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THE FINANCIAL ASPECT OF ADEQUATE REPRESENTATION UNDER RULE 23(a)(4): A PREREQUISITE TO CLASS CERTIFICATION?

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This article examines the financial implications of Federal Rule of Civil Procedure 23(a)(4) which requires that the representative for a class action provide fair and adequate representation in an adjudication of the class' rights. The authors trace the development in case law of the 23(a)(4) financial condition considerations. They then examine the tensions which arise as a result of imposition of heavy financial responsibilities on the class plaintiff under 23(a)(4). Requiring the prospective plaintiff to prove financial competence serves to provide due process and protection for the rights of absent class members but it may also preclude a plaintiff from bringing the suit at all. The authors suggest possible directions for legislative reform and recommend further legislative consideration of resolution of the competing objectives.

I. INTRODUCTION

The problem of fair and adequate representation for absent class members presented by the present Federal Rule of Civil Procedure 23(a)(4) stems from the fact that the rule requires that the judgment have a binding effect on all members of the class.[1] No subsequent suit based on issues of law or fact adjudicated in the class action may be brought by any member of the class who has not excluded himself from the effect of the judgment through notice to the court pursuant to 23(c)(2)(A).[2] This foreclosure of rights by

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1. Federal Rule of Civil Procedure 23(c)(2)(B) provides "the judgment, whether favorable or not, will include all members who do not request exclusion."

2. This provision advises a class member that "the court will exclude him from the class if he so requests by a specified date."

adjudication in one lawsuit means that the courts must assure absent class members adequate representation in that action; the absent class member will have no further judicial recourse. Moreover, the requirement of adequate representation reflects the fact that the absent class members will probably not take any part in the prosecution of the action itself.

This need to protect class members, due to preclusion of further action on their part, was not always a vital consideration of the federal judiciary. Until the adoption of the present rule in 1966, the applicable rules and cases permitted an absent class member to bring a subsequent suit, irrespective of the judgment applicable to the class. The orginal class action rule, Federal Equity Rule 48, in force between 1842 and 1912, specifically stated that "the decree shall be without prejudice to the rights and claims of the absent parties."[3]

The sentence regarding the nonbinding effect of the judgment was removed in 1912 with the adoption of Equity Rule 38,[4] but the confusion continued. In *Supreme Tribe of Ben-Hur v. Cauble,* the Court clearly held that such judgments would be binding on all class members: "If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented."[5] This decision was later weakened by *Christopher v. Brusselback*[6] which limited the binding effect of judgments on absentee class members to covering only the absentees' interests in property within the jurisdiction of the court.

With the adoption of the original rule 23 in 1938, the problem still was not clearly resolved. The rule divided class actions into three categories,[7] and one of these categories, the "spurious" class

3. 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1751, at 508 n.22 (1972).

4. *Id.* at 509.

5. 255 U.S. 356, 367 (1921).

6. 302 U.S. 500 (1938).

7. The three classes were described in rule 23(a) according to the nature of the right to be enforced:

> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

action, was often considered a mere permissive joinder device, so judgment bound only those parties named on the record.[8]

As rewritten in 1966, rule 23 resolves the problem by abolishing the categorical distinctions and by clearly stating that the judgment will be binding on those class members who have not specifically excluded themselves from the class.[9] However, since the absent class member can no longer protect himself by resorting to separate litigation unless he has specifically excluded himself, the court now faces the task of insuring that his interests will be protected by the class representative.[10]

Federal courts have indicated that unless there is assurance that the action will be prosecuted forthrightly and vigorously, the rights of absent class members will be considered inadequately protected.[11] An important factor to consider, therefore, is the ability of the representative party to pay the costs of the action, as this bears directly on how strenuously the action will be prosecuted. Although the lower federal courts have begun to consider financial capability in connection with adequate representation, they have not provided a clear standard as to the extent of financial resources necessary to meet the responsibility of adequate protection. There has also been no conclusive judicial decision establishing a regular procedure for discovery into the availability of such funds.

The landmark decision which first established guidelines as to *financial* responsibilities required of the class plaintiff is *Eisen v.*

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(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

C. WRIGHT & A. MILLER, *supra* note 3, § 1752, at 512. These three categories came to be known as "true," "hybrid," and "spurious" class actions, respectively. See § 1752 for a discussion of the confusion caused by the attempts to pigeonhole actions into these categories.

8. In Knowles v. War Damage Corp., 171 F.2d 15, 18 (D.C. Cir. 1948), the court said that in such an action "joinder is a matter of economy and efficiency on the part of courts and parties—an avoidance of a multiplicity of suits. . . . The joinder was and is a matter of discretion in the trial court.' *See also* Weeks v. Bareco Oil Co., 125 F.2d 84 (7th Cir. 1941).

9. *See* note 2 *supra* and accompanying text.

10. FED. R. CIV. P. 23(a) states: "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."

11. The ability of the class plaintiff to represent the members of the class is considered an essential prerequisite to insuring due process for the absent members of the class. *See* Hansberry v. Lee, 311 U.S. 32, 42 (1940); Dierks v. Thompson, 414 F.2d 453 (1st Cir. 1969). *See also* Alameda Oil Co. v. Ideal Basic Indus., Inc., 326 F. Supp. 98 (D. Colo. 1971); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968).

Carlisle & Jacquelin.[12] This case held that under 23(c)(2)[13] a class representative must bear the costs of giving notice of the suit to all reasonably identifiable members of the class. Rule 23(c)(2) simply requires that notice be directed to absent class members. The Court in *Eisen IV* set down that the cost of such notice should be born by the class representative. The Court rejected a notion of "mini-hearings" to determine who should bear the cost of notice as beyond the scope of the rule;[14] the Court also refused to shift the duty to pay 23(c)(2) costs to the defendant. By requiring the class representative to pay notice costs under rule 23(c)(2), the *Eisen IV* Court simultaneously underscored the protective nature of the role of class representative and annexed financial responsibilities to that role.

This conception of the role of class representative, although developed under a construction of 23(c)(2), may logically be extended to support the contention that 23(a)(4), through its fair and adequate representation requirement, also imposes financial responsibilities on the class representative. This extension of the *Eisen IV* decision has been made by lower federal courts[15] in opinions indicating that rule 23(a)(4) requires that the class representative be able to pay the cost of prosecuting the entire suit.

