manageability alluded to therein would be far surpassed should the instant action be allowed to proceed as a class action.

B. *The Facts Establish That This Case Would Be Unmanageable if Maintained as a Class Action*

1. Number of Class Members

Although the complaint's ambiguous class definition makes it impossible to determine at this time the precise number of class members, the class will include approximately two million individuals even if limited to purchasers of residential units built in 1973. If the entire ten-year scope of the complaint is included, there will be additional millions of members. It is self-evident that a litigation with more than one million parties plaintiff is inherently beyond the administrative capability of any court.

If this were a case where each purported class member had engaged in only a single transaction, it would be bad enough. But it is clear that most class members have engaged in several transactions, thus enormously compounding the problem. Conservatively assuming a class with only one million members, if each person averaged only two doorknob purchases annually, the litigation would embrace two million annual transactions, or approximately 20 million separate purchases over the ten year period in question. No judicial system is capable of adjudicating such a massive number of separate claims. And any attempt to do so would not only be futile but, far worse, could result in a breakdown of the machinery of this court.

2. Pretrial and Trial

If this action were to proceed as a class action, each of the mil-

69. 1972 Trade Cas. ¶ 73,879 (E.D. Pa. 1970), *appeal dismissed*, 455 F.2d 618 (3rd Cir. 1972), *cert. denied*, 407 U.S. 925 (1972).
70. 61 F.R.D. 427 (W.S. Mo. 1973).

lions of class members would have to receive notice and appear personally to present his claim.[71] Moreover, defendants would be entitled, under the Federal Rules of Civil Procedure, to discovery from each claimant with respect to the factual data underlying his claim for damages. Otherwise, defendants would lack the fundamental facts requisite to a defense of each claim. Discovery would necessarily cover the basic individual facts of each class member's claim. This individual discovery would take years to complete, and the result would be a mountain of paper which would have to be filed, examined and evaluated.

When, after notice and discovery are completed and the intervention by class members has been processed and the actions are ready for trial, the management and administrative problems would become even more severe, particularly in light of plaintiffs' request for a jury trial. As noted above, common treatment of the issues of violation, impact and damage would be impossible. Since there can be no liability in the absence of a showing of injury, and the claims here are such that the fact of injury is, of necessity, a separate and distinct question for each and every class member, the trial of this action would entail detailed proof concerning every transaction as to which damages are claimed.

Even disregarding the time and effort necessary for the inherently complex proof of the existence of the various conspiracies and illegal activities alleged in the two counts of the complaint, the type of individual factual showing necessary for the proof of each class member's claim amply demonstrates the total impossibility of managing a case of this magnitude. In cases involving much more limited classes and where proof of violation, impact and damages would have been far less complex, the courts have rejected class actions because of the impossibility of ever conducting a trial of the claims. For example, in *City of Detroit v. Grinnell Corp.*,[72] an action following a successful government civil action against defendants which established liability, the court, in considering the propriety of a proposed settlement of a class action in which there were only 14,156 claimants, noted the problem inherent in the trial of these claims as a class action:

71. 53 F.R.D. 45, 71-2.
72. 1973 Trade Cas. ¶ 74,341 (S.D.N.Y. 1972).

> Because of the dispartity in charges between cities and the various competitive local factors, defendants are ready to contest each of the 14,156 claims on the amount of damages, even though liability may be proven. Assuming, for the moment, that the class action status is resolved in favor of plaintiffs, interesting trial problems are present, since the case is to be tried to a jury. Defendants' right to a jury determination of the damages for each asserted claim is not lost because this is a class action. While Rule 23 has been given broad application, no one suggests that it has repealed the Seventh Amendment. After appropriate discovery by the defendants has been obtained, and the litigation has not even reached that point, it is fair to assume a minimum of one hour for the presentation and defense of each claim. *Thus, we can look forward to about 14,000 trial hours on the damage claims alone. With an average of 6 hours a day devoted to actually hearing testimony, the trial will take some 2,300 days or about eleven years.* Assuming the greatest cooperation possible among advocates strongly prosecuting or defending a position, you might dispose of the matter within 5 years. . . .
>
> The questions of administration raised by such a trial are: Do you use the same jury to decide the entire damage issue? Does the same judge preside over this trial to the exclusion of his other more pressing work, such as criminal trials or application for preliminary and permanent injunctions? Or is the judge relieved of all other assignments? Even if several judges or juries are used (including perhaps fragmentizing the proceedings into cities and their respective judicial districts), a huge amount of judicial time of any single judge and his court personnel would be devoted to the matter.[73]

The problems involved in the trial of the instant claims would be infinitely greater than in the *Grinnell* case. Here, there are over one million class members each of whom will have a relatively miniscule monetary claim. Even if plaintiffs were able to marshall all relevant data, including charge slips from the defendants and receipts for cash sales, at least one-half hour would be necessary for each plaintiff to take the stand and demonstrate his damages. Thus, even with a conservative estimate of the size of the class, there would be required trial time of 500,000 hours (1,000,000 class members x 0.5 hours/class member), and this does not include any of the time required for proof and defense of the substantive allegations of each of the complaint's counts. Assuming five hours of trial per day, in one week the Court would have time to examine forty plaintiffs (2 plaintiffs per hour x 5 hours per day x 4 days per week). In that case, it would take 20,500 weeks (1,000,000 plaintiffs divided by 40 plaintiffs per week) of trial time. Such an undertaking is clearly an impossible task for this Court and any jury.

