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Manageability of Class Actions Under S. 3475: Congress Confronts the Policy Choices Revealed in Rule 23(b)(3) Litigation

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MANAGEABILITY OF CLASS ACTIONS UNDER S. 3475: CONGRESS CONFRONTS THE POLICY CHOICES REVEALED IN RULE 23(b)(3) LITIGATION

INTRODUCTION

On August 25, 1978, Senators DeConcini and Kennedy introduced Senate Bill 3475[1] in the United States Senate.[2] This bill is designed to improve class action practice by replacing present Federal Rule of Civil Procedure 23(b)(3),[3] which describes the procedures for maintaining a class action on the basis of common questions of law or fact among class members.[4] The stated purpose of the bill is to create new procedures which "lessen the severe problems of cost and management which have created thousands of pages of overly-complex, contradictory precedent."[5] It is the culmination[6] of a Department

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[1] S. 3475, 95th Cong., 2d Sess. § 3(a) (1978).

[2] 124 CONG. REC. 14501 (daily ed. Aug. 25, 1978) (remarks of Sen. DeConcini). S. 3475 has been referred to the Senate Judiciary Subcommittee on Judicial Improvements. No action was taken before the end of the last session of Congress and no similar bills have been introduced in this session. *See* Letter from Sen. Walter D. Huddleston, United States Senate, to KENTUCKY LAW JOURNAL (June 5, 1979) (on file in KENTUCKY LAW JOURNAL office).

[3] FED. R. CIV. P. 23(b)(3) (amended 1966).

[4] The present version of 23(b)(3) requires:

> [that] 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 finding include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(b)(3) (amended 1966).

[5] 124 CONG. REC. 14502 (daily ed. Aug. 25, 1978) (Bill commentary).

[6] In June of 1977 the Justice Department mailed to 250 members of the bar a discussion memorandum cataloguing difficulties with present practice and possible solutions. In addition, a questionnaire was circulated to 1800 judges, practitioners and legal scholars. In December 1977, a draft statute was circulated and reprinted in 841

of Justice effort to realize the Carter Administration's commitment to facilitate responsible use of the class action device.[7]

Actually, the bill reflects a legislative attempt to circumvent limits recently placed on 23(b)(3) class actions by the courts. The Supreme Court has limited class action access to the federal judiciary by refusing to aggregate individual damages to meet the federal jurisdictional amount.[8] Also, the Court has imposed requirements on class representatives, such as individual notice to class members,[9] which have seriously impaired the usefulness of 23(b)(3) actions. These limitations have had particular impact on consumer class suits, where the individual claims are typically small and widespread and individual relief is not practical.[10] This bill would reopen the federal courts to such suits and would provide clearer procedural devices for management of all class action litigation.

Senate Bill 3475 is indeed a comprehensive response to the problems inherent in class action lawsuits. Although some of the bill's provisions are simple and straightforward,[11] this com-

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ANTITRUST & TRADE REG. REP. (BNA) F-1 (Dec. 8, 1977). The present version of the bill was produced after analysis of the commentary sent in response to that draft. 124 CONG. REC., *supra* note 5, at 14502.

[7] Comments of President Carter, Vice President Mondale, and Attorney General Griffin Bell referring to this commitment are noted in 124 CONG. REC., *supra* note 5, at 14502.

[8] Zahn v. International Paper Co., 414 U.S. 291 (1973); Snyder v. Harris, 394 U.S. 332 (1969). The required jurisdictional minimum is $10,000 for both diversity and federal question jurisdiction in district courts. 28 U.S.C. §§ 1331(a), 1332(a).

[9] Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

[10] 124 CONG. REC., *supra* note 5, at 14502; Note, *To Right Mass Wrongs: A Federal Consumer Class Action Act,* 13 HARV. J. LEGIS. 776, 786-92 (1976).

[11] *E.g.,* S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. A, § 3001(b) (1978) and S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. B, § 3011 (b) provide that federal jurisdiction is expressly granted so that jurisdictional amount is no barrier. Similarly, the prerequisites for bringing a class action are greatly simplified when compared to the vague certification requirements of Rule 23. *See generally,* Simon, *Class Actions—Useful Tool or Engine of Destruction,* 55 F.R.D. 375, 379-80 (1973) and Note, *The Cy Pres Solution to the Damage Distribution Problems of Mass Class Actions,* 9 GA. L. REV. 893, 899-900 (1975), for criticism of the ambiguity of Rule 23 prerequisites for certification of class actions. For example, *compare* FED. R. CIV. P. 23(a)(1) (amended 1966) (class too numerous for joinder) *with* S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. A § 3001(a)(1) (200 or more persons) *and* S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. B, § 3011(a)(1) (40 or more persons); *compare* FED. R. CIV. P. 23(b)(3) (amended 1966) (common questions must predominate over individual questions) *with* S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. A, § 3001(a)(4) and S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. B, § 3011(a)(3) (action must present a substantial common

ment will analyze the more complex manageability provisions of the legislation by: 1) outlining the structure of the bill; 2) identifying the management problems addressed by the bill; 3) discussing the theoretical approach of the solutions offered by the bill; and 4) outlining the concrete management devices in the bill.

I. STRUCTURE OF SENATE BILL 3475

Proper understanding of the manageability issues necessitates a brief outline of the bill's structure. The bill is divided into three subchapters.[12] Each of the first two subchapters describes a different class action device,[13] and the third offers tools for judicial management of either of the actions described in the first two subchapters.[14] Essentially, these two class action devices split the present Federal Rule 23(b)(3) actions on the basis of the size of the class and the individual claims, and provide separate procedures which are sensitive to the requirements of the particular action involved.[15]

A. *Subchapter A: The "Public Action"*

Subchapter A of the bill describes the public action.[16] In a public action a "person whose conduct in the manufacture, rental, distribution, or sale of realty, goods, or services, including securities, gives rise to a civil private right of action for damages" pursuant to a federal statute is also liable to the United States.[17] The prerequisites to such an action are that the unlawful conduct injure 200 or more persons,[18] in an

question of law or fact); *compare* FED. R. CIV. P. 23(a)(3) (amended 1966) (claims or defense of the representative must be typical of those of the class) *with* S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. A. § 3001(a)(3) *and* S. 3475, 95th Cong., 2d Sess. Sec. 2(a), subch. B. § 3011(a)(2) (injuries of the class members must arise from the same transaction or occurrence or series of transactions or occurrences).