The implications of this interpretation of 23 (a)(4) for would-be class representatives and for class suits in general are examined in this article.

II. Evolution of Financial Inquiry

Citing the rulings in *Eisen III* and *Eisen IV* as precedent for the proposition that rule 23 requires a financially capable class representative, defendants in a few recent class action suits have succeeded, at least at the lower federal court level, in arguing against

12. 417 U.S. 156 (1975) [hereinafter referred to as *Eisen IV*].

13. Fed. R. Civ. P. 23(c)(2) provides, in part: "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."

14. This aspect of the case was explicitly dealt with by the United States Court of Appeals for the Second Circuit, which held that the district court had no authority to conduct a preliminary hearing on the merits for the purpose of allocating costs. 479 F.2d 1005 (1973) [hereinafter referred to as *Eisen III*].

15. *See, e.g.*, National Auto Brokers Corp. v. General Motors Corp., 376 F. Supp. 620, 636-39 (S.D.N.Y. 1974); P.D.Q., Inc. v. Nissan Motor Corp., 61 F.R.D. 372, 377-78 (S.D. Fla. 1973); Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427, 433-34 (W.D. Mo. 1973).

certification of a class where the representative was either unwilling or unable to finance the costs of the suit.[16] Although in an obfuscated form, the theory presented in each case was that a representative who is not able to afford the costs of the class suit—including the sometimes immense costs of discovery—jeopardizes the interests of the absent class members by granting the generally affluent corporate defendants an adversarial advantage. If the defendants have vastly greater financial resources than the class plaintiffs, the litigation becomes one-sided; the prosecution of the suit is almost automatically rendered less effective than its defense. This theory, purporting to protect absent class members, was put forth by defendants for their own purposes, specifically in hopes of preventing class certification. Nonetheless, it brought before the courts the legitimate issue of possible inadequacy of representation due to the representative plaintiff's insufficiency of funding.

One of the first cases to present the problem for judicial solution involved separate antitrust actions consolidated for treatment of the motions for certification of the classes.[17] The first action considered was a suit against publishers for discrimination in advertising practices.[18] The court concluded that under rule 23(a)(4), and

16. *See* cases cited in note 15 *supra*.

17. Nat'l Auto Brokers Corp. v. General Motors Corp., 60 F.R.D. 476 (S.D.N.Y. 1973).

18. This was an action by Ambook Enterprises against Time, Inc. The first amended complaint alleged that the action was being brought on behalf of all "producers, wholesalers and retailers of goods and services of interstate commerce in the United States who advertise in publications." *Id.* at 480. The class thus defined was estimated at 1 million persons. The plaintiffs complained that the publisher defendants, including Time, Inc., had established dual rate structures for the sale of advertising in their publications. According to this system, advertising agencies would obtain a 15 percent commission from the publishers, whereas those advertisers purchasing directly from the publishers do not receive this commission. *Id.* at 480. The purpose of the rate structure was allegedly to coerce the purchase of advertising agency services and to fix a price for services of advertising agencies to their clients equal to 17.6 percent of the price charged by publishers. An injunction and damages were sought; the damage claim exceeded $1 billion.

After consolidation, plaintiffs sought to amend their complaint, although all the counts were grounded on the same basic claim concerning the dual rate system. The amendment based the purported violations squarely on action prohibited by the Sherman Act, alleging that the scheme resulted from combination and conspiracy, and that the New York Times Company had attempted to monopolize with respect to advertising in the New York area. Further claims included alleged price discrimination in violation of the Robinson-Patman Act.

The class was regrouped into those seeking damages and those desiring injunctive relief. The number of persons in the former class totaled about 5,500 whereas the proposed class for injunctive relief amounted to about 1 million persons.

particularly because of the binding effect of a judgment under rule 23, the court must insure that the representative party is capable of asserting the interests of the absent class members with vigor and forthrightness.[19] The court accepted the pragmatic contention that adequacy of representation may be highly correlative to sufficiency of funding. With regard to this aspect of the case, it was found that the representative was in such financial straits that "there [was] no assurance that [it was] in a position to carry on class litigation in [that] court in a responsible and vigorous manner."[20] The court denied class certification on grounds of the representative's apparent inability to represent the class; this inability was traced partially to the representative's poor financial condition.[21]

In the second antitrust action,[22] the plaintiff, National Auto Brokers Corporation, ("Nabcor,"), was considered unfit to represent the class due to its lack of financial stability. In that case, the corporate coffer was seriously depleted. "At a hearing . . . the president of Nabcor indicated that Nabcor was almost out of money and was in danger of going out of business. The president of Nabcor indicated that he had put $100,000 of his own money into the company, which was then almost gone."[23] In a later opinion involving

19. 60 F.R.D. at 486-87. Citing *Eisen IV*, the court further stated:

> Under the new Rule 23, and particularly because of the res judicata effects of judgments under the rule, a court must carefully scrutinize the adequacy of representation in all class actions. . . . In general, the primary criterion is the forthrightness and vigor with which the representative party can be expected to assert the interests of the members of the class.

Id. (citations omitted).

20. 60 F.R.D. at 487. Representative Ambook was out of business and in the process of liquidating, and had commenced action against Time, Inc. only after failing to receive a capital investment from Time. Moreover, Ambook had recently suffered a default judgment in Ohio proceedings which would further deplete available resources.

21. *Id.* at 488. The court evaluated the ability of Ambook to represent the class based on its poor financial status, and only subsequently stated that even if Ambook were adequate in that capacity, its failure to assert a claim typical of the class would bar it from representation.

22. National Auto Brokers v. General Motors Corp., 60 F.R.D. 476 (S.D.N.Y. 1973).

23. *Id.* at 493-94. At this point in the litigation, the court found that Nabcor was maintaining itself by land speculation in the Poconos, and that its overall condition was "bleak." *Id.* at 494.

