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CLASS ACTIONS IN THE FEDERAL SYSTEM AND IN CALIFORNIA: SHATTERING THE IMPOSSIBLE DREAM

EDWARD S. LABOWITZ*

Federal courts do not stage academic tournaments merely for Don Quixotes to practice knighthood.†

In the heels of the giggling lawyers, Too many slippery ifs and buts and however's, Too many doors to go in and out of.

When the lawyers are through

What is there left, Bob?

Can a mouse nibble at it

And find enough to fasten a tooth in?

—Carl Sandburg

Great tyrannies could be worked in Ecology's, or Consumers', no less than in Liberty's name.‡

INTRODUCTION

In recent years, both California¹ and federal² courts have experienced a phenomenal increase in the number of civil complaints filed. While the increase in the quantity of lawyers and in the population

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† *Dionne v. Springfield School Comm.*, 340 F. Supp. 334, 335 (D. Mass. 1972) (Wyzanski, J.).

‡ Louisell, Miller & West, *Comments on Vasquez v. Superior Court*, 18 U.C.L.A.L. REV. 1056, 1064 (1971).

1. The following tables present comparisons of the judicial loads in the California superior courts in recent years.

Table 1
Number of Judicial Decisions

	6/30/71	6/30/70	6/30/69	6/30/68	6/30/62
State	534.5	503.5	487.5	462	332
L.A.	205	189	184	179	120
S.F.	31.5	29.5	29.5	33	22

Table 2
Total Cases Awaiting Trial

	6/30/71	6/30/70	6/30/69	6/30/68	6/30/62
State	92,347	88,130	69,261	56,726	46,530
L.A.	49,402	47,122	36,245	27,079	25,037
S.F.	9,905	8,304	6,632	5,827	4,955

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Table 3
Total Civil Cases Awaiting Trial

	6/30/71	6/30/70	6/30/69	6/30/68	6/30/62
State	83,483	78,214	60,384	50,250	44,420
L.A.	44,586	41,019	30,747	23,200	23,796
S.F.	9,241	7,804	6,395	5,549	4,778

Table 4
Total Criminal Cases Awaiting Trial

	6/30/71	6/30/70	6/30/69	6/30/68	6/30/62
State	8,863	9,916	8,877	6,476	2,110
L.A.	4,816	6,103	5,498	3,879	1,241
S.F.	664	500	237	278	177

Table 5

No. of Cases Awaiting Trial per Judicial Position

	6/30/71	6/30/70	6/30/69	6/30/68	6/30/62
State	173	175	142	123	140
L.A.	241	249	197	151	209
S.F.	314	281	225	177	225

These tables were compiled from the following sources: ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS, ANNUAL REPORT 112 (1972); *id.* at 152 (1970); *id.* at 194 (1963).

The tables indicate that while the number of judicial positions has increased by almost 200 statewide during the nine year period, the number of cases awaiting trial per judicial position has also increased.

The Los Angeles County Clerk recently stated that there was a 4.5 percent rise in the number of civil court filings in Los Angeles County, from 45,742 in 1971 to 47,833 in 1972. L.A. Daily Journal, Jan. 19, 1973, at 1, col. 8.

2. The federal courts experienced the following percentage increases in the number of cases filed in fiscal year 1971 over fiscal year 1970: civil rights—28.9 percent; commerce—77.9 percent; securities, commodities and exchange—62 percent; and anti-trust—15 percent. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT 28,107 (1971).

There were 140,000 federal district court filings in fiscal 1972 compared with 88,000 in 1959. Chief Justice Burger has noted that increasing the number of judges has not solved the overload problem partly because "the trial of cases, particularly criminal cases and some others, had become more complex and protracted so that statistics do not tell the whole story." Burger, *Has the Time Come?*, 55 F.R.D. 119 (1972). Chief Justice Burger has also noted that even if the federal judiciary solves the overload problem by elimination of certain types of cases, the state courts will be forced to take on the new burden. *Id.* at 121. See generally Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929 (1970).

There were 1,300 U.S. Supreme Court filings in 1931; in 1971, there were 4,000. The number of civil appeals in the federal system jumped from 2,322 in 1960 to 7,001 in 1970. The number of conviction appeals increased from 623 in 1960 to 3,161 in 1970. Compared to those three, four, and ten-fold increases in the case load, the increase in the number of federal appellate judgeships between 1960 and 1970 was insignificant; from 68 to 97. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT 99, 104 (1970); *id.* at 210, 223 (1960).

For the California Supreme Court, the following numbers of filings per year may be compared:

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itself obviously has contributed to the upsurge in litigation,³ social historians will some day point to causes for this phenomenon,⁴ including urbanization, increases in the number and value of business transactions; heightened consumer, environmental and civil rights concern; and expanded education. Perhaps Alexis de Tocqueville's observation that Americans like to convert the most diverse sorts of controversies into legal terms⁵ is more applicable today than 140 years ago. A United States Supreme Court clerk has remarked:

I never realized how litigious people in this country are until I

<u>YEAR</u>	<u>NUMBER OF FILINGS</u>
1971	3,179
1970	3,400
1969	3,322
1968	2,959
1962	1,438

The following figures are for the California courts of appeal:

<u>YEAR</u>	<u>NUMBER OF FILINGS</u>
1971	8,684
1970	8,039
1969	6,874
1968	6,411
1962	3,250

These tables were compiled from the following sources: ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS, ANNUAL REPORT 88-89 (1972); *id.* at 128-29 (1970); *id.* at 173 (1963).

