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Federal Class Action Reform: A Response to the Proposed Legislation

By George B. Mickum, III*
and
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Introduction

Why write of potential reforms in federal class actions in this issue of the *Kentucky Law Journal* dedicated to Former Justice Stanley F. Reed? Although much could be written about the Justice's contributions to the legacy of the Supreme Court during his tenure there, or even during the period one of us clerked for him, much of that ground has already been plowed. More importantly, were he alive, Justice Reed, who had a fascination with all aspects of the law, would be intensely interested in this subject.

In many decisions,[1] including some by the United States Supreme Court, the federal courts have not been receptive to class actions brought under Federal Rule of Civil Procedure 23(b)(3).[2] Moreover, the class action mechanism has not

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[1] *E.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Zahn v. International Paper Co., 414 U.S. 291 (1973).

[2] Rule 23(b)(3) states:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> . . . .
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to

proven to be an effective mechanism for redressing mass, low-level injuries. These factors, along with the proliferation of consumer and employee-oriented federal statutes, have created pressures to enhance the manageability of class actions and to address other related problems. One such proposal before the 97th Congress is House Bill 13.[3]

In an apparent response to campaign promises and other statements of intent made by President Carter,[4] the Office of Improvements in the Administration of Justice of the Department of Justice undertook a comprehensive reform of current federal class action procedures. In December of 1977, copies of a draft statute were widely circulated for review. A premise underlying the proposal was that two kinds of cases are typically handled by class damage actions: those involving widespread harm to individuals in amounts so small that litigation costs prevent the bringing of individual suits or class actions and those involving substantial economic injuries to individuals so numerous that permissive joinder is impracticable and the maintenance of a class action is likely to achieve economies in the administration of justice. Recognizing this premise, the Department of Justice based its proposal on three major conclusions. First, more must be done to deter in-

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> the findings include: (A) the interest of members of the class in individually conrolling 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).

[3] H.R. 13, 97th Cong., 1st Sess. (1981). This bill was introduced previously as H.R. 5103, 96th Cong., 2d Sess. (1979) and S. 3475, 95th Cong., 2d Sess. (1977). The proposal is hereinafter referred to as the "Justice Department proposal" or the "bill." The bill actually emanated from the Office for Improvements in the Administration of Justice ("OIAJ") within the Department of Justice. Although there is no indication of the Department's current position on the proposal, Griffin Bell testified in support of S. 3475 while Attorney General. *Reform of Class Action Litigation Procedures: Hearings Before the Subcomm. on Improvements in Judicial Machinery, Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 2 (1978) [hereinafter cited as *Senate Class Action Hearings*].

[4] *See* 4 Class Action Rep. 491, 499, 588 (1975); OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE, UNITED STATES DEPARTMENT OF JUSTICE, BILL COMMENTARY: THE CASE FOR COMPREHENSIVE REVISION OF FEDERAL CLASS DAMAGE PROCEDURE 4 (July 25, 1979) [hereinafter cited as BILL COMMENTARY].

stances of pervasive small injury in which it is not economically feasible for the injured individuals to initiate actions. Second, where individual injury is more substantial, effective means of compensatory redress should be provided under procedures that avoid unnecessary escalation of expenses. Third, the courts must be given tools to manage both types of cases effectively and to avoid the procedural morass attendant to such litigation.[5]

Underlying these conclusions was the fundamental premise that the class action mechanism was being underutilized. Thus, in spite of the courts' obvious antipathy for class actions, the Department of Justice designed its proposal to increase the number of class actions and to convert them in some instances into means for penalizing wrongdoers who might otherwise escape being brought to justice.

As a result of comments received, the Justice Department proposal was revised extensively and introduced in the Senate in 1977 as Senate Bill 3475.[6] The Senate Judiciary Subcommittee for Improvements in Judicial Machinery held hearings on the bill.[7] After the hearings, the bill was revised again and incorporated into the Small Business Judicial Access Act of 1979.[8] Hearings again were held, this time before the Subcommittee on SBA and SBIC Authority and General Small Business Problems of the House Small Business Committee,[9] and the legislative session lapsed with no further action on the bill. This bill was revived and introduced in the 97th Congress as House Bill 13.[10] Whether the proposal will be adopted during this Congress is questionable, but even if this bill dies, it is clear that the issue of class action reform will remain, and future proposals may draw largely on the past work of the Department of Justice. If passed, the bill will work significant changes in class action procedures. Thus, the vital issue of

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[5] BILL COMMENTARY, *supra* note 4, at 10-11.

[6] S. 3475, 95th Cong., 2d Sess. (1977).

[7] *Senate Class Action Hearings, supra* note 3.

[8] H.R. 5103, 96th Cong., 2d Sess. (1979).

[9] *Judicial Access/Court Costs: Hearings on H.R. 5103 and H.R. 6429 Before the Subcomm. on SBA and SBIC Authority and General Small Business Problems, House Comm. on Small Business*, 96th Cong., 2d Sess. (1980).

[10] H.R. 13, 97th Cong., 1st Sess. (1981).

class action reform warrants consideration of the bill's features.[11]

I. THE JUSTICE DEPARTMENT PROPOSAL

The primary purpose of the Justice Department's proposal is to provide an effective means of deterring illegal conduct causing widespread, low-level injury. According to the Department, such injury goes largely unchallenged under the present rules.[12] This purpose fundamentally departs from the philosophy underlying Rule 23(b). To implement the deterrent philosophy, the Justice Department proposes to replace Rule 23(b)(3) with two entirely new procedures: one aimed at illegal conduct causing widespread, low-level injury (the "public action") and the other aimed at illegal conduct causing more substantial injury (the "class compensatory action"). Additionally, the proposal includes a variety of new judicial management techniques and procedures intended to render class actions more efficient and effective. Procedures under Rules 23(b)(1), 23(b)(2) and 23.1 are left unchanged, since they have presented significantly fewer problems than the Rule 23(b)(3) procedures.[13] The following description of the proposal refers to the provisions of House Bill 13.

A. *The Public Action*

Under the bill's provisions, the United States Attorney General or a private party (relator) may bring a public action in the name of the United States against a person whose illegal conduct in the manufacture, rental, distribution, purchase or offer of realty, goods or services (including securities) gives rise to a civil private damage action under a federal statute. Thus, diversity jurisdiction will not exist in the federal courts with respect to public actions. The public action may be brought only when the conduct harms at least two hundred

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[11] See Comment, *Manageability of Class Actions Under S. 3475: Congress Confronts the Policy Choices Revealed in Rule 23(b)(3) Litigation,* 68 KY. L.J. 216 (1979-80) for a summary of the salient features of the first Department of Justice proposal. As indicated, the focus here is on the second Department of Justice proposal.