The factual background of this suit dealt with basically the same claim as the *Ambook* action. The complaint was brought on behalf of persons who had placed advertising during the four years prior to commencement of the action directly with a newspaper in the United States, and who had not received the agency discount. Treble damages, declaratory judgment, and injunctive relief were sought. The size of the class was estimated at 10,000 persons. *Id.* at 493.

another aspect of the same case,[24] *"Nabcor II,"* the federal district court elaborated in more detail on the relationship between financial condition and ability to represent adequately. The court's analysis in *Nabcor II* indicated that since financial insolvency will have an adverse effect upon the representative's ability to render the required adequate representation, the court will carefully scrutinize the plaintiff's financial condition.[25] Noting that in the instant case the class plaintiff had suffered financial losses during the previous three years and had a negative balance in its working capital account, with no cash reserves, the court concluded that this poor financial state precluded a finding that the class plaintiff could adequately represent the absent members' interests.[26] Although the court did not specify the amount of money necessary to assume adequate representation, the opinion indicated that the representative had already expended approximately $38,000.[27] Nonetheless, the court concluded that the plaintiff, possessing limited funds and confronting mounting additional costs of suit, could not realistically expect to pay these costs and thereby protect the interests of the class.[28] Thus, the opinion in *Nabcor II* clearly establishes a high degree of correlation between the ability to pay the costs of properly prosecuting the class suit and adequacy of representation as required by 23(a)(4).

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24. National Auto Brokers Corp. v. General Motors Corp., 376 F. Supp. 620 (S.D.N.Y. 1974), [hereinafter referred to as *Nabcor II*]. While the case discussed at note 19 *supra* dealt with alleged antitrust violations due to dual advertising rates, the instant case concerned purported discrimination by automobile manufacturers in their dealings with Nabcor, an automobile broker, and its franchisees. Nabcor contended that the auto manufacturers discriminated in favor of long term leasing companies by refunding advertising contributions to them, and not to Nabcor, and by making available to these concerns certain other benefits, such as warranty programs and purchase price rebates.

25. *Id.* at 637-38.

26. *Id.* at 638. The record revealed that Nabcor had an operating loss of $82,000 on sales of $221,000 and a total loss of $183,651 for the 9 months ending October 31, 1971. Nabcor's operating loss for the six months ending July 31, 1972 was $87,000 and the company had a total loss of $96,000 on sales of $216,000. Nabcor had a negative working capital balance of $212,000 as of July 31, 1972, and a negative cash balance of $1,472 as of March 8, 1973. Furthermore, the company had a $150,000 default judgment entered against it in Ohio court proceedings based on a promissory note.

27. *Id.*

28. Nabcor's attorney contended that Nabcor had proved its ability as an adequate representative by conducting the litigation thus far. The court rejected this argument, stating that the record was not indicative "because the class action aspects of the litigation have not really begun." *Id.*

Another case significant in the development of a financial capability requirement under rule 23(a)(4) was *Ralston v. Volkswagenwerk, A.G.*[29] The plaintiff in *Ralston* filed a motion to certify an action on behalf of some 18,000 members who had allegedly purchased Volkswagen automobiles from Volkswagen dealers at "fixed" prices.[30] The court denied the motion on the grounds that the claims were not typical and the action was not manageable in its class form. Refusal to certify the suit was based on the additional reason that the representatives were financially weak advocates. The *Ralston* court had assessed the financial state of the representatives and found that they had a total of $15,000 available for use in prosecuting the class suit. The court estimated that pretrial notice costs would be approximately $4,000. Expenses incurred by plaintiff's counsel and discovery costs had already totalled $3,000. Therefore, plaintiffs had thus far committed $7,000, leaving them with approximately $8,000 with which to satisfy any future costs. The court dismissed the suggestion that this amount would suffice to prosecute the matter properly, concluding "that the probable expense of developing acceptable evidence necessary to present the merits of the case would exceed substantially the amount the named plaintiffs have at their disposal."[31] The representatives' lack of resources to cover the entire cost of the class suit convinced the court that the requirements of rule 23(a)(4) had not been satisfied. Over the representatives' objections that *Eisen IV* mandated only the payment of notice costs, the *Ralston* court dismissed the action, noting the necessity that the representative be able to pay for the entire suit. "In order adquately and fairly to represent the interests of the class, the named plaintiffs must sustain the burden of showing that their resources are adequate to pursue this lawsuit to completion, even in the absence of any additional financial contributions from members of the purported class."[32] The opinion refers to

29. 61 F.R.D. 427 (W.D. Mo. 1973).

30. *Id.* at 429. The complaint alleged that multiple corporate defendants, consisting of the manufacturer, the importer, a regional distributor, and dealers of new Volkswagens, had conspired to maintain the price of new Volkswagens at an artificially inflated level by resale price maintenance agreements setting prices from which dealers were forbidden to deviate. *Id.* at 428.

31. *Id.* at 434.

32. *Id.* at 433.

the payment of the costs of notice as merely "the tip of the iceberg."[33]

The court concluded that if the representative's ability to perform his duty as mandated by rule 23(a)(4) is not assured at the outset of litigation, that plaintiff, regardless of his personal stake in the outcome, must not be allowed to present the claims of other members. Specifically stating that "the court should allow such representation only upon a firm foundation that the named plaintiffs are willing and financially able to shoulder that burden,"[34] the court went on to point out that demonstration of this ability must take place at the beginning of the lawsuit. "Such a 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."[35]

In discussing adequate representation in another antitrust suit, *P.D.Q. Inc. v. Nissan Motor Corp.*,[36] the court again made evaluation of the financial resources available for prosecution of the suit a prerequisite of certification. In its examination of the plaintiffs' funding, the court stressed that the "inherent expense of conducting discovery in a complicated antitrust case such as this"[37] is an important factor in determining the amount of money the representatives would need to meet their statutory obligation. Deposition of the representatives revealed that they were unaware of the costs involved in such a suit and would not be willing to invest the huge sums necessary for adequate prosecution of the action.[38] Further-

33. *Id.*

34. *Id.* at 434.

35. *Id.*

36. 61 F.R.D. 372 (S.D. Fla. 1973). *P.D.Q.* involved consolidation of two antitrust cases for pretrial proceedings. Complaints in these suits alleged Sherman Act and Clayton Act violations by the defendant and its dealers in conspiring to fix retail prices for Datsuns, refraining from selling through brokers and discount houses, and allocating marketing territories. The class, as originally proposed, consisted of all those who had purchased Datsuns in the United States, its territories, and Puerto Rico, a total of approximately 630,000 persons. The court limited this number by including only purchasers of Datsuns from July 17, 1968 to July 17, 1972 who purchased the automobiles in either New York County, New York or Dade County, Florida.

