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CPLR 902: Court of Appeals Refuses to Grant Class Certification Following Summary Judgment

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one asserting jurisdiction.[27] Although alleviated by the inference of authorization, that burden probably should not be sustained where, for example, a defendant presents evidence that the secretary spoke untruthfully or negligently or that the secretary's superior acted without authority in permitting him to accept service.[28] As a practical matter, the process server may not know at the time of service whether the secretary has been authorized, regardless of what the secretary tells him,[29] and thus will still be required to make a reasonable and diligent effort to ensure service upon a proper person.[30] Accordingly, it appears that *Sullivan Realty* will not encourage careless service of process, but may help prevent selective avoidance of service by corporate defendants seeking refuge in unnecessary formalism.

Lois Peel Eisenstein

ARTICLE 9—CLASS ACTIONS

CPLR 902: Court of Appeals refuses to grant class certification following summary judgment

CPLR 902 places the burden upon the complainant to seek class certification of his action within 60 days following the expira-

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[27] Jacobs v. Zurich Ins. Co., 53 App. Div. 2d 524, 384 N.Y.S.2d 452 (1st Dep't 1976); Slotnick v. Campanile, 47 App. Div. 2d 536, 363 N.Y.S.2d 614 (2d Dep't 1975), *aff'd*, 38 N.Y.2d 986, 348 N.E.2d 911, 384 N.Y.S.2d 435 (1976); Saratoga Harness Racing Ass'n v. Moss, 26 App. Div. 2d 486, 275 N.Y.S.2d 888 (3d Dep't 1966), *aff'd*, 20 N.Y.2d 733, 229 N.E.2d 620, 283 N.Y.S.2d 55 (1967); CPLR § 306 (1972 & Supp. 1979-1980).

[28] In *Fashion Page*, the court indicated that the plaintiff should allege in his complaint whether or not the secretary had been authorized; whether he told the truth about having the authority to accept the service; what the officer did; and what the corporation did besides moving to vacate the service. 69 App. Div. 2d at 788, 415 N.Y.S.2d at 418.

[29] The existence of an agency cannot depend merely on "agent's" assertion of authority absent some manifestation on the part of the corporation which creates the appearance of authority, *see* RESTATEMENT (SECOND) OF AGENCY § 8 (1958) (apparent authority); *id.* § 8 B (estoppel), or by later ratification of the agent's act, *id.* § 82; *see* note 2 *supra*. Thus, the courts have refused to uphold service merely on the basis of a secretary's statement to the process server that she could accept the summons. *See* Coler v. Pittsburgh Bridge Co., 146 N.Y. 281, 40 N.E. 779 (1895); B & J Bakery, Inc. v. United States Fidelity & Guar. Co., 21 App. Div. 2d 783, 250 N.Y.S.2d 562 (2d Dep't 1964); Loeb v. Star & Herald Co., 187 App. Div. 175, 175 N.Y.S. 412 (1st Dep't 1919). CPLR 311(1) does not indicate the agents of the corporation that have the power to appoint an agent for service of process, but it appears that a managing agent is unable to make such an appointment. *See* Isaf v. Pennsylvania R.R., 32 App. Div. 2d 578, 299 N.Y.S.2d 231 (3d Dep't 1969).

[30] *See* McDonald v. Ames Supply Co., 22 N.Y.2d 111, 115-16, 238 N.E.2d 726, 728, 291 N.Y.S.2d 328, 332 (1968); note 2 *supra*.

tion of the time for the defendant to serve responsive pleadings.[31] Class status may be granted only upon a finding by the court that the requirements under CPLR 901 have been met.[32] Recently, in

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[31] CPLR 902 (1976) provides in relevant part:

> Within sixty days after the time to serve a responsive pleading has expired for all . . . defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained. An order under this section may be conditional, and may be altered or amended before the decision on the merits on the court's own motion or on motion of the parties. . . . Among the matters which the court shall consider in determining whether the action may proceed as a class action are:
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> 1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;
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> 2. The impracticability or inefficiency of prosecuting or defending separate actions;
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> 3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
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> 4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;
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> 5. The difficulties likely to be encountered in the management of a class action.