[12] BILL COMMENTARY, *supra* note 4, at 10.

[13] *Id.* at 1.

persons whose individual injuries do not exceed $300 and whose combined injuries exceed $60,000. Additionally, all of the injuries must arise out of the same transaction or occurrence, and the action must present a substantial common question of law or fact.[14]

A relator bringing a public action under this bill must give notice to the United States.[15] The United States Attorney General then may assume control of the action, may allow the relator to prosecute the action in the name of the United States, or may refer the action to an appropriate state attorney general. The United States may also opt to file with the court a written statement explaining why the public interest would not be served by the action; if this option is exercised, the court will dismiss the suit unless the relator demonstrates that the public interest warrants continuing the action.[16]

If the United States assumes control of the action, the Attorney General or the agency assuming control may allow private counsel to participate.[17] The government may also choose to retain private counsel, who will be compensated by the government on either an hourly or a contingent fee basis.[18] When the action is assumed by the government, the bill provides that a relator whom the court finds "measurably advanced the limitation of the action" will be reimbursed for his expenses, including attorneys' fees, as soon as practicable after the assumption.[19] If the action is not assumed and the relator prevails in the action or settles the case, the defendant must pay to the relator taxable costs and reasonable litigation expenses, including attorneys' fees, as well as an incentive fee of not more than $10,000.[20] If the action is assumed and the government wins or settles the case, the defendant must reimburse the government for costs and expenses.[21]

The bill permits calculation of damages by any reason-

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[14] H.R. 13, 97th Cong., 1st Sess., sec. 101, § 3001 (1981).

[15] *Id.* at § 3002(a).

[16] *Id.* at § 3002(b).

[17] *Id.* at § 3002(c)(1)(B).

[18] *Id.* at § 3003(b)(1)(B).

[19] *Id.* at § 3003(b)(1)(A).

[20] *Id.* at § 3003(a).

[21] *Id.* at § 3003(b)(2).

able means and specifies that individual proof of damages shall not be required.[22] The recovery may be based upon either the monetary benefit or profit realized by the defendant from the illegal conduct or upon the total monetary damage to the class members.[23] If the substantive law underlying the action provides for the award of a multiple of the damages or for a limitation on aggregate liability, the defendant will be assessed accordingly.[24] In such cases, claim payments will be adjusted proportionately.[25]

The bill establishes a "public recovery fund," to be supervised by either the court or by the director of the Administrative Office of the United States Courts. Upon receipt of a public recovery, notice by publication or other reasonable means shall be given to inform eligible persons of their right to file claims. The court or director may use any reasonably accurate distribution method that does not require the submission of individual claims. The court may even determine that distribution is not possible because of the difficulty of identifying potential claimants. In any event, all claims must be paid within one year of notice.[26]

If the fund exceeds the amount necessary to pay class members, the court will pay the excess to the United States Treasury, which in turn will distribute the money either to the state, to the Justice Department or agency conducting the action or, if the action was conducted by a relator, to the agency that could have initiated the action. This fund will be used to pay private counsel retained by the United States and to reimburse relators if the United States assumed the action. The state, Justice Department or agency may use any amount remaining after three years for the enforcement of any statute within its purview.[27]

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[22] *Id.* at § 3004(c)(2).

[23] *Id.* at § 3004(b)(1).

[24] *Id.* at § 3004(d).

[25] *Id.* at § 3005(b).

[26] *Id.*

[27] *Id.* at § 3005(c).

B. *The Class Compensatory Action*

A class compensatory action may be brought against a person whose conduct gives rise to a civil private right of action for damages under any federal statute. The conduct must have caused injury to or created liabilities for at least forty persons, each in an amount exceeding $300. Additionally, the injuries or liabilities must arise out of the same transaction or occurrence, and the action must present a substantial common question of law or fact.[28]

A defendant found liable in such an action must: (1) make a reasonable effort to identify from his records the persons likely to have been injured in excess of $300 and the amount of their injuries; (2) give individual notice of liability to such persons; and (3) give notice reasonably calculated to reach a substantial percentage of the remaining class.[29]

C. *Judicial Management of Public and Class Compensatory Actions*

In order to expedite and to improve the judicial management of class actions, the bill adds a final subchapter of provisions applicable to both public and class compensatory actions.

Within thirty days after the commencement of a public action or a class compensatory action, the court shall order a preliminary hearing to occur within 120 days from commencement of the action.[30] "No motion, other than a discovery motion or motion seeking immediate injunctive relief, shall be heard or disposed of prior to the preliminary hearing."[31] In order for the action to proceed, the court must find at or immediately after the hearing that the action is reasonably likely to meet the statutory prerequisites,[32] that it presents sufficiently serious questions on the merits, and that the interests

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[28] *Id.* at § 3011.

[29] *Id.* at § 3012(b).

[30] *Id.* at § 3022(a)(1).

[31] *Id.* at § 3022(a)(3).

[32] *Id.* at § 3022(b). The action must meet either the requirements for a public action in § 3001(a) or those for a class compensatory action in § 3011(a) before the court will proceed with the action.

of the United States or the class will be adequately represented by the relator or representative party and his counsel.[33] If the action is not dismissed, the court shall enter an order describing the scope of the action and shall include a description of the transaction or occurrence and the substantial common question.[34]

The bill authorizes limited discovery prior to the preliminary hearing. Each side is limited to thirty interrogatories, to the lesser of not more than ten deposition days or depositions of not more than ten persons, and to requests for documents. The bill prohibits discovery of unnamed injured persons both before and after the preliminary hearing, unless a party makes a showing of substantial need and undue hardship.[35]

At or immediately after the preliminary hearing in a class compensatory action, the court shall determine whether some injured persons will be excluded from the class or included in the class if such persons so request.[36] The court shall then give to all class members notice reasonably calculated to assure adequacy of representation and fairness and shall include a description of persons to be excluded from the action.[37]

The district court must notify the judicial panel on multidistrict litigation of the commencement of all public or class compensatory actions. "[T]o the extent feasible and consistent with the interests of justice," all actions arising out of the same transaction or occurrence shall be consolidated for *all* purposes in a single district court.[38]

A judgment on the merits in a public action, unless otherwise limited, is conclusive against the defendant, the class members, the United States or any state suing on the class

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[33] *Id.*

[34] *Id.* at § 3022(d).