[12] 124 CONG. REC., *supra* note 5, at 14503.

[13] *Id.*

[14] *Id.*

[15] *Id.* at 14502-03.

[16] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. A (1978); 124 CONG. REC., *supra* note 5, at 14503.

[17] S. 3475, 95th Cong., 2d Sess, Sec. 2(a), subch. A, § 3001(a) (1978).

[18] *Id.* § 3001(a)(1).

amount less than $300 each,[19] which aggregates to a sum in excess of $60,000.[20] The injuries must arise out of the same transaction or occurrence or series of transactions or occurrences,[21] and present "a substantial question of law or fact common to the injured persons."[22]

Clearly, a public action contemplates small, widespread injuries in the consumer context.[23] Although the action may be initiated by an injured class member (a relator) or the United States Attorney General, a public action must be brought in the name of the United States.[24] The Attorney General may assume control of the action and decide whether it will be prosecuted[25] and who will prosecute it.[26] Essentially, the individual class members have no vested interest in the action until the defendant's liability is determined and damages are distributed.[27]

B. *Subchapter B: The "Class Compensatory Action"*

The second subchapter creates the class compensatory action[28] in which liability is based on the violation of a federal statute which gives rise to a private cause of action for damages.[29] This subchapter provides for a defendant or a plaintiff class action.[30] The compensatory action contemplates a class

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[19] *Id.*

[20] *Id.* § 3001(a)(2).

[21] *Id.* § 3001(a)(3).

[22] *Id.* § 3001(a)(4).

[23] 124 CONG. REC., *supra* note 5, at 14503.

[24] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. A, § 3001(c).

[25] *Id.* § 3002(b)(4).

[26] *Id.* § 3002(b)(2)-(3).

[27] 124 CONG. REC., *supra* note 5, at 14505.

[28] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. B (1978); 124 CONG. REC., *supra* note 5, at 14506.

[29] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. B, § 3011(a) (1978).

[30] *Id.* For materials which focus exclusively on the issues associated with defendant class actions, *see generally* Wolfson, *Defendant Class Actions,* 38 OHIO ST. L.J. 459 (1977); Note, *Defendant Class Actions,* 91 HARV. L. REV. 630 (1978).

For an example of a defendant class action, see Technograph Printed Circuits, Ltd. v. Method Elec., Inc., 285 F. Supp. 714 (N.D. Ill. 1968). This case involved the successful attempt of two corporate plaintiffs to qualify four actions filed in this district as a class action under amended Fed. R. Civ. P. 23. The cause of action for these suits was patent infringement. Over 70 actions were filed by these plaintiffs in 18 federal district courts and the Court of Claims against other defendants for infringe-

containing forty or more persons[31] whose individual injuries or liabilities exceed $300.[32] Like the public action, the injuries or liabilities must arise from the same transaction or occurrence or series of transactions or occurrences,[33] and a substantial common question of law or fact must be presented.[34]

A class compensatory action is similar to a Rule 23(b)(3) action. The liability in such an action is on the defendant class, or recovery is given to the plaintiff class, and not to the United States.[35] Consequently, control of the litigation rests primarily on the class representative and his attorney.

C. *Subchapter C: Judicial Management*

Subchapter C outlines the tools available to courts to manage the litigation process in either type of aforementioned action.[36] These management tools are designed to ease the burden of class action suits on the federal judiciary and facilitate speedier resolution of procedural and substantive issues.[37] This subchapter provides unambiguous standards for determining adequacy of representation by the class representative and his attorney[38] and for calculating reasonable attorney's fees.[39] It

ment of the same patents. The court discussed each of the requirements of Rule 23 and decided that a defendant class action was proper in this litigation.

[31] *Id.* § 3011(a)(1).

[32] *Id.*

[33] *Id.* § 3011(a)(2).

[34] *Id.* § 3011(a)(3).

[35] 124 CONG. REC., *supra* note 5, at 14506.

[36] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. C (1978).

[37] 124 CONG. REC., *supra* note 5, at 14503.

[38] Section 3022 of the bill outlines the procedures a court must follow to determine adequacy of counsel and class representatives in a public action or class compensatory action:

> (a) In considering the adequacy of counsel for the relator to represent the interests of the United States in a public action prosecuted by a relator or the adequacy of the representative party and of his counsel to represent absent persons included within the class in a class compensatory action the court, without oral or written argument or motion by the parties, shall require counsel to file affidavits stating—
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> (1) the extent of counsel's experience with public actions and class or complex litigation;
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> (2) the extent to which a party in a class compensatory action has interests common to those of the class or fundamental interests antagonistic to those of the class; and

(3) any other information requested by the court.

In a class compensatory action the representative party or parties shall also be required to file affidavits setting forth the information in paragraphs (2) and (3).

(b) After reviewing the affidavits submitted under subsection (a) the court may request oral or written argument or motion by the parties before making its determination regarding adequacy of representation.

[39] Section 3027 provides for an award of attorney's fees if such an award is otherwise allowed by law, and is ordered to be paid out of a settlement or judgment fund, or by a party in a public action or class compensatory action.

Section 3027(a) outlines the basic formula for determining the time spent by the attorney on the action. This formula is based on the time spent on the action by the attorney, paralegal and administrative personnel found by the court to have been reasonably spent on the action. Time spent on the issue of attorney's fees and on the administration of a judgment or settlement fund is included. Alterations in this basic formula provide that:

(1) the court shall disallow hours found unnecessary, or unrelated to the action, or to involve duplication of activity, and shall state in writing its reasons for disallowance; and

(2) the court shall allocate hours to administrative personnel rather than counsel where the court finds that work performed by counsel could have been assigned to such personnel.

After the formula in § 3027(a) is used and the number of hours spent on the action is determined and allocated between counsel and administrative personnel, the § 3027(b) formula is applied to determine the hourly rate at which such time will be valued. The basic rate for services of counsel and administrative personnel is "the hourly rate most commonly billed by the attorney for similar services at the time such services were provided." If the attorney has no hourly billing rate, the court will use "the hourly fair market value for similar services provided by those with similar experience, professional background, reputation, and skill in the community" where the attorney is located.