Replacing CPLR 1005, ch. 308, § 1, [1962] N.Y. Laws 1316 (McKinney), article 9 of the CPLR was enacted in 1975 to modernize class action procedures to allow greater use of the class form. *See* Governor's Memorandum on Approval of ch. 207, N.Y. Laws (June 17, 1975), *reprinted in* [1975] N.Y. Laws 1748 (McKinney). CPLR 1005 had been construed as limiting class actions to situations where privity existed between class members. *See, e.g.*, Society Milion Athena, Inc. v. National Bank of Greece, 281 N.Y. 282, 292-93, 22 N.E.2d 374, 377 (1939). As a result of this privity requirement, class actions in New York could only be brought in litigations involving trusts, partnerships or joint ventures, and ownership of corporate stock. 2 WK&M ¶ 901.02. This limitation of class actions was widely criticized. *See, e.g.*, Farrell, *Civil Practice, 1974 Survey of N.Y. Law*, 26 SYRACUSE L. REV. 365, 388 (1975); Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 618 (1971).

The 1975 legislation was intended to accomplish two major goals:

> 1. to set up a flexible scheme whereby class actions could qualify without the present undesirable and socially detrimental restrictions; and
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> 2. to prescribe basic guidelines for judicial management of class actions.

THIRTEENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1975), in TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE 248 (1976). Initial reactions to the passage of article 9 were favorable. *See* Farrell, *Civil Practice, 1975 Survey of N.Y. Law*, 27 SYRACUSE L. REV. 425 (1976); Homburger, *The 1975 New York Judicial Conference Package: Class Actions and Comparative Negligence*, 25 BUFFALO L. REV. 415, 415-30 (1976); *The Survey*, 50 ST. JOHN'S L. REV. 179, 189 (1975). The new class action procedure was heralded as an effective tool to aid in the protection of consumers, Governor's Memorandum on Approval of ch. 207, N.Y. Laws (June 17, 1975), *reprinted in* [1975] N.Y. LAWS 1748 (McKinney), since class actions permit many individuals with small claims to pursue those claims at minimal expense. *See* SIEGEL § 139, at 173. Notwithstanding the modernity and flexibility of article 9, some questions remain as to the full breadth of the statute. 43 ALBANY L. REV. 388, 395 (1979).

[32] CPLR 901 (1976) provides:

> a. One or more members of a class may sue or be sued as representative parties on behalf of all if:
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> 1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

O'Hara v. Del Bello,[33] the Court of Appeals refused to permit certification of a class action following a pre-trial decision on the merits in favor of the petitioner, notwithstanding that the time period for seeking class certification had not yet begun to run.[34]

O'Hara, a reporter in Supreme Court, Westchester County, initiated an Article 78 proceeding[35] "on behalf of himself and all others similarly situated" to recover payment for travel vouchers allegedly owed to them by county officials.[36] Rather than filing an answer, the respondents moved to dismiss the action for failure to state a cause of action.[37] Without notifying the parties, special term treated the motion to dismiss as a motion for summary judgment pursuant to CPLR 3211(c).[38] The court then ordered the respon-

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2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
4. the representative parties will fairly and adequately protect the interests of the class; and
5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

b. Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

These requirements and those contained in CPLR 902 were not intended to represent an exclusive list of matters to be considered by a court in determining whether to certify a class. 2 WK&M ¶ 902.10. To prevent unnecessary hardship on either side, a court may refuse class action certification if the merits of the case indicate one side would be disadvantaged by such certification. *Id.* At least one commentator has expressed fear that this could lead a court, when determining the class action certification issue, into an unwarranted consideration of the merits. Farrell, *Civil Practice, 1975 Survey of N.Y. Law*, 27 SYRACUSE L. REV. 425, 426 (1976).

It has been suggested that while article 9 was intended to liberalize the availability of class actions, *see* note 31 *supra*, little success in this regard has been achieved. 43 ALBANY L. REV. 388, 395 (1979). For example, New York courts have suggested that class action certification should not be conferred in cases involving governmental operations. *See* Martin v. Lavine, 39 N.Y.2d 72, 346 N.E.2d 794, 382 N.Y.S.2d 956 (1976); Long Island College Hosp. v. Whalen, 68 App. Div. 2d 274, 416 N.Y.S.2d 841 (3rd Dep't 1979). This sentiment had been expressed by courts prior to the enactment of article 9. *See, e.g.*, Rivera v. Trimarco, 36 N.Y.2d 747, 329 N.E.2d 661, 368 N.Y.S.2d 826 (1975).

[33] 47 N.Y.2d 363, 391 N.E.2d 1311, 418 N.Y.S.2d 334 (1979).

[34] *Id.* at 368-69, 391 N.E.2d at 1313-14, 418 N.Y.S.2d at 336-37.

[35] CPLR art. 78 (1976).

[36] 47 N.Y.2d at 366, 391 N.E.2d at 1312, 418 N.Y.S.2d at 335.