[35] *Id.* at § 3021(a), (b).

[36] *Id.* at § 3022(3)(1). In determining whether to exclude class members who have not requested to be included, the court shall consider (1) whether the amount of their injury or liability makes it feasible for them to pursue their interests separately and (2) whether those persons have the necessary resources, experience, and sophistication in business to conduct their own litigation. *Id.* at § 3022(e)(1)(A) & (B).

[37] *Id.* at 3022(e)(2).

[38] *Id.* at § 3023(a)(emphasis added). For a similar provision, *see* Hart-Scott-Rodino Antitrust Improvement Act of 1976, 15 U.S.C. § 15c (1976 & Supp. IV 1980) where *parens patriae* actions are consolidated for all purposes.

members' behalf, and, if the action is not filed or assumed by it, against the United States if it later sues on behalf of class members.[39] Similarly, a judgment on the merits in a class compensatory action, unless otherwise limited, is conclusive against the defendant and any injured person who remained in or entered the class.[40]

The bill requires court approval for settlements. In a class compensatory action, notice of a proposed settlement and hearing must be given to class members. In a public action, the United States also shall be notified and may participate in the hearing.[41]

Liability and damage issues are to be tried separately, to the extent constitutionally permitted.[42] In addition, a separate fee hearing shall be held to assure the reasonableness of attorneys' fees awarded in public or class compensatory actions.[43] As a further tool for judicial management, the bill provides that the court may dismiss class compensatory or public actions it finds unmanageable.[44]

Finally, the bill provides definitions and certain special provisions with regard to seven substantive laws.[45] It amends Rule 23 by deleting subdivisions (b)(3) and (c)(2) and the last sentence of subdivision (c)(3)[46] and provides that any existing

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[39] H.R. 13, 97th Cong., 1st Sess., sec. 101, § 3024(a) (1981).

[40] *Id.* at § 3024(b).

[41] *Id.* at § 3025.

[42] *Id.* at § 3026(b).

[43] *Id.* at § 3026(c).

[44] *Id.* at § 3026(d). The court, however, must first permit amendment to the complaint.

[45] *Id.* at § 3027. The seven substantive laws specifically mentioned are the Magnuson-Moss-Warranty—Federal Trade Commissson Improvement Act, 15 U.S.C. §§ 2310(d)(3), 2310(e) (1976) (provisions relating to cure of illegality, aggregate claims and minimum individual harm); the Truth-in-Lending Act, 15 U.S.C. § 1640(a)(2)(B) (1976 & Supp. IV 1980) (limitation on aggregate liability); the Fair Debt Collections Practices Act, 15 U.S.C. § 1692k(a)(2)(B) (Supp. III 1979) (limitation on aggregate liability); the Equal Credit Opportunity Act, 15 U.S.C. § 1691e(b) (1976) (limitation on aggregate liability); the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 15c (1976 & Supp. IV 1980) (preserving right of state attorney general to bring *parens patriae* action); the Fair Labor Standards Act, 29 U.S.C. § 216(b) (1976) (consent of unnamed party plaintiffs shall not be required); and the Deepwater Port Act of 1974, 33 U.S.C. § 1517(i) (1976) (confirming right of relator to bring public action under that act).

[46] H.R. 13, 97th Cong., 1st Sess., sec. 102 (1981). The sentence deleted from

right to secure damages under the provisions of Rule 23 "remaining in force" shall not be affected.[47]

II. EVALUATION OF THE PROPOSED BILL

A. *The Public Action*

In order to assess accurately the Justice Department's reform proposal, the far-reaching impact of the new public action concept must not be underestimated. Essentially, the public action would convert a broad range of private rights into a right on the part of the federal government. Upon initiation of a public action by either the government or a private party, other private parties whose injuries fall within the range covered by the public action would lose all rights to proceed with their own causes of action and would be bound by the judgment obtained in the public action, even though they would have had no notice of its pendency nor any right to opt out. In contrast to current procedures and to the proposed class compensatory action, a statistically computed aggregate class damage award would be assessed against defendants having no right to recover any amounts not actually claimed by class members. Moreover, prevailing plaintiffs in all public actions would be entitled to have their attorneys' fees paid by the defendant. In short, the public action would be transformed in many instances from a private compensatory action into a punitive action prosecuted in the name of the public interest in an effort to deter certain types of unlawful conduct.

1. *Is the Public Action Needed?*

Although dissatisfaction with various aspects of current class action practice is widespread, no systematic analysis has

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(c)(3) is:

> The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed and who have not requested exclusion, and whom the court finds to be members of the class.

FED. R. CIV. P. 23(c)(3).

[47] *Id.* at sec. 101, § 3027(g).

demonstrated a need for the public action device with respect to most, if not all, of the statutes covered by the Justice Department proposal. Although the scope of the public action is limited to "conduct in the manufacture, rental, distribution, or sale of realty, goods or services, including securities," that "gives rise to a civil private right of action for damages under a statute of the United States,"[48] this new action would encompass a wide variety of substantive federal statutes.[49] Obviously, the civil actions created by these statutes arise from a variety of legal provisions, each with unique elements of proof and each covering different factual and procedural situations. Therefore, instead of the "shotgun" approach implemented in the Justice Department's proposal, the special characteristics and problems of a particular substantive area should be considered and a remedy tailored to that specific situation when need for a public action in that area can be demonstrated. Without such an area-by-area approach, the potential for conflicts and unintended results is great.[50]

Although the Justice Department's commentary on the proposed bill frequently refers to the general need for major reform in order to deal with situations of widespread, low-level harm, the commentary contains only two specific refer-

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[48] *Id.* at § 3001 (a)(1).

[49] *Id.* The Department of Justice has prepared an "illustrative" list of 67 statutes that would be affected by the proposed public action. The statute covers a wide spectrum of substantive fields, including agriculture, banking, commerce, communications, conservation, copyright law, criminal law, customs duties, foreign relations, Indian law, judicial procedure, navigation, public contracts, public health, public lands, railroads, shipping, transportation and veterans benefits. OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE, DEPARTMENT OF JUSTICE, PROPOSED REVISIONS IN FEDERAL CLASS DAMAGE PROCEDURES 13 (Aug. 25, 1978) (bill commentary accompanying S. 3475).