37. *Id.* at 377.

38. *Id.* at 377-78.

The court drew this conclusion from the depositions of the plaintiffs quoted in note 4 of the opinion as follows:

more, the court estimated that pretrial expenditures would exceed $10,000 and that when notice costs were added, the total amount necessary would vary between $25,000 and $250,000, depending upon the size of class permitted.[39] Thus, certification, which ultimately was granted in *P.D.Q.*, after the class size was considerably reduced, was dependent on assurances to the court that this amount could be furnished, thereby linking adequate protection with financial capability.

To recapitulate, according to this line of cases, the representative, irrespective of any personal claim, is not entitled to represent others in class suits if the court determines that he is financially unable to meet the heavy responsibility set down for him in rule 23(a)(4). The exact amount of money needed to satisfy the rule depends upon the particular factual situation. In the preceding discussion, all the cases involved large classes consisting of thousands of plaintiffs, with damage claims aggregating millions of dollars. Moreover, *P.D.Q.*, *Ralston*, and *Nabcor* were concerned not only with huge classes, but also with complex antitrust litigation. Shouldering the economic burden clearly becomes more onerous as the number of persons to be represented and the complexity of the litigation increases. In such cases, the courts have rightfully imposed a heavy burden regarding financial ability to prosecute.

Q. Are you aware of the fact that your attorney in bringing this suit has sought to bring a class action?
A. Yes, he told me that.
* * * * * * * * * * * * * * * * *
Q. Are you prepared to pay for a class action if called upon?
A. No.
Q. Suppose it were to cost you $100,000 to pull a figure out of the air?
A. I couldn't afford that.
Q. Could you afford $10,000?
A. I certainly wouldn't want to.

The deposition of the other plaintiff revealed the following:

Q. Has anybody told you about the possibility that you may have to pay the expenses of notifying the class in this action?
A. No sir.
* * * * * * * * * * * * * * * * *
Q. Suppose your company needed $100,000 to pay the costs of prosecuting this action; would that money be available?
A. No sir.
Q. Would you borrow to pay the costs of this action?
A. No, sir.

39. *Id.* at 378.

When a small number of persons is involved in class litigation, courts should not be as concerned with scrutiny of the representative's financial abilities since the economic exigencies will be less rigorous. This fact does not, however, completely erase the court's duty to assure itself that the plaintiff can afford to represent the small class. Because of the variants such as class size and complexity of litigation, the examination of financial capability should be taken on a case by case basis, without rigid rules defining the amount necessary to sustain certification on the adequate representation issue. Attachment of financial responsibilities to the fair and adequate representation mandate of 23(a)(4) seeks to afford protection to absent class members. However, a dogmatically inflexible application of the financial capability requirement could in itself be detrimental to the rights of class members by making certification of any class almost impossible.

An attempt to address this problem was made by the court in *Sanderson v. Winner.*[40] There, the United States Court of Appeals for the Tenth Circuit rejected the defendants' argument that the action could not be maintained as a class suit since the funds available to the representatives for prosecuting the suit were insufficient under the rationale set forth in *Ralston and P.D.Q.* "Defendants considered it important to ascertain whether plaintiffs were able to pay all of the costs in the litigation including extensive depositions. We fail to see relevancy in these inquiries particularly with respect to *in limine* inquiry as to whether a class action is to be allowed."[41]

The Tenth Circuit stated that the rule 23(a)(4) requirement of adequate representation and consequently the issue of the plaintiffs' financial condition is not of paramount importance in an action involving a relatively small class:

> We are aware that some lower court decisions have considered the plaintiff's ability to pay as relevant and proper in the present context. However, in both of these cases in which antitrust violations were alleged, the plaintiffs sought to represent a class of all

40. 507 F.2d 477 (10th Cir. 1974), *cert. denied,* 421 U.S. 914 (1975). Plaintiffs were seeking to bring an antitrust action against the Nissan Corp. for engaging in alleged unlawful conspiracy with the dealerships to violate section 1 of the Sherman Act. They sought issuance of writs of mandamus and prohibition directing the United States District Court for the District of Colorado to vacate discovery orders requiring production of income tax returns, financial documents, and agreements with attorneys relating to their fees. *Id.* at 478.

41. *Id.* at 479.

> new car purchasers in the United States. Thus, there was legitimate concern about the ability of the plaintiffs to successfully lead a class of this magnitude. Also, the court in *Ralston* was concerned about its ability to manage the class. The mentioned considerations are not present here.[42]

The court ostensibly reasoned that because of the small size of the class, there would be less chance of inadequate representation due to financial weakness. Although this conclusion is undoubtedly logical, the court should not have dispensed with the financial prerequisite entirely. While drawing distinctions between small and large classes may be relevant, it is submitted that the opinion of the Tenth Circuit in *Sanderson* was an incorrect application of rule 23 because of its refusal to allow *any* examination of the representative's financial condition. Whether the class is small or large, the representative stands in for absent members, and his statutory duty is to represent these members—be they one or one million in number—in a fair and adequate manner. The Tenth Circuit did not discuss this point, although the court did recognize that financial condition is relevant in the determination of the representative's ability to prosecute a larger class suit.[43] It is unfounded for the court to indicate that the relevancy of the inquiry decreases as class size decreases. It is not that the relevancy of the inquiry into the representative's financial condition decreases in importance when the class is small, but rather, that the resources which must be shown to be available to assure adequate representation of the small class decrease in extent. Thus, it is suggested that the class representative in the *Sanderson* case should have been required to show a degree of financial resources which would comport with the needs of the small class he sought to represent. A complete failure to require any showing of financial status seems to ignore the adequate representation mandate, or has the effect of making it applicable only to the kinds of large classes found in the *P.D.Q.*, *Ralston*, and *Nabcor* cases. Certainly the absent class member in a small class action has a right of adequate representation equal to that of his counterpart who is a member of a large class. *Sanderson* undermines the intended statutory protection for absent class members

42. *Id.* at 480 (citations and footnote omitted).
43. *Id.*

by its refusal to allow inquiry into the financial condition of the representative.