[37] *Id.*; *see* CPLR 3211(a)(7) (1976). The respondent also made a motion to dismiss under CPLR 3211(a)(2), challenging the subject matter jurisdiction of the court. 47 N.Y.2d at 366, 391 N.E.2d at 1312, 418 N.Y.S.2d at 335.

[38] 47 N.Y.2d at 366, 391 N.E.2d at 1312, 418 N.Y.S.2d at 335. CPLR 3211(c) authorizes a court, after giving adequate notice to the parties, to treat a 3211(a) motion to dismiss as a

dents to pay the travel vouchers submitted by the members of the potential class, even though no formal decision had been made concerning whether the case could proceed as a class action.[39] Following reargument, special term adhered to its prior determination.[40] The Appellate Division, Second Department, affirmed.[41]

A divided Court of Appeals modified the order of the appellate division by limiting the relief granted to the named petitioner.[42] Judge Jones, who wrote the majority opinion,[43] maintained that the benefits of the summary judgment award could not be extended beyond the petitioner, since the trial court had never decided whether a class action was appropriate.[44] Nor could the case be remanded for a consideration of class action status, declared the

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motion for summary judgment. CPLR 3211(c) (McKinney Supp. 1979-1980).

[39] 47 N.Y.2d at 366, 391 N.E.2d at 1312, 418 N.Y.S.2d at 335.

[40] *Id.* at 367, 391 N.E.2d at 1313, 418 N.Y.S.2d at 336. The defendants sought reargument on the grounds that the court had failed to give sufficient notice of its decision to convert their 3211(a) motion into a motion for summary judgment and that the court had not determined whether a class action was appropriate. *Id.* at 367, 391 N.E.2d at 1313, 418 N.Y.S.2d at 335-36. In response to the motion for reargument, O'Hara maintained that the award of summary judgment should be sustained since the controversy involved only a question of law and that the proceeding correctly was treated as a class action because the court had found sua sponte that class relief was proper. *Id.*

Upholding its previous order, special term held that prior notice of the summary judgment order was unnecessary because the sole issue in the case concerned a question of law that had been argued orally and in the papers submitted on the 3211(a) motion. *See id.* at 367, 391 N.E.2d at 1313, 418 N.Y.S.2d at 336. The court also determined that class certification was not required since the class was small and its members' identities were on the record. *See id.*

[41] O'Hara v. Del Bello, 62 App. Div. 2d 1034, 404 N.Y.S.2d 34 (2d Dep't 1978). The second department noted that special term had erred by failing to notify the parties of its decision to treat the defendants' motion to dismiss as a motion for summary judgment, but found that the error had been cured by permitting the defendants to reargue. *Id.* at 1034, 404 N.Y.S.2d at 35. The appellate division reasoned that the reargument permitted the defendant to litigate fully the controlling issues of law and therefore refused to reverse on procedural grounds. *Id.* As to the defendants' other contentions, the second department found them "to be without merit." *Id.*

[42] 47 N.Y.2d at 368, 391 N.E.2d at 1313, 418 N.Y.S.2d at 336. The majority upheld the appellate division's affirmance of the summary judgment award notwithstanding the trial court's failure to comply with the notice requirements of CPLR 3211(c). *Id.* *See generally* notes 38, 40 & 41 *supra.* Noting the absence of any factual dispute, the Court observed that, on the motion to dismiss, the parties had addressed fully the sole issue in the case—a question of statutory construction. 47 N.Y.2d at 368, 391 N.E.2d at 1313, 418 N.Y.S.2d at 336. Moreover, the Court stated that the defendants had not shown that they had been prejudiced by the lack of notice. *Id.*

[43] Judges Jasen, Wachtler, and Fuchsberg concurred with Judge Jones. Judge Gabrielli dissented.

[44] 47 N.Y.2d at 368, 391 N.E.2d at 1313, 418 N.Y.S.2d at 336; *see* CPLR 902; note 31 *supra.*

Court, because to allow such a determination to be made after a resolution of the merits would be contrary to the legislative intent of CPLR 902.[45] Furthermore, Judge Jones reasoned that a disposition on the propriety of class relief made after a determination on the merits could subject a losing party to liability beyond that contemplated during the litigation.[46] The Court also was hesitant to bestow the "gratuitous" avails of a favorable adjudication upon individuals who had not been exposed to the risk of an unfavorable decision.[47] Finally, the majority noted that a prior disposition on the merits could influence a court's later resolution of the class action issue.[48]