[50] One example of an undesirable relationship between the public action and an "illustrative statute" occurs with the recently enacted *parens patriae* provision of the Hart-Scott-Rodino Anntitrust Improvements Act of 1976, 15 U.S.C. § 15c (1976 & Supp. IV 1980). The bill, however, would in effect provide an easy method for circumvention of the limitations carefully devised by the drafters of the *parens patriae* provisions. For example, the United States Attorney General could refer to a state attorney general a public action involving business entities; the *parens patriae* provisions purposely limit the applicability of the action to natural persons. Under the public action, aggregation of damages would occur regardless of whether the violation involved price fixing; the *parens patriae* provisions authorize aggregation only for price fixing cases.

ences to situations that might warrant a new form of action—cases involving consumer fraud and cases involving price fixing and other antitrust violations.[51] Even in those areas, the figures used by the Department of Justice to demonstrate the need for reform are grossly overstated.[52] Recent federal legislation has specifically addressed problems in these substantive areas, with the issue of widespread, low-level injury receiving particular attention.[53] While recognizing the existence of these statutes, the commentary asserts that their coverage is not sufficiently broad.[54] The drafters of the bill, however, have failed to recognize that the "limited impact" of these laws was precisely what Congress, after review of all relevant factors, determined was needed. Moreover, the commentators do not explain why broadening these statutes or drafting new statutes to meet particular, well-defined deficiencies would not be an appropriate response to the specific concern alleged.

2. *Procedural Aspects of the Public Action*

The public action includes a variety of procedural modifications and innovations designed to render actions more manageable and effective. Such modifications, however, would eliminate a number of the procedural safeguards currently es-

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[51] BILL COMMENTARY, *supra* note 4, at 18.

[52] Philip A. Lacovara, testifying before the Senate Subcommittee on behalf of The Business Roundtable and the National Association of Manufacturers, noted that the supposedly conservative figure of $150 billion cited as the cost of consumer antitrust injuries alone is more than twice the total amount of all corporate profits earned by domestic manufacturers in 1977. Similarly, the $21 billion figure cited as the cost of consumer fraud was apparently derived from a 1974 U.S. Chamber of Commerce publication entitled *A Handbook on White Collar Crime.* According to that publication, the single largest component in the figure cited was $12 billion in lost government revenue resulting from tax fraud. The estimate of the cost to consumers of illegal activities was only $5.5 billion. *Senate Class Action Hearings, supra* note 3, at 107.

[53] *See, e.g.,* the Magnuson-Moss-Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 2310 (d), (3) (1976); the Truth-in-Lending Act, 15 U.S.C. § 1640(a) (1976 & Supp. IV 1980); the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15c (1976 & Supp. IV 1980).

[54] BILL COMMENTARY, *supra* note 4, at 19-22; *see also* Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action,* 80 COLUM. L. REV. 299, 321-22 (1980).

tablished for class actions by Rule 23. The drafters of the bill contend that the elimination of some procedural safeguards is permissible because the public action is designed primarily to deter unlawful conduct and penalize wrongdoers, rather than to compensate injured individuals.[55] This rationale, however, ignores the fact that the public action, like the class compensatory action or any other class action, has an explicit compensatory purpose.[56] Moreover, the extent of a particular action's concern for deterrence, disgorgement and compensation cannot be judged absent an examination of the purposes underlying the substantive statute.

If viewed primarily as a deterrent piece of legislation, it is significant that the public action lacks the additional safeguards commonly found in civil penalty actions. For example, defendants are liable for more than clearly illegal conduct. They are afforded no opportunity to cure illegal conduct, and no exception is made for good faith violations. Factors such as the frequency and persistence of violations and the extent to which the conduct is intentional are not considered in assessing damages, and, with the exception of the recognized ceilings already included in the underlying substantive statutes, the defendant's liability is not limited.[57] Thus, the bill not only eliminates a number of the procedural safeguards considered appropriate in a primarily compensatory action, but it also fails to provide the safeguards common to deterrent or punitive actions. The provisions or purposes of the underlying substantive laws are not considered.[58]

The drafters of the bill also rely on the supervision and

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[55] BILL COMMENTARY, *supra* note 4, at 13-14, 41-42.

[56] The bill gives class members a statutory right to compensation for their injuries. The public action bars them from initiating their own action.

[57] As noted by the American College of Trial Lawyers, "[a] flagrant violation may cause little mass economic injury while business decisions taken in good faith, *e.g.*, after consultation with independent counsel and in accord with then-existing decisions of the courts, may later be held to violate the . . . laws and to have resulted in a substantial mass economic effect." AMERICAN COLLEGE OF TRIAL LAWYERS, COMMENTS WITH RESPECT TO A PROPOSED BILL ENTITLED "EFFECTIVE PROCEDURAL REMEDIES FOR UNLAWFUL CONDUCT CAUSING MASS ECONOMIC INJURY," DATED DECEMBER 1, 1977, AND PREPARED BY THE OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE, DEPARTMENT OF JUSTICE 6 (1978).

[58] See note 50 *supra* and accompanying text for such an observation.

involvement of the federal government to justify the elimination of procedural standards. For example, if a private individual initiates a public action, the United States can recommend dismissal upon a determination that the action is not in the "public interest." Federal or state officials can also choose to assume control or to support the maintenance of a public action, and the United States can participate in settlement hearings. Although the Department of Justice has estimated that the federal government would only handle approximately twenty-two public actions per year,[59] a far more substantial number of actions would probably be initiated, necessitating review and continuing supervision. The federal government would have to establish a costly new bureaucracy within the Department of Justice to supervise these public actions and after it was established, the bureaucracy's ability to assess thoroughly and fairly all of the public actions referred to it is open to serious doubt.

With this backdrop in mind, attention will be focused primarily on four significant procedural difficulties with the public action: the lack of notice to class members, despite the res judicata effect of the public action; the calculation of the public recovery and the distribution of claims; the incentive fee; and the potential for duplicative suits.

a. *Lack of Notice and Res Judicata*

The proposed bill makes no provision in the public action for prejudgment notice, and members of the affected class have no right to opt out of the proceeding. Despite these limitations, the judgment in a public action would be conclusive as to any injured individual in the class whose damages do not exceed $300.

Although the requirement of early individual notice found in current Rule 23(c)(2)[60] may have delayed some actions and in some cases may have even rendered them too ex-

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[59] BILL COMMENTARY, *supra* note 4, at 33.