It seems that an overriding concern of the Tenth Circuit in reaching its decision in *Sanderson* was the rich-poor plaintiff dichotomy.[44] The court stated: "Ordinarily courts do not inquire into the financial responsibility of litigants. We generally eschew the question whether litigants are rich or poor. Instead, we address ourselves to the merits of the litigation."[45] The court believed that a poor plaintiff has as much right to access to the federal courts as a rich one. In class actions, however, the rich-poor distinction is critically important. The representative does not simply present a sole claim but attempts to represent others in the presentation of their claims as well. Whether a single plaintiff has funds to prosecute his claim is of no concern to the courts. If he does not have such funds, the single plaintiff suffers alone; no one else is harmed. In a class suit, however, if there is an insufficiency of funds, the absent class members, as well as the representative, may be seriously harmed in that ineffective presentation of the claim may result in an adverse judgment binding on all class members. A distinction between rich and poor plaintiffs is therefore at least relevant, if not necessary, in class suits. Rule 23(a)(4) recognizes the import of the distinction by specifically requiring adequate representation; thus it is contended that the court in *Sanderson* erred when it relied on a rich-poor argument to deny discovery into the financial status of the representatives.

The lines of cases prior to *Sanderson,* including *Ralston, P.D.Q.,* and *Nabcor,* considered financial capability an important factor in the determination of adequacy. However, *Sanderson* distinguished those cases, all of which involved large classes, and held that financial capability is not a factor where the class involved is small. This distinction, albeit erroneous, could be followed in the future in order to avoid financial examination. It is more likely, however, that if *Sanderson* is accepted at all by the other circuits, it will be limited to its facts, thereby barring discovery into financial capability only when small classes are involved. Any extension of *Sanderson* that might bar financial consideration in a case involving a large class and complex litigation will assuredly undermine the

44. *Id.* at 479.
45. *Id.*

rule 23(a)(4) requirement of adequacy of representation.

Regardless of future consideration of *Sanderson*, the cases requiring such inquiry necessitate an examination of the amount of funding sufficient for a determination that statutory requirements have been met.

III. MONETARY REQUIREMENTS UNDER RULE 23

The demonstration of financial capability which the court should require of a class plaintiff in satisfaction of rule 23(a)(4) should center on the sum the court considers necessary to prosecute the class claim effectively.[46] The cost factors deemed vital in prosecution of a suit in general include discovery, attorney's fees, court costs, and notice.[47] The class representative is, of course, opposed to expanding the amount needed to bring the class suit beyond the single cost of giving notice to the members of the class as explicitly required by *Eisen IV*.[48] The Supreme Court in *Eisen IV* was, how-

46. The federal district court in Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427, 433 (W. D. Mo. 1973) flatly held:

> In order adequately and fairly to represent the interests of the class, the named [class] plaintiffs must sustain the burden of showing their resources are adequate to pursue this lawsuit to completion. . . .

The apparent meaning of the words "to completion" is that the class representative should pay all costs incurred while developing and preparing the claim for final adjudication. *See* P.D.Q., Inc. v. Nissan Motor Corp., 61 F.R.D. 372 (S.D. Fla. 1973).

47. The most expensive items, of course, are discovery and attorney's fees. The cost of notice is mandated by *Eisen IV*. Court costs, which include fees of the clerk and marshall, etc., are generally inconsequential and will not be discussed further. *See* 28 U.S.C. § 1920 (1970). In addition, under FED. R. CIV. P. 54(d), costs are generally awarded to the prevailing party. However, except in rare circumstances, the costs so awarded do not include discovery and attorney's fee costs. 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2666.

48. It is interesting to note that the cost of notice may include many elements. *See, e.g.*, Katz v. Carte Blanche Corp., 53 F.R.D. 539, 546-47 (W.D. Pa. 1971), *rev'd on other grounds*, 496 F. 2d 747 (3d Cir. 1974), which reveals the extent of notice costs involved in that case:

> There remains for us to consider the form, content, and manner of disseminating the notice. . . .
>
> . . . With respect to those who will be sent regular monthly billings, the plaintiff will supply to the defendant a sufficient number of notices and unstamped, self-addressed return envelopes for inclusion in the monthly billings. The plaintiff will bear the burden of the cost of the production of the notice and the purchase of the return envelopes. The plaintiff, further, will reimburse the defendant for the cost of the labor to stuff such notices and return envelopes in with the defendant's monthly billings. With respect to those who will not be sent regular monthly billings, the defendants will produce for the plaintiff, at the cost of the plaintiff, address labels. . . . [T]he plaintiff will be responsible for . . .

ever, primarily concerned with notice as satisfying rule 23(c)(2) and did *not* extensively concern itself with the concept of financial condition as related to adequate representation pursuant to 23(a)(4).[49] Thus, the question of whether or not the class representative must pay costs other than notice should be analyzed in light of the reasoning of *Eisen IV,* but in no event is the ultimate answer limited by that case.

The *Eisen IV* Court believed that since procedural due process mandated fair notice to the absent members, the class representative should bear that cost "as part of the ordinary burden of financing his suit."[50] Moreover, the Court stated that procedural due process is satisfied only if the class plaintiff is an adequate representative and if the aforementioned notice is given to the class.[51] The *Eisen IV* Court did not address the 23(a)(4) issue, but since the Court required the plaintiff to pay the cost of notice to satisfy the due process requirement embodied in 23(c)(2), it seems unwarranted to think that the *Eisen IV* decision can be interpreted as specifically limiting the class plaintiff's financial responsibility to notice costs. The requirements of the due process clause and rule 23(a)(4) are equally applicable throughout the course of class litigation.[52] The court should require the class representative to conform to these requirements at all stages of the suit. Thus, if the *Eisen IV* Court required the payment of notice at the outset to insure due process, then it seems consistent for the Court to order the payment of other costs necessary to develop the case effectively. These latter costs also ensure due process. The class plaintiff should therefore be subject, before certification, to court determination of financial capability to pay the other costs which will be incurred if the class suit is vigorously pursued. Clearly, such a requirement is as "ordinary

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mailing [the notices] . . . to the members of the class who will not be sent regular monthly billings, including those who are no longer Carte Blanche cardholders.