Dissenting, Judge Gabrielli disputed the majority's dismissal of the claims of the other class members.[49] Emphasizing that the failure to certify the class was caused through no fault of the petitioner,[50] Judge Gabrielli questioned the fairness of depriving the other members of the right to recover in this action.[51] Accordingly, the dissent contended that the majority should have remanded to special term for a determination on the appropriateness of class certification.[52]

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[45] 47 N.Y.2d at 368-69, 391 N.E.2d at 1313-14, 418 N.Y.S.2d at 336-37; *see* THIRTEENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1975), in TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE 252 (1976). Noting that article 9 is based upon the federal class action rule, *see* FED. R. CIV. P. 23, Judge Jones stated that the "general scheme" of both procedures is to have a disposition on the propriety of the class action "promptly . . . at the outset of the litigation." 47 N.Y.2d at 368, 391 N.E.2d at 1313, 418 N.Y.S.2d at 336; *see* FED. R. CIV. P. 23(c)(1); CPLR 901. The Court emphasized that while the federal rule requires the decision to be made "[a]s soon as practicable after the commencement of an action," FED. R. CIV. P. 23(c)(1), the CPLR imposes a stricter time limitation. 47 N.Y.2d at 368, 391 N.E.2d at 1313, 418 N.Y.S.2d at 336; *see* CPLR 902. Under CPLR 902, the class action plaintiff must move for a hearing on the appropriateness of class action relief within 60 days after the expiration of the defendant's time to answer. The majority concluded that CPLR 902 evidenced the legislature's intent to have the class action issue resolved "well before any determination on the merits of the action." 47 N.Y.2d at 369, 391 N.E.2d at 1314, 418 N.Y.S.2d at 336-37.

[46] 47 N.Y.2d at 369, 391 N.E.2d at 1314, 418 N.Y.S.2d at 337.

[47] *Id.*

[48] *Id.* According to the majority, after receiving notice of the order granting class relief without class certification, the petitioner should have requested special term to satisfy the requirements of article 9. *Id.* Since he chose not to pursue this "remedy," the Court essentially concluded that the petitioner forfeited any chance to demonstrate the appropriateness of class relief. *Id.*

[49] *Id.* at 371, 391 N.E.2d at 1315, 418 N.Y.S.2d at 338 (Gabrielli, J., dissenting).

[50] *Id.* Judge Gabrielli noted that since the trial court had granted summary judgment *sua sponte* and without notice to the parties, the petitioner had no opportunity to move for class certification at any time prior to the final order. *See id.* at 370-71, 391 N.E.2d at 1315, 418 N.Y.S.2d at 338 (Gabrielli, J., dissenting).

[51] *Id.* at 371-72, 391 N.E.2d at 1315-16, 418 N.Y.S.2d at 338 (Gabrielli, J., dissenting).

[52] *Id.* Judge Gabrielli opined that the rationale used by the majority to dismiss the other

It is submitted that as a general proposition, the *O'Hara* rule prohibiting class certification following a judgment on the merits is reasonable and fair.[53] Nevertheless, as applied in a factual setting similar to that of *O'Hara*, it is suggested that the rule may cause unnecessarily harsh consequences.[54] Where the court converts a motion to dismiss into a summary judgment motion,[55] and the time to seek class certification has not yet begun to run,[56] permitting class certification at the time of or within a reasonable time after judgment would seem to cause little possibility of prejudice.[57] In such a

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class members' claims also would seem to require dismissal of the claims of a litigant to whom a court wrongfully had granted summary judgment notwithstanding the presence of a factual dispute. *Id.* The dissent pointed out, however, that where a court prematurely grants relief, the proper remedial course has always been to remand, not to dismiss. *Id.*

Finally, Judge Gabrielli added that a remand to decide the certification issue was not tantamount to conferring class action status. *Id.* Indeed, the dissent posited that a class action might not be appropriate in this case, especially since the class was small. *Id.* at 372, 391 N.E.2d at 1316, 418 N.Y.S.2d at 338-39 (Gabrielli, J., dissenting); *see* CPLR 901(a)(1).

[53] In recommending the enactment of article 9, the Judicial Conference noted that "[p]roposed section 902 would adopt the federal policy of determining, at least tentatively, the propriety of maintaining a class action in the initial stages of the proceedings," and that the court would have wide discretion "to vary the order at any time before reaching a decision on the merits." THIRTEENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1975), in TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE 252 (1976).

[54] *See* 47 N.Y.2d at 371-72, 391 N.E.2d at 1315-16, 418 N.Y.S.2d at 338 (Gabrielli, J., dissenting); note 59 and accompanying text *infra*.

[55] *See* CPLR 3211(c) (1976).