[60] Rule 23(c)(2) requires "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." FED. R. CIV. P. 23(c)(2).

pensive to pursue, the constitutionality of entirely eliminating notice is questionable. Precedent exists for the proposition that a person whose interests are being litigated in a proceeding to which he is not a party is, in some circumstances, constitutionally entitled to notice and to the concomitant opportunity to decide not only whether he wants his claim pursued at all but whether he wants it pursued in that suit or in some other action of his choosing. In *Mullane v. Central Hanover Bank and Trust Co.*,[61] for example, the United States Supreme Court held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[62] Similarly, in *Eisen v. Carlisle & Jacquelin*,[63] the Supreme Court stated that "notice and an opportunity to be heard [are] fundamental requisites of the constitutional guarantee of procedural due process."[64] Since the Court did not have to reach the purely constitutional issue in *Eisen*,[65] the extent to which the Court based its holding on due process requirements is unclear. Nevertheless, the proposition that notice, in some instances, is constitutionally required is strongly supported.

The Department of Justice, however, in a memorandum on the constitutionality of various aspects of the public action, has cited a number of cases standing for the proposition that notice is not constitutionally required. The department has concluded that "due process requires only [that] class members whom the judgment is to bind to be adequately represented by the named plaintiffs and their attorneys . . . ."[66] All of the cases relied upon by the department,[67] however,

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[61] 339 U.S. 306 (1950).

[62] *Id.* at 314.

[63] 417 U.S. 156 (1974).

[64] *Id.* at 174.

[65] The Court did not have to reach the constitutional question because the rule itself required notice.

[66] OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE, MEMORANDA ON CONSTITUTIONALITY, APPENDIX C at 4 [hereinafter cited as MEMORANDA ON CONSTITUTIONALITY].

[67] Alexander v. Aero Lodge No. 735, 565 F.2d 1364 (6th Cir. 1977); Elliott v.

dealt with class actions brought under Rule 23(b)(1) or (b)(2), rather than under Rule 23(b)(3) where individual interests are more likely to vary.[68] Indeed, in *Wetzel v. Liberty Mutual Insurance Co.*,[69] the Court of Appeals for the Third Circuit observed:

> The very nature of a (b)(2) [or (b)(1)] class is that it is homogeneous without any conflicting interest between the members of the class . . . . Thus, as long as the representation is adequate and faithful, there is no unfairness in giving *res judicata* effect to a judgment against all members of the class even if they have not received notice.[70]

The court, however, distinguished class actions brought under Rule 23(b)(3): "[M]andatory notice is required in (b)(3) actions for the effective operation of the 'opt-out' provision, which is essential to protect the interests of individuals in the heterogeneous group. The 'opt-out' procedure, however, is not necessary for the protection of interests of individuals in the homogeneous (b)(2) class."[71]

Moreover, the cases cited by the Justice Department do not hold that notice is *never* required by due process. Rather, each of the cases specifically noted that Rule 23(d)(2) gives the court discretion to require notice even in (b)(1) and (b)(2) actions, and each noted that there may be circumstances in which notice to absent class members is necessary for the fair conduct of the action.[72]

Weinberger, 564 F.2d 1219 (9th Cir. 1977); Larionoff v. United States, 533 F.2d 1167 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975).

[68] The drafters of Rule 23 recognized this distinction between Rule 23(b)(1) and (b)(2) class actions, on the one hand and Rule 23(b)(3) class actions, on the other, when they provided discretionary notice for the former actions and mandatory notice and opt-out procedures for the latter. The Rule 23 Advisory Committee's Note explains that when a class is maintained under subdivision (b)(3), "this individual interest is respected. Thus the Court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request." 39 F.R.D. 98, 105 (1966).

[69] 508 F.2d at 239.

[70] *Id.* at 256.

[71] *Id.* at 255 (emphasis added).

[72] Alexander v. Aero Lodge No. 735, 565 F.2d at 1374; Elliott v. Weinberger, 564 F.2d 1228-29; Larionoff v. United States, 533 F.2d 1167, 1186 (D.C. Cir. 1976), *aff'd*,

Even if adequate representation of the class were a constitutional substitute for notice,[73] it is unclear that the bill would always insure fully adequate representation. To insure adequate representation, the drafters place substantial reliance upon governmental involvement and supervision of public actions.[74] But the protection afforded by federal supervision may be illusory when one considers the potentially large number of public actions that may be initiated each year. In addition, the bill's drafters rely upon the inquiries the court is required to make as to the legal competence of the relator's counsel for assurance of adequate representation.[75] This provision adds no new protection as courts already are required to examine the qualifications of attorneys under present Rule 23.[76]

In view of the elimination of notice and opt-out requirements, the bill's attempt to extend the res judicata effect of a judgment in a public action to all class members with individual claims not in excess of $300 is also constitutionally suspect. In its memorandum on the bill's constitutionality, the Department of Justice recognized the existence of the constitutional issue[77] and acknowledged that even if the res judicata

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431 U.S. 864 (1977); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 256-57 (3d Cir.), *cert. denied,* 421 U.S. 1011 (1975).

[73] Rule 23 Advisory Committee's Note states that notice must be given in an attempt "to fulfill requirements of due process to which the class action procedure is of course subject." 39 F.R.D. 98, 107 (1966).

The Justice Department's belief that adequate representation is a sufficient substitute for notice is not well grounded. Courts have held under present Rule 23 and under the previous version of that rule that the mere predominance of common questions of law or fact is not sufficient justification for binding absent class members *unless* those members receive notice and have the choice of opting out. Thus, it is the right not to particupate, *i.e.,* to opt out, or to participate on their own behalves that safeguards the interests of the absent class members. Mere adequacy of representation is not enough.

[74] BILL COMMENTARY, *supra* note 4, at 38. The commentary also cites the incentive fee as advancing adequacy of representation, claiming that it will encourage "detection of violations and close citizen cooperation in public action litigation." *Id.* at 38-39. *See* text accompanying notes 82-83 *infra* for a discussion of the incentive fee resulting in the opposite effect.

[75] *Id.* at 38.

[76] *See* Shulman v. Ritzenberg, 47 F.R.D. 202, 207 (D.D.C. 1969).

[77] As stated by the Justice Department:

Research into the potential constitutional problem outlined above has re-

effect were upheld in principle, "adequate representation in each particular case in which an injured person seeks to avoid the *res judicata* effect of a judgment would be a fact question which would have to be determined after the event."[78]

b. *Calculation of Recovery and Distribution of Claims*

In order to maximize the deterrent effect of the public action, the defendant's liability is either the full amount of the profits realized from the illegal conduct or the aggregate value of all damages inflicted on class members, regardless of the amount actually distributed to the injured parties. The bill does not require class members to prove individual injury. In many cases, particularly where the affected class has suffered only de minimus injuries, it is probable that only a relatively small portion of the recovery actually would be distributed to the injured parties.[79] Amounts not claimed and distributed would "escheat" to the government (including, potentially, a state government) and could be used to pay expenses involved in unrelated public actions or to enforce statutes within the government's purview. Thus, the bill imports the device of "fluid recovery" into the public action.