Sections 3027(c)-(d) provide for certain accelerated hourly rates in certain high risk situations. Under § 3027(c) the § 3027(b) rate is increased for risk:

(1) by multiplying that rate by up to 1.75 in any action in which the attorney relied to a substantial extent upon a judgment, upon the product of a civil action, or upon the product of an investigation, grand jury proceeding, or criminal prosecution conducted by a State or by the United States; or

(2) in any other action, by multiplying that rate—

(A) by no less than 2 and no more than 3 if the time spent occurred prior to the conclusion of the preliminary hearing; or

(B) by no less than 1.75 and no more than 2.5 if the time spent occurred after the conclusion of the preliminary hearing.

Section 3027(d) states that the increases in 3027(c) are the sole and exclusive increases under the bill. Also, § 3027(d) states that § 3027(c) does not apply to time spent on the attorney's fees issue or on settlement administration.

Finally, § 3027(e) names two situations in which the court must reduce the award. First, the court must reduce the award in order to ensure that the compensation received by counsel from all sources does not exceed the amount calculated under § 3027. Second, if the court finds the award calculated under § 3027 too large in relation to the total recovery, if any, then the court may reduce the award to a more reasonable amount.

also contains provisions aimed at preventing unreasonable delay in class actions, including the imposition of a specific timetable for judicial action.[40]

II. MANAGEABILITY UNDER SENATE BILL 3475

The concept of manageability in Rule 23(b)(3) actions is centered in subsection 23(b)(3)(D).[41] That subsection requires that the court consider possible management problems in deciding whether the class action is superior to alternative remedies.[42] Primarily, manageability objections are based on the size of the class, the difficulties associated with notice to the class and the problems in computing and distributing damages.[43]

A. Class Size and Manageability

Large class size in itself is seldom identified as the primary basis for dismissing a class action;[44] even in exceptional cases, one suspects that other factors are behind the conclusion that the class is too large.[45] The usual large class action is a mass consumer action in which the individual claims are small and widespread, but the defendant's unlawful profits are large.

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[40] *Id.* § 3024 (provides a process by which the court will assume a litigation timetable to govern the course of the case); *Id.* § 3025 (enables the Judicial Conference of the United States to fix time limits within which the court must make rulings and file opinions, and if a delay occurs the judicial council must be notified of the reasons therefore, and may provide assistance to the court to resolve it).

[41] FED. R. CIV. P. 23(b)(3)(D) (amended 1966).

[42] *Id.*

[43] Partain v. First Nat'l Bank of Montgomery, 59 F.R.D. 56, 61 (M.D. Ala. 1973); Note, *supra* note 11, at 901 (manageability is a combination of notice and damage distribution).

[44] *In re* Sugar Industry Antitrust Litigation, 73 F.R.D. 322, 335 (1976) ("[T]here is no need to state the exact number and identity of every class member because to do so would frustrate the purpose of class actions when recoveries may be numerous but small."); Boshes v. General Motors Corp., 59 F.R.D. 589, 599 (M.D. Ill. 1973); *In re* Antibiotic Antitrust Actions, 333 F. Supp. 278, 282-83 (S.D.N.Y. 1971) (ill-gotten gains are not to become "a 'pot of gold' inaccessible to the mulcted consumers because they are many and their individual claims small."); Freeman, *Current Issues in Class Action Litigation,* 70 F.R.D. 251, 260 (1976).

[45] *E.g.,* Boshes v. General Motors Corp., 59 F.R.D. 589, 599 (M.D. Ill. 1973), in which the court noted that no case had ever certified a class of the size involved (30 to 40 million). However, the major concern of the court was the difficulty of providing notice and compiling the materials necessary for determination of individual damages.

Often the individual claim is so small that administrative costs of the suit threaten to eat up most of an individual's award.[46] As a consequence, only the attorney for the class benefits from the action, and some courts have found this result intolerable.[47] While Federal Rule 23(b)(3) requires courts to remain sensitive to the interests of individual class members,[48] this is often an impossible task in a mass consumer action. Moreover, if any individual questions do arise, courts are faced with the possibility of individual mini-trials of such issues.[49] Finally, the problems inherent in all class actions—notice and computation of damages—grow in magnitude as the size of the class increases.[50]

1. *Balancing of Individual Interests: The Public Action/Class Compensatory Dichotomy*

Beyond reduction of the scope of the class and creation of subclasses, the present Rule 23 offers a few real guidelines aimed at resolving the conflict between the need for class action lawsuits and the interests of individual class members.[51] Thus, since the judicial system is geared to the resolution of

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[46] *In re* Hotel Telephone Charges, 500 F.2d 86, 91 (9th Cir. 1974).

[47] *Id.;* Simon, *supra* note 11, at 377.

[48] The court must find that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members . . . . " FED. R. CIV. P. 23(b)(3) (amended 1966). Also, one factor pertinent to the consideration of the superiority of a class action is "the interest of members of the class in individually controlling the prosecution or defense of separate actions . . . . " FED. R. CIV. P. 23(b)(3)(A) (amended 1966).

[49] *In re* Memorex Security Cases, 61 F.R.D. 88, 103 (N.D. Cal. 1973); Boshes v. General Motors Corp., 59 F.R.D. 589, 600 (M.D. Ill. 1973) (individual trial of damages issues); Ralston v. Volkswagenwerk, 61 F.R.D. 427, 432 (W.D. Mo. 1973). The alternative to having individual mini-trials of such issues may be to alter substantive rights. *See* Simon, *supra* note 11, at 381-83. An example of this type of alteration of substantive law may be found in *In re* Memorex Security Cases, 61 F.R.D. at 95-96. There the issue concerned misrepresentations made to defendant's shareholders. The court recognized that in most cases many different misrepresentations would be involved, but concluded that that consideration would not render this action too individual. The court ruled that where there is a "common nucleus" within the several misrepresentations the common issue predominates over the individual issues.

[50] *See* notes 78-113 and 138-45 and accompanying text *infra* for a detailed discussion of the manageability problems associated with notice and damages.