49. The Supreme Court of the United States held that in a 23(b)(3) class suit, the class representative, to satisfy procedural due process, must bear the cost of notice to the members of the class. 417 U.S. at 177.

50. 417 U.S. at 179.

51. *Id.* at 176-77.

52. *See, e.g.,* Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973), where the Fifth Circuit set aside the trial court's judgment on the grounds that the requirement of adequate representation was not satisfied.

[a] burden of financing [the] suit" as the cost of notice.[53]

A rule that the class plaintiff be required to pay the cost of the class suit as insurance against inadequate representation takes on further merit when the items of cost are put into perspective. The major costs of suit that the class plaintiff should finance are discovery and attorney's fees. These two expenses of the suit bear directly on how effectively the matter will be pursued and are therefore within the parameters of rule 23(a)(4).

The use of discovery is crucial to a full exploitation of the facts underlying any matter in litigation.[54] The strength of the presentation of the case depends primarily on the scope of discovery employed by the litigant to gather facts and develop the issues. In view of this fact, a restricted use of discovery impairs the effectiveness of the presentation of the case, thereby reducing the chances for successful court action not only for one plaintiff, but possibly for hundreds of absent class members. Thus, if the class plaintiff is not thoroughly prepared, the rights of the absent members are not adequately protected as required by rule 23(a)(4).[55] Moreover, when a class plaintiff is unable to finance the cost of discovery, the adversarial advantage discussed earlier accrues to the generally more affluent corporate defendants. The resultant one-sidedness of the litigation, coupled with the statutory requirement of adequate representation, dictate that the class plaintiff pay such costs of discovery as are needed to develop the claim fully.

The other element of cost which must be analyzed to decide whether rule 23(a)(4) requires its payment by the class plaintiff is attorney's fees. The conclusion drawn with respect to the payment of discovery costs does not apply to the question of the payment of attorney's fees. In fact, a careful consideration of those situations in which the class plaintiff is unable to prepay the fee compels a contrary conclusion. Generally, there are two situations where an attor-

53. 417 U.S. at 179. *Accord*, King v. Sharp, 63 F.R.D. 60 (N.D. Tex. 1974); FED. R. CIV. P. 23(a)(4).

54. The importance of employing full discovery in class actions, and consequently, the ability to pay its cost, was discussed tersely in P.D.Q., Inc. v. Nissan Motor Corp., 61 F.R.D. 372, 377 (S.D. Fla. 1973): "Also to be considered is the inherent expense of conducting discovery in a complicated antitrust case such as this, especially when that discovery program is sure to include exhaustive examination of the defendant's documents." The court then stated that failure to undertake this degree of discovery can jeopardize the likelihood of the class action's success.

55. Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973).

ney will represent a class without advance payment. One is where the attorney accepts the case on a contingency fee arrangement, and the other is where the class claim is predicated on a statute authorizing the recovery of attorney's fees.[56]

In either situation, the attorney has evaluated the facts and concluded that the class claim is meritorious and that consequently the chances of recovery are high. The potential award of reasonable attorney's fees or a percentage of the recovery in contingency cases seems to be sufficient incentive to the attorney to assure the court that he will vigorously prosecute the matter. Accordingly, there is no overriding reason for the court to require the prepayment of attorney's fees. However, where neither a contingency fee arrangement nor statutory recovery of attorney's fees is possible, the class representative must also be prepared to pay the class's attorney.

The above analysis indicates that under 23(a)(4) the representative must at least be able to pay the discovery costs of the suit, and, in some instances, attorney's fees as well. The next question is whether the representative may expect contributions from the class. There is no valid objection to contributions from the class to defray the expenses of the suit. In fact, this practice is salutary since the absent members benefit from an effective prosecution of the case. The contributions, however, must be made prior to the time the motion to certify the class is presented to the court.[57] Otherwise, the court would be unable to accertain the extent of resources available to prosecute the action. A class suit should never be undertaken in the hope that at some future date the members of a class will aid the representative in carrying the case to completion; it is uncertain whether unidentified members of the class are able or willing to contribute to financing the class suit. Consequently, if a plaintiff

56. An example of statutory recovery of attorney's fees is an action brought pursuant to the Truth in Lending Act, 15 U.S.C. § 1640(a) (Supp. V, 1975). As to those situations where the attorney may enter into a contingency fee arrangement, *see* ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 and Ethical Consideration (EC) 2-20.

57. The federal district court in Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427, 433 (W.D. Mo. 1973), remarked that the class plaintiff must show he can pay the costs of the class suit "even in the absence of any additional financial contributions from members of the purported class." Moreover, the court held that such contributions, if any, must be made available to the class plaintiff before the suit is commenced. *Id.* at 434.

As an alternative to the class contribution method of financing, the attorney representing the class in *Nabcor* has suggested a public stock offering. The proceeds from the sale of stock would be used to cover the class suit expenses. TIME, April 26, 1976, at 46.

desires monetary contribution from the class, he should undertake solicitation as soon as possible and certainly prior to the time certification of the class is requested from the court. Otherwise, the court will not consider the finances of the class but will instead rest its decision regarding the financial aspects of adequate representation on the financial capability of the class representative alone.

IV. ADVANCEMENT OF COSTS BY THE ATTORNEY

Since an inquiry into the plaintiff's ability to pay is mandated by most courts which have dealt with this matter, it is clear that certification will be denied in many cases due to lack of funds. In order to avoid this result, some plaintiffs have sought to have their attorneys pay for the costs of suit with the proviso that the client will repay the attorney upon recovery from the defendant. There is nothing unethical about an arrangement of this sort. The Code of Professional Responsibility expressly authorizes the lawyer to advance the costs of the suit when his client would otherwise be unable to prosecute the case.[58] At the same time, however, the disciplinary rules specify that the client must remain ultimately responsible for payment of costs and expenses.[59] This requirement poses a dilemma with regard to advancement of funds. In theory, the client will pay the attorney from the recovery, but if there is no recovery, reimbursement may be impossible. That the attorney's reimbursement is dependent upon recovery might be taken as indicative of maintenance or solicitation of the class suit by the attorney rather than the client, in contravention of the Code of Professional Responsibility.[60]

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58. ABA CODE, *supra* note 60, Disciplinary Rule (DR) 5-103(B) provides:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

Ethical Consideration (EC) 5-7 states that the possible adverse effect of financial interest on the exercise of the attorney's free judgment renders advancement of costs undesirable. Ethical Consideration (EC) 5-8 specifically recognizes that the practice may, however, prove necessary as "the only way a client can enforce his cause of action."