Undoubtedly, separate proof of individual injury cannot be dispensed with completely in all of the different kinds of civil actions to which the public action device would apply. On

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> vealed no precedent upon which a reliable prediction concerning the *res judicata* effects of a public action judgment can be based. On the one hand, to give the judgment *res judicata* effect would seem to fly in the face of the traditional rule that a judgment may not bind one who was not a party or in privity with a party to the suit in which it was entered and who was given no opportunity to be heard. *E.g.*, Griffin v. Burns, 570 F.2d 1065, 1070-72 (1st Cir. 1978). On the other hand, the legislation should, in normal circumstances, insure that the *de minimis* (as a practical matter) interests of injured persons are adequately represented, even though the action in which their interests are being protected is one prosecuted on behalf of the United States.

MEMORANDA ON CONSTITUTIONALITY, *supra* note 66, at 7.

[78] *Id.* at 8 n.7.

[79] Indeed, if the court or the Director of the Administrative Office of the United States Courts determines that it is impracticable to determine accurately the identities of the injured persons or the amounts of individual damages, it can order that no damages be distributed. H.R. 13, 97th Cong., 1st Sess., sec. 101, § 3005(b).

the contrary, individual computation of damages may frequently be necessary because the underlying substantive statute so requires[80] or simply because other means of calculating damages are not feasible.

Moreover, the fedeal courts have rejected the concepts of aggregate class damage assessment and fluid recovery in the class action setting, in part on constitutional grounds.[81] For example, in the Second Circuit's *Eisen* opinion, Judge Medina stated:

> Even if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an unconstitutional violation of the requirement of due process of law . . . . We hold the "fluid recovery" concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper.[82]

Even if, as some commentators have claimed,[83] there is no constitutional obstacle to aggregate calculation of damages and fluid recovery, an across-the-board application of such

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[80] *Senate Class Action Hearings, supra* note 3, at 110-111, 131-32; *Developments in the Law—Class Actions,* 89 HARV. L. REV. 1318, 1524, 1526 (1976). *See* National Auto Brokers Corp. v. General Motors Corp., 376 F. Supp. 620, 634-35 (S.D.N.Y. 1974); Handler, *Twenty-fourth Annual Antitrust Review,* 72 COLUM. L. REV. 1, 5-12 (1972).

[81] *See, e.g.,* In re Hotel Telephone Charges, 500 F.2d 86, 89 (9th Cir. 1974); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), *vacated on other grounds,* 417 U.S. 156 (1974). *See also* Windham v. American Brands, Inc., 565 F.2d 59 (4th Cir. 1977) (en banc), *cert. denied,* 435 U.S. 968 (1978); Pfizer Inc. v. Lord, 522 F.2d 612 (8th Cir. 1975), *cert. denied,* 424 U.S. 950 (1976); Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), *cert. denied,* 421 U.S. 963 (1975); State of California v. Frito-Lay, Inc., 474 F.2d 774 (9th Cir.), *cert. denied,* 412 U.S. 908 (1973). *But see* West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079 (2d Cir. 1971), *cert. denied,* 404 U.S. 871 (1971) (permitting fluid recovery in a settlement).

Although Congress specifically authorized fluid recovery in the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15(e) (1976), the constitutionality of the provision was seriously disputed during the debates on the bill and has not yet been tested in the courts. In any case, the Hart-Scott-Rodino bill applies fluid recovery only to *parens patriae* actions brought by a state attorney general on behalf of the citizens of his state for price fixing violations.

[82] 479 F.2d at 1018.

[83] *See Developments in the Law—Class Actions, supra* note 80, at 1524 n.359 and authorities cited therein.

mechanisms may be inappropriate. Instead, as the *Harvard Law Review* concluded in its overview of class actions, "the process of determining appropriate methods for delivering damages in class actions should proceed by analyzing whether the policies served by particular mechanisms for calculating and distributing damages match statutory policies."[84] Thus, the drafters of the bill again have failed adequately to consider the varying goals, policies and provisions of the many substantive statutes affected by the public action proposal.

c. *Incentive Fee*

In an effort to "encourage action by injured persons, those best able to detect violations," and to "create incentives that run not only to attorneys,"[85] the bill provides for an incentive fee to be paid to the relator in the event of a successful public action or settlement. The fee would equal twenty percent of the first $25,000 of recovery plus ten percent of the next $50,000. Thus, a settlement of only $75,000 would guarantee the class representative the maximum incentive fee. To the extent that the fee provision is intended to encourage the relator to monitor the performance of his counsel to ensure an adequate recovery, it is unlikely to achieve its purpose. Indeed, when coupled with the strong incentive defendants have to settle,[86] the incentive fee could possibly create an undesirable settlement dynamic.[87]

Although the incentive fee concept may have some utility, its usefulness should not be overestimated. Although citizen detection may work well in some cases, laymen often may be unable to perceive mass harms, such as price fixing or securities fraud, or to recognize that a legal cause of action exists.[88]

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[84] *Id.* at 1527.

[85] BILL COMMENTARY, *supra* note 4, at 40.

[86] In view of the costs of litigating, the fear of adverse publicity and the potential liability that may accompany many suits, defendants would have strong incentive to settle even utterly frivolous suits, particularly since the settlement would bind absent class members.

[87] Although the court and potentially the United States would participate in the settlement conference, it cannot be safety assumed that these limited safeguards could effectively balance and regulate the settlement process in all cases.

[88] 5 Class Action Rep. 110 (1979).

In any event, if the incentive fee concept is to be utilized, it should be restructured to become a more balanced settlement device.[89]

d. *The Potential for Duplicative Lawsuits and Recovery*

The public action/class compensatory action dichotomy proposed by the bill would virtually guarantee that as often as not two separate class claims arising from the same transaction or occurrence and presenting substantially common questions will be litigated in federal court. The potential for duplicative state court proceedings is equally great. The bill increases the possibility of overlapping state actions by providing that federal court jurisidiction over public actions shall not extend to pendent claims based on state law.[90] Although duplicative suits in federal court can be consolidated, the bill offers no guidance as to the effect of a federal court action. Thus, the public action/class compensatory action dichotomy would appear to reduce rather than to increase efficiency in disposing of related claims.