[51] FED. R. CIV. P. 23(c)(4) (amended 1966). *See also* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 179 n.16, 180-82 (1974) (Douglas, J., concurring).

individual rights, there is something of an institutional prejudice toward very large class actions.[52] In the context of the mass consumer action, where the claims are too small for individual actions, the present Rule can result in absolute denial of relief.[53]

The drafters of Senate Bill 3475 recognized that a class action in which the class is very large and the claims are small cannot be resolved in the same manner as an action involving a moderate sized class with significant individual claims;[54] the public action/class compensatory action dichotomy evidences this recognition.[55] The bill provides substantially different mechanisms for each type of action, and these mechanisms are based on legislative judgments regarding the primary interests behind each type of class action.[56]

The proposed class action legislation recognizes that the weight accorded individual interest in controlling the litigation varies with the facts of the case. The public action, where the class is large and the claims small, represents the case where individual interest is at its nadir and compensation is a secondary consideration.[57] Here, the Rule 23 mechanisms designed to protect individual interests are not only cumbersome, but may be destructive.[58] Clearly, the public action presumption that individual interests are so slight as to require almost no consideration is reasonable where the possibility of individual suits

[52] Homburger, *Private Suits in the Public Interest in the United States of America*, 23 BUFFALO L. REV. 343, 405-06 (1973-74).

[53] Hohmann v. Packard Instrument Co., 399 F.2d 711, 715 (7th Cir. 1968); Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 489 (N.D. Ill. 1969).

[54] 124 CONG. REC., *supra* note 5, at 14502.

[55] *Id.* at 14502-03.

[56] *Id.* at 14502.

[57] *Id.* at 14503; Homburger, *supra* note 52, at 409 ("Plaintiff [class representative] is not so much interested in the rights of the individuals whom he purports to represent, as in the rights of the group as such.").

[58] *See* note 53, *supra* for cases discussing the fact that dismissal of a class action often results in closing the door on any recovery at all. There is, however, some dispute as to whether this denial of a remedy is actually destructive. *See* Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Review*, 71 COLUM. L. REV. 1, 10-11 (1971) and Simon, *supra* note 11, at 377, in which the commentators argue that, from a broader perspective, it is more destructive to permit such suits to burden the federal courts. They argue that no social purpose is served by encouraging suits which otherwise would not be brought.

is virtually non-existent.[59] On the other hand, the class compensatory action exists for the situations in which individual interests are typically more important.

2. *Additional Goals of Class Actions: The Dichotomy Approach*

In addition to preserving realistic individual interests of class members, the division between public and class compensatory actions also facilitates the attainment of other specific types of goals. The goals of class actions have been described as: 1) compensation of the named plaintiff; 2) compensation of unnamed plaintiffs; 3) prevention of unjust enrichment of the defendant; and 4) deterrence of wrongdoers.[60] The relative importance of each goal obviously varies with the facts of the case.[61] Moreover, different procedural mechanisms are required to maximize the satisfaction of a particular goal.

In a class compensatory action the class members have a significant stake in the litigation by virtue of the appreciable size of the individual claims.[62] Thus, the goal of compensating all the plaintiffs is paramount;[63] the goals of deterrence and prevention of unjust enrichment, while still extant, are not as important.

Conversely, a public action is characterized by a large class with small individual claims.[64] However, while the individual claims are small, the aggregate damage for the injured class is quite large.[65] Thus, in these cases, the profit to the wrongdoer is great, but the individual incentive to challenge the wrongdoer is miniscule. In that situation the goals of deterrence and prevention of unjust enrichment are most signifi-

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[59] Freeman, *supra* note 44, at 260; Schuck & Cohen, *The Consumer Class Action: An Endangered Species,* 12 SAN DIEGO L. REV. 39, 68 (1974).

[60] Comment, *Class Actions and the Need for Legislative Reappraisal,* 50 NOTRE DAME LAW. 285, 295 (1974).

[61] Note, *supra* note 11, at 920-22.

[62] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. B, § 3011(a)(1) (individual claims exceed $300).

[63] 124 CONG. REC., *supra* note 5, at 14506.

[64] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. A, § 3001(a)(1) (1978) (200 or more injured persons with individual damages below $300).

[65] *Id.* § 3001(a)(2) (aggregate exceeds $60,000).

cant;[66] in such cases an inordinate emphasis on the compensatory function would hinder the vindication of society's interest in the enforcement of its laws.[67]

On a practical level, Senate Bill 3475 provides different procedural devices for each type of action; these devices are sensitive to the class size involved, the size of the claim involved, the individual interest in control of the litigation and the goals served by the action. In a class compensatory action the emphasis is on the protection of individual interests in controlling the litigation and the promotion of compensatory goals.[68] The paramount concern is achieving judicial efficiency through the class action without sacrificing individual interests;[69] consequently, a proper class representative retains control of the suit.[70] Individual interests are safeguarded by provisions which allow some or all members of the class to opt out or some or all of the members to opt in, as the court in its discretion may decide.[71]

Because it significantly affects substantive rights, the public action must be viewed as more than a procedural innovation. As previously mentioned, liability in the public action is to the United States and not to the injured class members.[72] The primary goals are deterrence and the disgorging of ill-gotten gains; thus the Attorney General may maintain control of the action[73] and must dispose of it consistently with the public interest.[74] There are no opt-out or opt-in procedures to protect individual interests[75] and intervention by a class member is specifically denied.[76] Clearly, the public action is a public enforcement mechanism which merely utilizes the private bar to discover and bring wrongful conduct to the government's

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[66] 124 CONG. REC., *supra* note 5, at 14503.

[67] *Id.*; Comment, *supra* note 60, at 295-96.

[68] 124 CONG. REC., *supra* note 5, at 14502, 14506.

[69] *Id.*

[70] *Id.* at 14506 ("There must also be a representative party who, with counsel, adequately represents the class interests.").

[71] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. B. § 3013(e)(1)-(2) (1978).

[72] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. A., § 3001(a) (1978).

[73] *Id.* § 3002(b)(1).

[74] *Id.* § 3002(b)(4).

[75] 124 CONG. REC., *supra* note 5, at 14505.

[76] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. A, § 3001(C) (1978).

attention.[77] As such, the bill provides a procedure for redress of consumer grievances where essentially none existed before.

B. *The Notice Problem*

The second management problem inherent in class action lawsuits is determining what constitutes adequate notice of the action to absent class members. Since the burden of providing such notice is on the class representative, a determination of adequacy may be crucial for the maintenance of the action; if notice is costly the representative party may be unwilling or unable to bear the expense. The notice problem becomes especially acute in light of *Eisen v. Carlisle & Jacquelin,*[78] in which the Supreme Court strictly construed Rule 23(c)(2) to require "individual notice to all members who can be identified through reasonable effort"[79] in 23(b)(3) class actions.[80] *Eisen* represents a rather mechanistic application of the Rule 23(c)(2) notice requirement; such an approach treats notice as though it is an end in itself.[81] Conversely, Senate Bill 3475 takes a more flexible approach to the notice requirement and can best be justified by an analysis of the goals served by notice.