59. *Id.* Disciplinary Rule (DR) 5-103(B); *see* note 62 *infra*.

60. *Id.* Disciplinary Rule (DR) 5-103(A) prohibits an attorney's acquisition of "a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client." This rule is subject to the exception set forth in 5-103(B) for advancement of funds. *See* note 62 *infra*. Disciplinary Rule (DR) 2-101 generally precludes advertisement indicating solicitation.

If the court were to find that the attorney had a proprietary interest in the action, such unethical conduct could prevent certification of the class regardless of the fact that the financial capability requirement was satisfied.[61]

Three lower federal courts[62] have held that without evidence of maintenance or solicitation, any inquiry into the plaintiff's financial condition is irrelevant once the plaintiff's attorney has expressed his intention of advancing to plaintiffs all the costs of the suit. Relaxation of the courts' scrutiny of the representative's financial condition in this instance reflects judicial awareness of the fact that failure to allow such agreements would doom many class claims from the start. Although the court should permit an attorney to advance costs, it will nevertheless question the class plaintiff concerning his arrangement with the lawyer in order to determine whether the agreement indicates that the attorney is maintaining the action.[63] Consequently, in *Stavrides v. Mellon National Bank & Trust Co.*,[64] the court ordered the plaintiff to answer specific questions regarding the payment of costs in order to elicit this information.[65] Another

61. Comment, *Ethical Obligations of the Attorney Under Rule 23—Abuses and Reforms*, 12 SAN DIEGO L. REV. 224 (1974). *Cf.* Sayre v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 65 F.R.D. 379 (E.D. Pa. 1974). *But see* 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1766 (1975 Supp.), where the commentators suggest as an alternative to dismissal, disciplinary action should be taken against the lawyer and a remedial notice sent to the class. In Korn v. Franchord Corp., 456 F.2d 1206 (2d Cir. 1972), the attorney was removed and replaced by "ethical," counsel.

62. Sayre v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 65 F.R.D. 379 (E.D. Pa. 1974); P.D.Q., Inc. v. Nissan Motor Corp., 61 F.R.D. 372 (S.D. Fla. 1973); Stavrides v. Mellon Nat'l Bank & Trust Co., 60 F.R.D. 634 (N.D. Pa. 1973).

63. The questioning may not, however, extend to compulsion of divulgence of confidential communications. Thus, the attorney-client privilege may prevent an in-depth inquiry. *See* Sayre v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 65 F.R.D. 379, 386 (E.D. Pa. 1974).

64. 60 F.R.D. 634 (W.D.Pa. 1973).

65. *Id.* at 638.

The court ordered the following questions, unanswered at an earlier deposition, to be answered by the plaintiff:

> Q. Have you agreed to pay your attorneys' legal fees for the work that they perform for you?
>
> Q. Dr. Stavrides, have you agreed to pay the legal costs involved in this suit if there should be any?
>
> Q. Dr. Stavrides, have you agreed to reimburse your attorneys any legal costs they might incur in the prosecution of this action?
>
> Q. Dr. Stavrides, have you been told that you may be required to pay the cost involved in the prosecution of this action?
>
> Q. Could you tell me the first time when this question of cost of the lawsuit ever arose or was ever discussed?

district court[66] agreed that such an inquiry was relevant, but emphatically held that without an independent showing of maintenance and solicitation, the plaintiff's own financial condition is irrelevant.

> Of course, were the questions concerning plaintiffs' understanding of their fee and costs arrangement to reveal a widespread expectation among plaintiffs that they were free from ultimate liability for funds advanced by counsel, or any other evidence that plaintiffs' counsel were maintaining this suit, then perhaps the extent of plaintiffs' assets would become relevant as supportive evidence in determining whether plaintiffs' counsel were ethically adequate representatives of the class. But until some independent evidence is brought to this Court's attention we can see no purpose to be served by the costly and time consuming process of inquiring into plaintiffs' financial status.[67]

Even when evidence of unethical conduct is absent, an agreement by the attorney to advance costs will be invalid if the plaintiff is clearly unwilling or unable to reimburse the attorney.[68] Judge Atkins of the Southern District of Florida addressed this problem:

> [T]he deposition testimony reveals that the plaintiff will not willingly advance more than a few thousand dollars. Is the Court required to believe that they will willingly guarantee reimbursement of an amount possibly in excess of the outer limits defined in their respective depositions should the cause of action fail? And even if this representation is made, could not the Court look beyond it to determine whether, should that eventuality ever result, any attempt to collect on that guarantee would be doomed from the start.[69]

The plaintiff's willingness to repay his attorney becomes a salient factor in considering certification. If reimbursement is impossible, the plaintiff may be considered an inadequate representative due to his projected inability to pay.[70] Thus, the attorney's willingness to advance costs is not the solution to guaranteeing financial ability in many cases where the plaintiffs do not have the resources to meet

66. Sayre v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 65 F.R.D. 379 (E.D. Pa. 1974).
67. *Id.* at 385-86.
68. *See* P.D.Q., Inc. v. Nissan Motor Corp., 61 F.R.D. 372 (S.D. Fla. 1973).
69. *Id.* at 380.
70. *Id.*

rule 23(a)(4) themselves. Such an agreement may be defeated by a showing of maintenance and solicitation, or by demonstration that the plaintiff remains unable or unwilling to reimburse his attorney. Hence, the advancement device does not easily circumvent the financial requirements and consequently does not increase the availability of the class suit to relatively poor plaintiffs.