B. *The Class Compensatory Action*

1. *Class Compensatory Action Prerequisites*

The bill would reduce the prerequisites for maintaining a class action for damages to three: (1) that at least forty persons suffer injuries exceeding $300 or have liabilities exceeding $300; (2) that the injuries or liabilities arise out of the same transaction or occurrence or series of transactions or occurrences; and (3) that there be at least one substantial question of law or fact common to the proposed class. In addition, the bill directs the court to assess whether the named plain-

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[89] For example, one commentator has suggested that a "sliding scale" fee be substituted so that a relator would always receive more for a larger class recovery. *Id.* at 111.

[90] In addition, as a result of a gap in the law, there may be cases that do not satisfy the statutory prerequisites of either the public action or class compensatory action that would have to be brought in state court. For example, a class action where the class numbered less than 200 with individual claims less than $300 or aggregage injury less than $60,000, or where the class numbered less than 40 with individual claims in excess of $300 could only be brought in state court.

tiffs and their counsel will adequately protect the interests of all class members.

The radical changes found in the proposed class compensation action can be traced to the dissatisfaction with and criticism of the present rule. The commentary to the bill correctly notes that there has been "much critical comment and dissatisfaction" engendered by Rule 23(b)(3).[91] A growing consensus, however, is that the courts have been or are in the process of working out many of the initial management problems as experience with the rule grows.[92] Indeed, Justice Benjamin Kaplan of the Massachusetts Supreme Judicial Court, the reporter to the Advisory Committee on Civil Rules that drafted the 1966 revision, forecast that it would probably take at least a full generation before the problems and mechanics of the rule would be developed sufficiently and understood.[93] Moreover, the Department of Justice has made no effort to distinguish the difficulties attributable to Rule 23 from those inherent in all large, complex litigation cases.[94] Thus, although the cry for reform may have a superficial appeal, the present class action procedures may not be the root of the problem.

Certain aspects of the proposal, such as the substitution of specific numbers in place of the more general "numerosity" requirement, may in fact simplify class action certification. The introduction of substantial new terminology, however, may lead to yet new rounds of litigation. The deletion of certain current prerequisites may result in the certification of more complex and less cohesive class actions. Thus, the attempts at simplifying certification may result in even greater delay and more management problems in class litigation.

For example, the bill eliminates the present requirement that common questions "predominate" over other issues. The

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[91] BILL COMMENTARY, *supra* note 4, at 1.

[92] *Senate Class Action Hearings*, *supra* note 3, at 117; Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the Class Action Problem*, 92 HARV. L. REV. 664, 666, 680 (1979).

[93] Frankel, *Some Preliminary Observations Concerning Rule 23*, 43 F.R.D. 39, 52 (1967) (quoting then Professor Kaplan).

[94] *Senate Class Action Hearings*, *supra* note 3, at 122; Miller, *supra* note 92, at 668.

rationale advanced for the deletion is the courts' inability to articulate a practical test of predominance and the notion that, "if applied literally, predominance would prevent all Rule 23(b)(3) damage actions because, by their nature, these actions always involve many different impact and damage issues."[95] Although courts have been troubled in developing a practical standard of predominance, they have interpreted the requirement so that class actions may proceed even where separate trials of damages or other issues are necessary.[96] As one well-known commentator has observed:

> One dominant pattern has emerged from the class action decisions under 23(b)(3). Courts have repeatedly focused on the liability issue, in contrast to individual right to recover or amount of individual damages; and if they found that liability issues were common to the class, have held that those issues predominated over any potential individual issues for 23(b)(3) purposes.[97]

Indeed, the Justice Department's own comments on the original (December 1977) class action draft proposal recognized that, with the exception of plaintiffs' attorneys, an overwhelming majority of all private practitioners, legal scholars and federal appellate and district court judges favored extending the present predominance requirements of Rule 23(b)(3) to Rule 23(b)(1) and (b)(2) class actions.[98]

Moreover, the introduction of a new "substantial common question" requirement provides no more assurance of an objective standard than does the "predominance" requirement with its developed judicial gloss. The new requirement will

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[95] BILL COMMENTARY, *supra* note 4, at 27.

[96] *See, e.g.*, Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); Siegel v. Chicken Delight, Inc., 271 F. Supp. 722, 726 (N.D. Cal. 1967).

[97] 1 H. NEWBERG, NEWBERG ON CLASS ACTIONS: A MANUAL FOR GROUP LITIGATION AT FEDERAL AND STATE LEVELS § 1155 (1977).

[98] OFFICE OF IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE, UNITED STATES DEPARTMENT OF JUSTICE, DRAFT STATUTE AND COMMENTARY at 53 (Dec. 1, 1977); RULE 23 SUBCOMM., ADVISORY COMM. ON CIVIL RULES, CLASS ACTION QUESTIONNAIRE RESPONSES (1977). *See also* AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMM. ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE 1, 7-10, 25-28 (1972); *Developments in the Law—Class Actions*, *supra* note 80, at 1626.

likely result in extensive briefing and discovery efforts by parties attempting to persuade the court that there is or is not a substantial common question. Given the lack of judicial interpretation, litigation will be stimulated.

Another deletion from the present rule is the requirement that the court consider whether a class action is superior to other available methods for adjudicating the controversy. Thus, even if an alternative method of adjudication, such as a "test case," were more efficient and appropriate, the court could not refuse to certify the class action solely on the ground of the other method's superiority. The deletion of this requirement would needlessly diminish judicial flexibility and, when combined with the elimination of the predominance requirement, would result in the certification of unmanageable cases that are inappropriate for class action treatment.

The bill would also delete the requirement of typicality of claims and defenses on the ground that this "requirement has served in the past only as a duplicative standing test."[99] Although the requirement somewhat overlaps both the common question and the adequate representation requirements,[100] conflicts of interest among class members are more apt to arise if the requirement is deleted.

2. *Notice in Class Compensatory Actions*

The proposed bill directs the court at or immediately after the preliminary hearing to "determine whether some or all other injured persons will be excluded from or included in the class only if they so request by a specified date."[101] The court must thereafter give notice "reasonably necessary to assure adequacy of representation of all persons included in the class and fairness to all such persons."[102] Thus, contrary to the

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[99] BILL COMMENTARY, *supra* note 4, at 29.

[100] The essential policy behind Rule 23(a)(3) is the same as that behind Rule 23(a)(4): "That the representatives ought to be squarely aligned in interest with the represented group." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1)*, 81 HARV. L. REV. 356, 387 n.120 (1967).

[101] H.R. 13, 97th Cong., 1st Sess., sec. 101, § 3022(d) (1981).