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[77] 124 CONG. REC., *supra* note 5, at 14504.

[78] 417 U.S. 156 (1974). For discussion of the issues and problems which arose in the course of the Eisen v. Carlisle & Jacquelin litigation, see Benett, *Eisen v. Carlisle & Jacquelin: Supreme Court Calls for Revamping of Class Action Strategy,* 1974 WIS. L. REV. 801; Ceiner, *Class Actions: The Legal Odyssey of Eisen v. Carlisle & Jacquelin,* 5 MEM. ST. U. L. REV. 19 (1974); Duesenberg, *Class Actions and Eisen v. Carlisle & Jacquelin,* 31 MO. B.J. 189 (1975); Hauser, *The Class Action Struggle Continues: The Problems Eisen Ignored,* 44 A.B.A. ANTITRUST L.J. 75 (1975); Shapiro & Springer, *Management of Consumer Class Actions After Eisen: Notice and Determination of Damages,* 26 MERCER L. REV. 851 (1975); Note, *Eisen v. Carlisle & Jacquelin—Fluid Recovery Minihearings and Notice in Class Actions,* 54 B.U. L. REV. 111 (1974); Note, *Eisen v. Carlisle & Jacquelin: Rejection of the 23(b)(3) Class Action as a Social Remedy,* 10 WILLIAMETTE L.J. 127 (1973); Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin,* 87 HARV. L. REV. 426 (1973); Note, *The Manageability Crisis of Consumer Class Actions: The Severe Example of Eisen III,* 7 IND. L. REV. 361 (1973); Comment, *Eisen v. Carlisle & Jacquelin—Fluid Class Recovery and Notice Requirements in Rule 23(b)(3) Class Actions—a Strict Approach,* 1973 UTAH L. REV. 489.

[79] FED. R. CIV. P. 23(c)(2) (amended 1966).

[80] 417 U.S. at 173. Moreover, the Court defined "reasonable effort" in a manner which referred to the physical effort involved in locating the absent parties without considering cost as a mitigating factor. *Id.* at 176.

[81] Comment, *supra* note 60, at 294.

1. *Res Judicata*

The underlying source of the entire notice controversy involves the concept of res judicata.[82] In the older version of Rule 23, the "spurious" class action was not automatically res judicata on absent members.[83] To be bound by the judgment the absent class member would have to opt in, or, in other words, directly acknowledge the power of the class representative to litigate his rights.[84] Under this scheme notice served only to bring more individuals into the suit. Under the present version of Rule 23, the most significant innovation was the expansion of the res judicata effect in 23(b)(3) actions, which replaced the "spurious" action.[85] Now the only way for a class member to avoid res judicata is to opt out of the action in a timely manner.[86] This procedure serves both the interest of the courts and the defendant, because the common issues need only be litigated once.[87] Moreover, such an approach aids the class representative by giving him more clout vis-á-vis the defendant.[88]

Senate Bill 3475 provides for res judicata in both the public and class compensatory actions.[89] In a public action res judicata is virtually absolute.[90] In a class compensatory action res judicata is the general rule,[91] although there are exceptions in the form of opt-out and opt-in provisions, which may be used in the court's discretion.[92]

2. *Due Process: Adequacy of Representation*

Clearly it is in the interest of both parties to the suit to ensure res judicata,[93] and the class action would lose its useful-

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[82] Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97, 117.

[83] 3B F. MOORE, MOORE'S FEDERAL PRACTICE 23.30 (2d ed. 1978).

[84] *Id.*

[85] *Id.* § 23.45. *See* FED. R. CIV. P. 23(c)(3) (amended 1966).

[86] 3B F. MOORE, *supra* note 83, at § 23.60. *See* FED. R. CIV. P. 23(c)(2)(B), 23(c)(3) (amended 1966).

[87] Dam, *supra* note 82, at 118.

[88] *Id.*

[89] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. C, § 3023 (1978).

[90] *Id.* § 3023(a).

[91] *Id.* § 3023(b).

[92] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. B, § 3013(e)(1)-(2) (1978).

[93] *See* notes 87-88 *supra* for authority relating to the plaintiff's and the defendant's interests in res judicata.

ness as a device for judicial efficiency if it became too susceptible to collateral attack. However, courts must determine that minimum due process requirements are met in order to properly and justly bind absent class members to the judgment.[94] This due process requirement presents a definitional problem: exactly what is "due process" in a class action? Due process is most fundamentally defined as an opportunity to be heard;[95] therefore, notice is important only insofar as it is an effective tool for ensuring a fair hearing.[96] A citizen would get little consolation from a right to notice if a right to present his interests at an impartial hearing did not follow. While the notion of a class action is founded on the assumption that all members of the class will not appear at the trial, the due process requirement of an opportunity to be heard is not entirely abandoned. The crucial concept in a fair hearing in a class action is representation by an individual or a few class members of the interests of the entire class.[97] Thus, since a fair hearing in a class suit is contingent on representation, it follows that notice must be designed to maximize the adequacy of the representation.[98] This role is different from the one played by notice in an adversarial context. In the adversary context notice is a jurisdictional due process concept.[99] Factors, such as the possibility of a default judgment, necessitate sufficient individual notice.[100] However, in a class action the party is already before the court in the person of the class representative and the possibility of default is non-existent.[101] Notice is merely a procedural due process issue designed solely to guarantee adequate representation of the class.[102]

In *Eisen* the Court based the requirement of individual notice on a strict reading of 23(c)(2).[103] Both the *Eisen* opinion

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[94] Note, *Class Action Judgments and Mutuality of Estoppel,* 43 GEO. WASH. L. REV. 814, 828-29 (1974-75).

[95] Grannis v. Ordean, 234 U.S. 385, 394 (1914).

[96] *Id.; see also* Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314 (1950) (Notice must be "reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

[97] Note, *supra* note 94, at 827-28.

[98] *Id.* at 828; Comment, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23,* 123 U. PA. L. REV. 1217, 1231 (1975).