[56] A motion to dismiss pursuant to CPLR 3211(a) extends the defendant's time to serve a responsive pleading to 10 days "after service of notice of entry of the order." CPLR 3211(f). The class action plaintiff, however, can seek class certification only within 60 days after the defendant's time to answer has expired. CPLR 902; *see* note 31 and accompanying text *supra*. Thus, in a class action, an accelerated judgment awarded under CPLR 3211(c) may often be granted before the plaintiff has had an opportunity to move for certification.

[57] It is significant to note that article 9 is based upon the federal class action statute. CPLR art. 9, commentary at 319, 336 (McKinney 1976); THIRTEENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1975) in TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE 249-52 (1976); *see* FED. R. CIV. P. 23. Although the federal courts generally hold that class action determination should precede the final trial on the merits, *e.g.*, Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270, 274 (10th Cir. 1977); Peritz v. Liberty Loan Corp., 523 F.2d 349, 354 (7th Cir. 1975), some courts have permitted post-judgment certification where the suit had been commenced and had proceeded to trial as a class action, and the defendants had been aware throughout the proceedings that the plaintiffs were seeking relief on behalf of a class, *e.g.*, Alexander v. Aero Lodge No. 735, 565 F.2d 1364, 1371-72 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978); Senter v. General Motors Corp., 532 F.2d 511, 520-22 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976); Jimenez v. Weinberger, 523 F.2d 689, 697-99 (7th Cir. 1975); Bing v. Roadway Express, Inc., 485 F.2d 441, 445-47 (5th Cir. 1973); Haas v. Pittsburgh Nat'l Bank, 381 F. Supp. 801, 803-06 (W.D. Pa. 1974), *modified on other grounds*, 526 F.2d 1083 (3d Cir. 1975); *cf.* Peritz v. Liberty Loan Corp., 523 F.2d 349, 354 (7th Cir. 1975) (post-judgment certification disallowed where plaintiff, over defendants' objections, actively sought adjudication on merits prior to certification).

Since the certification order under CPLR 902 may be altered or amended before the

situation, the defendant has reason to know that a class may be certified; it is suggested, therefore, that only where a defendant can show actual prejudice should the relief granted be limited to the named plaintiff.[58]

Moreover, the *O'Hara* decision severely weakens the utility of the class action device by affording the defendant a possible escape from liability to the remainder of the putative class.[59] Indeed, the result reached in *O'Hara* may encourage some defendants served with a class action complaint to use the motion to dismiss only to preempt class certification. The Court is exhorted, therefore, to reevaluate its position to avoid the abuses and injustices that its decision may foster.

Martin J. Thompson

ARTICLE 10—PARTIES GENERALLY

CPLR 1007: Second department permits third-party claim for damages in excess of sum demanded in plaintiff's complaint

CPLR 1007 permits a defendant to implead a nonparty "who is or may be liable to him for all or part of the plaintiff's claim

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decision on the merits on the court's own motion or on motion of the parties, CPLR 902; *see* note 31 *supra*, certification at the time summary judgment is granted under CPLR 3211(c) could be seen as an extension of the wide discretion the court has on the certification issue. *See generally* THIRTEENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1975), in TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE 252 (1976). *See also* Jimenez v. Weinberger, 523 F.2d 689, 697 (7th Cir. 1975).

Furthermore, it is submitted that since the class action and the accelerated judgment serve similar purposes, the two devices should be permitted to achieve most effectively their intended functions. The summary judgment procedure enables the courts to avoid needless litigation in cases where the issues are merely superficial. Andre v. Pomeroy, 35 N.Y.2d 361, 364, 320 N.E.2d 853, 854, 362 N.Y.S.2d 131, 133 (1974); Richard v. Credit Suisse, 242 N.Y. 346, 350, 152 N.E. 110, 111 (1926). Permitting several claims to be sued upon in one proceeding, the class action also reduces the burdens on the judicial system. Homberger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 609-11 (1971).

[58] *See* Alexander v. Aero Lodge No. 735, 565 F.2d 1364, 1371-72 (6th Cir. 1977), *cert. denied*, 436 U.S.946 (1978); Senter v. General Motors Corp., 532 F.2d 511, 520-22 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976); Jimenez v. Weinberger, 523 F.2d 689, 697-99 (7th Cir. 1975).

[59] One of the intended functions of the class action is to allow many individuals with small claims to share the otherwise prohibitive costs of the litigation with others similarly situated. *See* SIEGEL § 139, at 173. Following the decision in *O'Hara*, it is possible that expense will deter any other class member from initiating a subsequent action, thus enabling a wrongdoer to escape substantial liability to the balance of the actual class members.