[102] *Id.* at § 3022(e)(2).

public action, some form of prejudgment notice would be required in the class compensatory action. The requirement, however, is a watered-down version of present Rule 23(c)(2), which requires "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[103]

The original drafters of Rule 23 viewed individual notice to all identifiable class members as constitutionally required.[104] After the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*,[105] it is unclear whether the bill's relaxed notice requirements could pass constitutional muster. Even the bill commentary acknowledges that individual notice may sometimes be justified.[106] In any event, the introduction of the new notice requirement could certainly stimulate further litigation.[107]

In the case of post-judgment notice, the defendant must bear both the cost of identifying persons likely to have been injured by his conduct and the cost of giving notice to them of the finding of liability. Although the imposition of such costs on defendants has been upheld by the Third Circuit,[108] the costs could be enormous. The court has no discretion or flexibility to adjust the notice requirement to fit the facts and circumstances of a particular case. In contrast to the pre-judgment notice, the defendant would be statutorily required to give individual notice to those who can be identified, regardless of the potential cost.

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[103] FED. R. CIV. P. 23(c)(2).

[104] Rule 23 Advisory Committee's Note, 39 F.R.D. 98, 107 (1966). *But see* Comment, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23*, 123 U. PA. L. REV. 1217, 1224-41 (1975).

[105] 417 U.S. 156 (1976).

[106] BILL COMMENTARY, *supra* note 4, at 49.

[107] Interestingly, the *Eisen* case continued for eight years before the Supreme Court finally decided the issue. 417 U.S. at 159.

[108] The Justice Department cites Samuels v. University of Pittsburgh, 538 F.2d 991, 994, 999 (3d Cir. 1976) to support the position that such cost shifting after a determination of liability is constitutional. The department views cost-shifting as "equivalent to taxing costs against the losing party," citing FED. R. CIV. P. 54(d) and therefore, as not unconstitutional. MEMORANDA ON CONSTITUTIONALITY, *supra* note 66, at 11-12.

C. *Management Techniques*

The bill would also effect a number of procedural modifications and innovations, applicable to both public and class compensatory actions, designed to render class actions more manageable and effective. Several of these modifications appear well-grounded and could substantially enhance the effectiveness of class actions with minimal concomitant disadvantage. For example, the requirement of a preliminary hearing at an early stage in the public action is a useful innovation that would enhance the court's ability to screen out frivolous suits brought by plaintiffs interested in achieving a quick settlement or harassing the defendant. Moreover, the court's order entered at the conclusion of the hearing would define the scope of the action, thereby affording the parties some insight into the defendant's potential liability and the res judicata effect of a judgment. If, at the hearing, the court decided to dismiss the action as a public or class compensatory action, the plaintiff could immediately appeal the court's decision, thereby ensuring a speedy and final determination on the certification issue. Similarly, the modifications limiting discovery and motions prior to the preliminary hearing should reduce the inordinate delays caused by protracted discovery disputes and pre-certification motions. The parties, however, would still be furnished a sufficient opportunity to gather information necessary to support their respective positions at the preliminary hearing.

III. REACTION TO THE JUSTICE DEPARTMENT PROPOSAL

Reaction to the Justice Department proposal has been mixed. During the congressional hearings, several individuals testified in strong support of the proposal.[109] Although oppo-

[109] *See, e.g., Senate Class Action Hearings, supra* note 3. (Statements of Attorney General Griffin Bell, Assistant Attorney General Daniel J. Meador, Professor G.W. Foster, Jr., Hon. John P. Fullam, Hon. Sam C. Pointer and Kenneth R. Reed).

See Berry, *supra* note 54, at 299 for an article strongly supporting the legislation. Stephen Berry was serving with the Office of Improvements in the Administration of Justice at the time he wrote the article.

A commentator in the *Kentucky Law Journal* gave a more guarded favorable reaction to the proposed legislation. *See* Comment, *supra* note 11, at 216.

nents to the bill also testified,[110] criticism prior to this article has not been publicized widely. Opposition has been widespread, however, and those opposing the bill include a number of members of sections of the American Bar Association and the American College of Trial Lawyers. These groups were among those originally invited to comment upon the proposal, and they did so with vigor. Prior to the bill's introduction in Congress, significant revisions were made to the discussed proposal, partly in response to these comments.

The ABA Litigation Section prepared a lengthy report on Senate Bill 3475. After having been circulated to and reviewed by other interested sections, this report was presented to the ABA House of Delegates at its mid-winter 1979 meeting in Atlanta.[111] With the support of those sections, the ABA adopted the Litigation Section's report in opposition to the Department of Justice proposal. The following resolution was passed:

> Litigation (Report No. 125)
> A substitute recommendation, proposed by the Board of Governors and agreed to by the Section, was approved by voice vote. The substitute reads:
>
> > Be It Resolved, That the American Bar Association is opposed to the enactment of any class action legislation which would contain the following features: transfer to the United States Department of Justice control over private class litigation; transform the class action from a compensatory to a punitive device; adversely affect substantive rights of litigants by eliminating requirements for proof of damages and restricting the right to receive damages; relax or eliminate important procedural rights, such as the right of absentees to receive notice and participate, now provided in Rule 23 of the Rules of Federal Procedure; and substantially increase the burdens of an already overburdened federal judiciary, without concomitant benefit. Resolved,

[110] *See, e.g., Senate Class Action Hearings, supra* note 3. (Statements of William Simon, Philip A. Lacovara on behalf of the Business Roundtable and National Association of Manufacturers, Professor Arthur R. Miller, Paul M. Bernstein, J. Vernon Patrick, Jr.).

[111] This article draws upon the Section of Litigation's report in many areas.

> That the American Bar Association stands ready to assist and cooperate with the Department of Justice to address the foregoing.[112]

Because the ABA hopes to assist and cooperate in addressing the problems associated with class actions and because the Litigation Section agrees with some of the premises underlying the Justice Department proposal, the section recently has formed a committee to study the need for class action reform and, perhaps, to draft its own reform proposal. Although it is too early to predict the shape of any proposal that the committee may make, clearly the more meritorious suggestions of the Department of Justice will be seriously considered. A variety of innovative, and perhaps controversial, ideas for dealing with class actions will possibly surface. Thus, regardless of the fate of the Justice Department proposal as embodied in House Bill 13, the debate with respect to class action reform will clearly continue, and amendments to Rule 23(b)(3), whether major or minor, will likely emerge at some point in the future.

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[112] ABA SECTION OF LITIGATION, REPORTS, No. 125 (1979).