[99] Homburger, *supra* note 52, at 364.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] 417 U.S. at 175.

and the Advisory Committee Notes to 23(c)(2) suggest that such notice is a due process requirement.[104] The authority for this position is *Mullane v. Central Hanover Bank & Trust Co.*,[105] in which the Court ruled that due process required a bank seeking a judicial settlement of accounts in a trust to send individual notice to all known beneficiaries of the trust. *Mullane* is factually inapposite to the class action situation, because in that case the interests of the bank were opposed to those of the "class" of beneficiaries;[106] adequacy of representation was clearly not the issue. Moreover, even in *Mullane* the Court outlined a very flexible notion of due process in such cases; the Court advocated an approach that would give "due regard for the practicalities and peculiarities of the case."[107] In addition, the Court gave some inkling of the characteristics of class action notice when it noted that "notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all . . . . We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable."[108] The district court in *Eisen* expounded this type of approach to the notice requirement[109] only to be overruled by the Supreme Court.[110]

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[104] *Id.* at 173-74. The Court noted that the Advisory Committee's Note suggested that individual notice is a constitutional requirement. Advisory Committee's Note, *Proposed Rules of Civ. Proc.*, 39 F.R.D. 69, 106-07 (1965).

[105] 339 U.S. 306 (1950).

[106] Homburger, *supra* note 52, at 364; Comment, *Amending Rule 23 in Response to* Eisen v. Carlisle & Jacquelin, 53 N.C.L. REV. 409, 414-15 (1974).

[107] 339 U.S. at 314. *See* Note, *supra* note 10, at 801-02. Comment, *supra* note 60, at 293-94.

[108] 339 U.S. at 319.

[109] Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 265-68 (S.D.N.Y. 1971). Rather than sending individual notice to the 2,000,000 identifiable class members, the court approved a three-tiered approach to notice. First, the plaintiff would give a form of indirect notice by sending "individual notice to all member firms of the NYSE and to all commercial banks with large trust departments . . . . " Second, individual notice would be sent to the approximately 2,000 class members with ten or more stock transactions during the period covered by the suit. In addition, individual notice would be mailed to 5,000 class members picked at random. Finally, notice by publication in various newspapers would supplement the other notice. The court felt this type of approach would satisfy the standard established in *Mullane. See also* West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1090 (2d Cir. 1971), in which the court approved notice by publication in an action where states were the class representatives. The court outlined a very flexible standard for due process in notice issues.

[110] 417 U.S. at 172-73.

The case most often cited by commentators on the issue of class action notice is *Hansberry v. Lee.*[111] In *Hansberry,* the Court was dealing with a collateral attack on a prior class action brought to seek enforcement of a restrictive covenant.[112] In that case the Court discussed due process, not in terms of individual notice, but in terms of assuring adequacy of representation.

> It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present . . . .
>
> In all such cases, so far as it can be said that members of the class who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented, though absent, which would satisfy the requirements of due process and full faith and credit.[113]

Thus, it is a fundamental error to approach due process by a mechanical application of notice requirements when adequacy of representation is the true issue.

3. *The Approach of Senate Bill 3475: Adequate Representation*

Adequacy of representation is the foundation for notice in Senate Bill 3475. The basic notice provision requires the court to "give notice reasonably necessary to assure adequacy of representation of all persons included in the class and fairness to all such persons."[114] Thus, while notice is still viewed as an excellent tool for ensuring adequate representation,[115] at least in class compensatory actions, notice is not equated with due

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[111] 311 U.S. 32 (1940).

[112] *Id.* at 37-40.

[113] *Id.* at 42-43. *See also* Dam, *supra* note 82, at 111-12; Jacoby & Cherkasky, *The Effects of* Eisen IV *and Proposed Amendments of Federal Rule 23,* 12 SAN DIEGO L. REV. 1, 15-16 (1974); Comment, *supra* note 98, at 1230-31.

[114] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. B, § 3013(3).

[115] *See* Note, *supra* note 94, at 835; Comment, *supra* note 98, at 1231.

process as appears to be the case in the Advisory Committee's Note to Rule 23.[116]

Pre-trial notice is not required in a public action.[117] In these suits the individual interests of class members are secondary and the primary focus is on the government's interest in enforcement of its laws.[118] This substantive change in focus centers the issue of adequacy of representation around the public interests in the action—deterrence and prevention of unjust enrichment. These concerns are not left to a class representative and his attorney; rather, the United States Attorney General may take control of the action and determine who will pursue it.[119] As the circumstances require, the Attorney General may assume control of the suit,[120] delegate control of the action to an appropriate state,[121] or allow the class representative to continue to handle the action.[122] Furthermore, the Attorney General may decide whether to continue or withdraw the suit,[123] and in order to overcome a decision to withdraw the suit the class representative must show that the public interest will be served by the action.[124] In addition, any settlement must be approved by the Attorney General and the court.[125] Finally, if the Attorney General allows the suit to continue as a class

[116] The Advisory Committee's Note refers to Rules 23(c)(2) and (d)(2) as being consistent with due process requirements, citing, *inter alia, Mullane* and Hansberry v. Lee, 311 U.S. 32 (1940). This reference would appear to put primary emphasis on notice as satisfying due process, without a great emphasis on adequacy of representation. Advisory Committee's Note, *supra* note 104, at 106-07.

[117] 124 CONG. REC., *supra* note 5, at 14504.

[118] *Id.* at 14503.

[119] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. A, § 3002(b)(1)-(4). An exception to this rule is where the public action is instituted by a relator for injuries caused by the United States itself. *Id.* § 3001(e)(1)-(3).

[120] *Id.* § 3002(b)(1).

[121] *Id.* § 3002(b)(3)(A)-(C). When the state is delegated the action it has options similar to those first available to the Attorney General. The state may assume control of the action, allow the class representative to control it or file a statement with the court stating reasons why the action would not be in the public interest, which would result in dismissal unless the relator can convince the court that the public interest would be served by the action.

[122] *Id.* § 3002(b)(2).

[123] *Id.* § 3002(b)(4).