The above analysis concerns only the minimum time required to

73. *Id.* at 93, 603-4 (emphasis added). *See also* Shaffner v. Chemical Bank, 339 F. Supp. 329 (S.D.N.Y. 1972).

prove individual damages. There would, of course, be commensurate additional time required to prove impact on each individual class member, and counterclaims by defendants against individual class members arising out of credit card charges and other transactions could multiply three or four-fold the time required to try the claims of each class member.

The impossibility of such a situation led Judge Moody to find the *Robiner v. General Motors Corp.*, case unmanageable as a class:

> In conclusion, it is inescapable that the instant case would cause a number of management difficulties which further erodes the claims of Plaintiffs that the instant case appropriately may be pursued as a class action as formulated by Plaintiffs' Complaint.[74]

CONCLUSION

We recognize that the foregoing arguments are neither unanswerable nor are they exhaustive. For example, the related problems of manageability and predominance of common questions predicated on the necessity of individual damage proofs are substantially diminished if fluid class recovery concepts are adopted.[75] *Eisen III* specifically rejected the concept of fluid class recovery on the dual grounds that (1) Rule 23 does not contemplate or make provision for such a procedure; and (2) if authorized, the procedure would constitute a violation of due process of law.[76]

The issue was never reached in *Eisen IV*. If other courts choose not to follow *Eisen III* and permit fluid recovery, then the coercive impact of (b) (3) suits will increase because they will be less susceptible to dismissal on manageability grounds.

Furthermore, *Eisen IV* leaves many questions unresolved which, when decided, will define the ultimate impact of the individual notice requirement. To be sure, *Eisen IV* should eliminate the large,

74. Civil Action No. 172865 at 6 (Cir. Court, Wayne County, Mich., July 21, 1971).

75. Proponents of the fluid recovery theory would substitute individual recovery with recovery for the class. Without regard to individual injury "class damages" would be computed and, after all individual claimants had been compensated, the balance would be distributed to future "purchasers" or "victims", without any showing of actual injury. For discussion of this notion, *see* Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338 (1971).

76. 479 F.2d 1005, 1018 (2d Cir. 1973). The result has been criticized in *Note*, 87 HARV. L. REV. 426 (1973).

nationwide class action where identification of class members is readily available from defendants' records. Many such actions, however, involve class members whose identities are not known.[77] Further, in *Eisen IV* "readily available" meant that the information was computerized and in the possession of the defendants. Assume, however, that the identities of some or all of the class members are available through records in the possession of private corporations or persons not parties to the litigation. Will courts require individual plaintiffs to (a) undertake discovery from third parties to obtain such information; or (b) commence litigation, if necessary, to obtain it. Further, what if the information is a matter of public record which would be made available by a public agency upon the payment of a processing fee. Obviously, the burdens attendant upon individual notification will be lightened considerably if the requirement is confined to those circumstances where the information is in the possession of the defendants. No case has yet addressed itself to these issues.

Another important question left undecided by *Eisen IV* is the permissibility of sending notice to class members as part of a routine mailing.[78] Even assuming that the cost of doing so would make it sufficiently attractive to a plaintiff, it can be argued that the probability that a person would disregard, ignore or fail to appreciate such a notice would render it inadequate under Rule 23(c)(2).

However these questions are resolved, we do not believe that 23(b)(3) suits will fade away. The lure of multimillion dollar recoveries will continue to inspire the filing of such complaints. Prior to *Eisen IV*, many of the decisions adverse to advocates of the device directly resulted from the zeal of over amibitous lawyers who failed to appreciate that, in this area, it is the "limited issue" case that stands a better chance of certification.[79] Given the financial limitations imposed by *Eisen IV*, it is entirely possible that class suits filed in the future will be even more troublesome for defense counsel and their clients since smaller classes should substantially alleviate the administrative problems which plagued the court of appeals throughout the *Eisen* appeals.[80]

77. In the *Eisen* case, for example, the identities of "only" two million of the six million class members were readily available, Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140, 2147 (May 28, 1974).

78. The technique is suggested by Mr. Justice Douglas. *Id.* at 2144 n.1.

79. Thus, *e.g.*, a suit brought on behalf of *all* Corvair owners was dismissed as unmanageable, Robiner v. General Motors Corp., Civil Action No. 172865 (Cir. Court, Wayne County, Mich. July 21, 1971).

80. *See* Judge Medina's "observations" in *Eisen III*, Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1018-20 (2d Cir. 1973).