V. CONCLUSION

The rule 23(a)(4) requirement of adequate representation emerged from obscurity in the wake of the landmark *Eisen* decisions. Federal district courts that have been confronted with the issue of adequate representation after *Eisen* have required a showing of financial ability in order to satisfy rule 23(a)(4).[71] Those courts have interpreted the *Eisen* mandate that plaintiff pay the 23(c)(2) costs as precedent for their indications that the plaintiff must also be able to meet the financial responsibility inherent in 23(a)(4). These decisions reflect a realistic judicial concern with protection of the interests of the absent class members. Concomitantly, however, the decisions have had the perverse effect of preventing adjudication of certain class claims, thereby allowing defendants to escape judicial restraint of their actions. To circumvent this effect, one federal court has narrowed the size of the class to comport with the financial ability of the plaintiff.[72] However, this is not feasible in all class actions.[73] Cases holding that the class plaintiff must pay all the costs of the suit including notice may be the death knell for future class actions. The Tenth Circuit recognized the fatal effect of the financial requirement and, therefore, in its *Sanderson* decision refused to follow it.[74] However, as discussed above, it is contended that the soundness of the *Sanderson* decision is dubious since in reaching

71. *See* cases cited in note 15 *supra.*

72. P.D.Q., Inc. v. Nissan Motor Corp., 61 F.R.D. 372 (S.D. Fla. 1973), where due to the plaintiff's limited resources, the judge reduced the size of the class by restricting it geographically.

73. In Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427, 433 (W.D. Mo. 1973) the court, relying solely on *Eisen III*, 479 F.2d 1005 (1973), argumentatively assumed that it could geographically reduce the size of the class to a manageable level. Even with the reduced size, however, "the plaintiff would [only] be able to finance notice to the . . . class" and this is just "the tip of the iceberg." Finding the plaintiff unable to support the financial burden of properly maintaining the lawsuit, the court condluded the plaintiffs had not shown an ability to protect adequately the interests of the class and dismissed the action.

74. Sanderson v. Winner, 507 F. 2d 477 (10th Cir. 1974), *cert. denied*, 421 U.S. 914 (1975).

it, the court ignored the rationale behind a financial capability requirement.

In still other cases the harsh effects of the rule were alleviated where the court allowed the class attorney to advance costs.[75] These decisions are also indicative of judicial awareness of the rule's adverse effect. However, even in situations where the attorney agrees to advance the costs, the class remains ultimately responsible.[76] This practice raises collateral questions of adequacy which may themselves defeat the motion to certify the class.[77]

Overall, the requirement that a class representative be financially able to represent the class has reduced the incentive of potential plaintiffs for bringing class actions. This is exemplified by *Eisen IV* itself. There, while the plaintiff's damages only amounted to $70.00, the class damages totalled millions. However, the plaintiff was less than willing to pay a $315,000 notice cost to adjudicate his $70.00 claim as required by the decision, so the action could not continue. The result was that the defendant was safeguarded from attacks on its alleged illegality since no single plaintiff had sustained sufficient damages to warrant payment of the notice costs. Rather than relenting from stringent requirements imposed by *Eisen IV,* the courts are adding to the already onerous burden confronting the class plaintiff.[78] Unless measures are taken to reverse the recent trend, the large class action seems doomed.

The dilemma is that imposition of weighty financial responsibilities under 23(c)(2) and 23(a)(4) may simultaneously promote and inhibit due process and protection for absent class members. Imposition of financial responsibilities on the class representative promotes due process and protection for absent members by ensuring notice and adequate representation. However, imposition of those same financial responsibilities may preclude any adjudication whatsoever of the class's rights.

A solution for one aspect of the problem specifically, that stemming from actions based on alleged antitrust violations, may result

75. Sayre v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 65 F.R.D. 379 (E.D. Pa. 1974), *modified,* 169 F.R.D. 117 (E.D. Pa. 1975). *But cf.* Stavrides v. Mellon Nat'l Bank & Trust Co., 60 F.R.D. 634 (W.D. Pa. 1973), where the court allowed the defendant to inquire into possible unethical conduct of plaintiff's counsel who advanced funds for the maintenance of the action.

76. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule (DR) 5-103(B).

77. *Id.* at (DR) 2-101, (DR) 5-103(A).

78. *See* cases cited in note 15 *supra.*

from recent Congressional legislation. The Hart-Scott-Rodino Antitrust Improvement Act of 1976[79] through its Parens Patriae section provides an alternative, in antitrust suits, to class action thereby allowing circumvention of present 23 (a)(4) financial obstacles. Broadly, the Act authorizes a state attorney general to bring an action on behalf of the citizens of the state to recover damages arising from the antitrust violations of price fixing or patent fraud within the state. The Act is in response to the *California v. Frito-Lay* case.[80] In *Frito-Lay*, the United States Court of Appeals for the Ninth Circuit held that California could not maintain a parens patriae case even though failure to allow the suit meant that the alleged wrong would probably go unredressed since no citizen had a claim large enough to justify bringing a class suit against the defendant. The House recognized the inefficiency of the class suit as a vehicle for consumer antitrust cases. The Committee Notes discuss the result in *Eisen* and conclude that in broad consumer antitrust cases the only effective means of prosecution is through a generalized figure, specifically the State Attorney General.[81]

Nonantitrust class action grievants, however, are still faced with the difficulties posed by 23(a)(4) financial requirements. An amendment to rule 23 providing that the prevailing plaintiff recover all litigation costs, including discovery, notice costs, and attorney's fees, may serve to alleviate a small measure of the harsh consequences which will follow upon the impending financial condition rule. At least such an amendment might provide incentive for an affluent prospective class plaintiff as he would presumably be more willing to pay the heavy costs of suit knowing he would be reimbursed if successful. However, less affluent class plaintiffs who are unable to pay the costs of suit at the outset would not be assisted by this amendment. Their predicament under the judicially imposed financial requirements of rule 23 merits legislative consideration lest the availability of the class action as a possible avenue for redress of grievances be too severely limited.

79. Pub. L. No. 94-435, 90 Stat. 1383 (1976).

80. 474 F.2d 774 (9th Cir. 1973), *cert. denied*, 412 U.S. 908 (1973).

81. HOUSE COMM. ON THE JUDICIARY ANTITRUST PARENS PATRIAE ACT, H.R. REP. No. 94-499, 94th Cong., 1st Sess. 6-8 (1975).