[124] *Id.*

[125] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. C, § 3026(b) (1978).

action with the class representative in control, an incentive fee is provided for the successful class representative.[126] This fee provision is designed to encourage the representative party to retain some control of the suit and to keep the attorney from becoming too independent in the prosecution of the action.[127]

The class compensatory action represents the more typical class action approach. Adequacy of representation in this action focuses on representation of the interests of the class members and assuring the class members a fair hearing via the class representative; pre-trial notice may therefore be required.[128] The court is given discretion to determine the type of notice necessary to ensure adequate representation of the class members.[129] Moreover, in determining the extent of the class to be represented, the court may designate certain parties who must either opt out to be excluded from the class or opt in to be included in the class.[130] The standards for making such a determination are, *inter alia,* the feasibility of those class members pursuing individual claims and the likelihood that they have the sophistication to do so.[131] With these procedures the court can ensure adequate representation by giving some members of the class the opportunity to determine for themselves the adequacy of the class representative.[132]

Senate Bill 3475 also supplies the courts with other tools necessary to prevent erosion of adequate representation. The

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[126] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. A, § 3005(a)(2) (1978).

[127] 124 CONG. REC., *supra* note 5, at 14505. *See* Simon, *supra* note 11, at 391-94, for a long discussion of the problems which arise because of the independent entrepreneur status a lawyer attains in the typical class action. The incentive fee is designed to encourage the class representative to maintain some control over the action and his lawyer.

This approach is not as innovative as may first appear. The value of *parens patriae* suits (*see* 124 Cong. Rec., *supra* note 5, at 14503, for a discussion regarding the use of the parens-patriae device in the Hart-Scott-Rodino Antitrust Improvements Act of 1976) and class actions prosecuted by states have been recognized in other contexts. *See, e.g., In re* Antibiotic Antitrust Actions, 333 F. Supp. 278, 280-81 (S.D.N.Y. 1971).

[128] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. 1B, § 3013(3) (1978). 124 CONG. REC., *supra* note 5, at 14506.

[129] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. B., § 3013(e) (1978).

[130] *Id.*

[131] *Id.*

[132] 124 CONG. REC., *supra* note 5, at 14506. The commentary notes that only persons with a claim of $10,000 or more or with an unusual claim or defense should get the benefit of the opt-in procedure.

class representative and his attorney must submit affidavits showing the representative's common interests with the class and the extent of the attorney's experience with complex litigation.[133] The court may require other pertinent information and may hold written or oral argument to aid in the determination of adequate representation.[134] In addition, all settlements are subject to judicial scrutiny to guarantee that the interests of the class as a whole are not prejudiced by the representative.[135] Finally, the bill provides very strict guidelines for calculating attorney's fees.[136] The control of attorney's fees is designed to make the attorney less of a private entrepreneur and to minimize potential conflicts of interest between the attorney and the class.[137]

C. *Manageability and the Damage Process*

The final management problem concerns the damages process. Problems arise in two stages of this process: 1) the computation of damages and 2) the distribution of damages to the individual members of the class.

1. *Inherent Problems in Individual Proof of Damages*

Most courts consider the issue of damages to be an individual question even in the class action context; under this approach the sum of the defendant's liability is deemed to be the aggregate of individual damages, and each plaintiff is individually responsible for proving the extent of his injury.[138] This approach has resulted in management problems at both stages of the damages process.

At the calculation stage, the court could be overwhelmed with individual hearings because the extent of the defendant's

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[133] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. C, § 3022(a)(1)-(2) (1978). *See also* 124 CONG. REC., *supra* note 4, at 14507.

[134] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. C, § 3022(a)(3) & (b) (1978).

[135] *Id.* § 3026(a).

[136] *Id.* § 3027(a)-(e).

[137] *See* Simon, *supra* note 11, at 391-94, for a discussion of the possible problems of conflict of interest between the class and its attorney.

[138] *In re* Hotel Telephone Charges, 500 F.2d 86, 88-89, 92 (9th Cir. 1974); Ralston v. Volkswagenwerk, 61 F.R.D. 427, 432-33 (W.D. Mo. 1973).

liability is determined by the sum of the individual claims.[139] Since the defendant probably would take issue with each claim, the time required to perform this task would be enormous.[140] Moreover, in many cases the plaintiff will have insufficient records of his own to establish a claim in an adversary setting;[141] thus, injured plaintiffs could go uncompensated and in such situations the defendant would be allowed to keep a portion of his ill-gotten gains.

During the distribution stage, even if an aggregate recovery were established, the extensive time required for proof could still pose a problem. In some cases administrative costs could eat away smaller recoveries, thus prompting the court to declare the action unmanageable for failing to fulfill the compensatory function.[142] Also, unclaimed damages could leave a large fund in the hands of a court which might be ill equipped to handle such a fund;[143] since fluid class recoveries are generally disfavored, the court cannot give this fund to the next best class without risking accusation of enhancing the rights of non-class members at the expense of uncompensated class members.[144] Finally, damage questions are often so intertwined with substantive issues that class action treatment may be inadequate.[145]

2. *The Flexible Approach of Senate Bill 3475*

In light of these potentially crippling problems in the damages process under present Rule 23, it is clear that the proposed

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[139] 500 F.2d at 89. (The court concluded that holding individual hearings would be too burdensome.); *In re* Memorex Security Cases, 61 F.R.D. 88, 103 (N.D. Cal. 1973) (The court recognized the difficulty of the task, but held that such hearings were necessary if the defendant were to be found liable.); Boshes v. General Motors Corp., 59 F.R.D. 589, 600 (N.D. Ill. 1973).

[140] *See,* Note, *supra* note 11, at 919; Comment, *Due Process and Fluid Class Recovery,* 53 OR. L. REV. 225, 236-37 (1974). Here the authors take issue with the notion that the defendant has the right to confront each individual plaintiff.

[141] *E.g.,* City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 72 (D.N.J. 1971).

[142] *E.g., In re* Hotel Telephone Charges, 500 F.2d 86, 90-91 (9th Cir. 1974).

[143] Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1012 (2d Cir. 1973) (The court referred to the problem of disposing of the leftover fund as "troublesome.").

[144] *E.g.,* City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 72 (D.N.J. 1971). *See also* Comment, *supra* note 140, at 237.

[145] Simon, *supra* note 11, at 382-84.

class action legislation must have provisions for the effective and expedient computation and distribution of damages. The approach embodied in Senate Bill 3475 is more flexible than the current approach, which concentrates on individualized procedures. The new bill takes a twofold approach which is: 1) contingent on the underlying policy objectives of the particular class action device involved and 2) sensitive to the types of circumstances and resources typically involved in a class action suit.

a. *The Public Action*

As stated throughout, the goals in a public action are deterrence and prevention of unjust enrichment. Consistent with this policy, damages are based on the total profit resulting from the defendant's wrongful conduct or the total damage caused to the class as a whole.[146] Separate proof of individual injury is not required.[147] Instead, the aggregate amount is determined by "any reasonable means of ascertaining benefit, profit, or damage . . . ."[148] This approach would seem to free the court to utilize any reasonable evidence of aggregate damages at its disposal.[149]

Distribution of damages in a public action also reflects the twofold approach to the damage process. The defendant must pay the entire aggregate amount to the court clerk who then transfers it to the Administrative Office of the United States Courts for distribution to the class by that office's Director.[150] Any surplus remaining after distribution is not returned to the defendant; instead it is used to pay claims in other actions in

[146] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. A, § 3006(b)(1)-(2) (1978).

[147] *Id.* § 3006(c). The court may, however, take a sampling of injured persons to aid measurement of class damages. 124 CONG. REC., *supra* note 5, at 14505.

[148] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. A, § 3006(c) (1978).

[149] There is authority which suggests that use of the defendants' business records or even computer models may be proper for determining aggregate damages. *See, e.g., In re* Sugar Industry Antitrust Litigation, 73 F.R.D. 322, 351-54 (E.D. Pa. 1976) (The court discussed the use of statistical and polling methods, defendant's business records, and computer techniques.); Barr v. WUI/TAS Inc., 66 F.R.D. 109, 115 (S.D.N.Y. 1975) (The court discussed the use of time sheets kept by defendant in the course of his business with plaintiffs.); *In re* Antibiotic Antitrust Actions, 333 F. Supp. 278, 289 (S.D.N.Y. 1971) (The court discussed the use of statistics and computer models).

[150] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. A, § 3006(e) (1978).

which the fund may be depleted,[151] and ultimately reverts to the United States Treasury.[152] Therefore, the defendant keeps none of his ill-gotten gains. Since the Director is charged with the responsibility of distribution of the fund, he must establish standards by which claims will be judged and honored or denied.[153] In fact, the Director has the discretion to design a payment procedure which is "reasonably accurate" without requiring the submission of claims.[154] The court itself gets involved in this process only if an extraordinary dispute arises between the Director and a claimant to the fund.[155] By this design, the bill maximizes the use of available resources in a public action.[156]

b. *The Class Compensatory Action: Shift in the Burden of Proof*

The class compensatory action focuses on individual compensation, and the damages procedure reflects this concern. The court may bifurcate the trial by splitting the damage determination from the trial of substantive questions of liability;[157] the only limitation, of course, is that the constitutional rights of the parties may not be violated.[158] Consistent with the compensatory thrust of the action, the calculation of damages is based on the individual injuries.[159] However, the evidence regarding the amount of individual damages need not be brought forward by the plaintiffs. The defendant has the duty to make an effort to ascertain the identity of the injured parties and the extent of individual damages from the defendant's records or "other reasonably available sources."[160] This require-

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[151] *Id.* § 3007(e)(2).

[152] *Id.* § 3007(a) (This reversion occurs three years after date of deposit.)

[153] *Id.* § 3007(b). *See generally* 124 CONG. REC., *supra* note 5, at 14505.

[154] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. A, § 3007(c) (1978).

[155] *Id.* § 3007(d) (When the Director suspects fraud or other lack of basis he may refuse to pay the claim, and file his reasons therefor with the clerk of the court.)

[156] *Id.* § 3007(b) & (e)(2).

[157] S. 3475, 95th Cong., 2d Sess., sec. 2(a), subch. B, § 3014(b) (1978).

[158] *Id.*

[159] "The amount of injury to *each person* who remains in or enters a class compensatory action shall be proven by any method permitted or required by law." *Id.* § 3014(a)(emphasis added).

[160] *Id.* § 3014(c)(1).

ment comports with the reality that the best sources of proof of damages often are at the disposal of the defendant. At the distribution stage the defendant must give notice of his liability to the persons discovered from his records[161] and any additional notice designed to inform other possible class members of liability.[162] Again, this approach reflects a concern for effective use of available resources, since the defendant found liable at trial is in a better position to handle such extensive notice than is the class representative.

The bill's approach to damages, therefore, reveals a sensitivity for the resources available in a class action, rather than a mechanistic attachment to individual proof of damages. However, this is not entirely a procedural change; rather, the approach represents a substantive shift in the burden of proof of damages to the defendant.[163]

CONCLUSION

Generally speaking, Senate Bill 3475 provides valuable tools for management of class actions, and effectively reopens the doors of the federal courts to mass consumer class actions. As it treats the manageability issue, the bill is effective in providing innovative procedures and using devices developed by certain imaginative courts. This effectiveness does not, however, end Congressional consideration of the value and the merits of the bill. Despite the improvement of judicial management of class actions, the bill will still significantly increase the workload of federal courts.[164] Congress must make a policy determination of whether these class actions are worth a possible increase in the docket backlogs in federal courts.[165] Moreover, despite protestations to the contrary, the bill significantly al-

[161] *Id.* § 3014(c)(2).

[162] *Id.* § 3014(c)(3).

[163] This shifting of the burden of proof of damages is not entirely without precedent. For instance, certain tort law concepts shift the burden of proof to the defendants in situations where the plaintiff proves that one of the multiple defendants is liable, but he cannot prove which one. The burden is then shifted to each defendant to prove his nonliability. *See generally* Homburger, *supra* note 52, at 373.

[164] *See* Burger, *Has the Time Come?* 55 F.R.D. 119 (1972), for a general discussion of the problem of the enormous case load in the federal judiciary.

[165] Handler, *supra* note 58, at 10-11.

ters substantive rights as well as procedural devices. Thus, the possible effect of these alterations on the ability of a defendant to properly defend the action must be carefuly weighed. Finally, the proposed legislation may inadequately deal with the problems of strike suits and blackmail settlements.[166] Although some safeguards, such as Attorney General and court control of settlements and preliminary hearings on the merits of actions, are provided,[167] Congress must evenhandedly consider whether improved procedures for bringing and managing class actions will operate at the expense of defendants whose guilt is in doubt.

James R. Lyons, Jr.

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[165] *Id.* at 9; Simon, *supra* note 11, at 388-90.

[167] 124 CONG. REC., *supra* note 5, at 14504-05, 14507.