3. The legal assistance programs funded by private and government sources have probably contributed to availability of lawyers to certain economic and ethnic groups for the first time. One court has said:

There is no certain basis for the assumption that an interested holder of a small claim will be unable to prevail upon a private attorney to pursue that claim in the hope of being compensated by the award of "reasonable counsel fees" against a wrongdoer. Moreover, the burgeoning in recent years of interest in publicly supported legal service organizations and of private support for legal aid and public interest law firms cannot be disregarded Many small but important claims heretofore, for purposes of litigation, beyond the pale of financial practicability, have been successfully litigated by such organizations in recent years. Thus an adverse class action decision may ring out as a death knell on far fewer occasions than superficial analysis would suggest.

Hackett v. General Host Corp., 455 F.2d 618, 623 (3d Cir.) (citations omitted), *cert. denied*, 407 U.S. 925 (1972).

However, it is possible that President Nixon's recent dismantling of the Office of Economic Opportunity may destroy the legal services system, unless it is funded by other federal or state government sources.

4. One law professor, now a philosopher-king, has posited the novel theory that "Consciousness III" is a potent new concomitant in the development of awareness of one's place in the universe. See C. REICH, *THE GREENING OF AMERICA* (1971). Most social historians, however, would find it hard to believe that all contemporary change is related to the same "consciousness."

5. 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 357-58 (1898).

did some work in comparative law. . . . Here, people are expected to stick up for their rights. They're not afraid to sue their neighbor. But in other parts of the world, especially Asia, only the most ill-bred person thinks in terms of his own rights. Controversies are conciliated. People bargain in a very polite way. Filing suit is almost shameful.⁶

Changes in civil substantive and procedural law have also made the courts more accessible and litigation more desirable during this period.⁷

Unfortunately, the courts at all levels have been unable to keep pace with the demands of this litigation.⁸ Some writers have suggested that more courts be created and that more judges be appointed.⁹ While it is difficult to quarrel with the suggestion that more judge-ships be created, such a program would be expensive and, even if undertaken on a grand scale, would not alleviate all congestion. Even if

6. L.A. Times, Dec. 19, 1972, at 1, 12-13, col. 1. Professor Lubman, one of this country's foremost scholars of Chinese law, has written that

Confucianism, the dominant political philosophy in pre-Communist China, stressed the virtues of compromise, yielding, and nonlitigiousness. The organization of the imperial Chinese state, the operation of its governing institutions, and its traditional social nuclei—family, clan, village, and guild—combined to create pressures and institutions for extrajudicial mediation.

Lubman, *Mao and Meditation: Politics and Dispute Resolution in Communist China*, 55 CALIF. L. REV. 1284, 1286 (1967). However, Professor Lubman also noted that because of geographic distance, the non-expertise of magistrates, corruption, and the humiliation suffered by parties and witnesses, "[l]itigation was, in short, time-consuming, degrading, and costly." *Id.* at 1296.

7. Examples of state civil procedural law alterations include the adoption of broad discovery tools. *See, e.g.*, *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961) (court recognized the broad discovery allowed by the federal rules as precedent for the new California discovery statutes); CAL. CIV. PRO. CODE §§ 2002-36 (West 1955).

Examples of federal substantive law changes include: Civil Rights Act of 1968, 18 U.S.C. § 245, 42 U.S.C. §§ 3601-31 (1970); Labor Management Relations Disclosure Act, 29 U.S.C. §§ 401-531 (1970); Civil Rights Act of 1964, 42 U.S.C. §§ 2000 *et seq.* (1970). Criminal procedure law changes are exemplified by *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961). Very few of the major criminal procedure decisions of the last decade were applied retroactively. Nevertheless, the ground broken by such decisions obviously provided incentives for the filing of petitions to review convictions and post-conviction motions. *See* materials cited note 2 *supra*.

8. *See* Burger, *supra* note 2. *See also* materials cited notes 1 & 2 *supra*. Apparently, various measures have been adopted in Los Angeles County over the last one and one-half years which have shortened the waiting period for jury trials from 36 months to 16 months. Loring, *Improving the Administration of Justice in Los Angeles County*, 6 J. BEV. H.B.A. 20 (1972). While adoption of such measures may shorten time once the litigants are prepared for trial, it is unlikely that they will improve the efficiency of class action discovery, pleadings, or motion procedures and would thus not have a great impact on the overall amount of time during which a class action is pending.

9. A special panel of law professors and jurists chaired by Professor Paul Freund has recommended that a national court of appeals be created to lighten the Supreme Court's load and to certify cases to the Court. L.A. Times, Dec. 20, 1972, at 22, col. 1.

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such a program were initially successful, it would ultimately create new demands by potential litigants who previously rejected legal action because of the extensive waiting periods before trial.¹⁰ The courts must be more cautious than they have been in the immediate past and avoid experimental reshaping of rights and remedies in the business and consumer fields¹¹ without careful study of the possible effects of such experiments on the judicial system.¹²

This article focuses on the contemporary business and consumer class action¹³ as such an experimental device which has grown to the point where class allegations may be as frequent and boilerplate as punitive damage prayers.¹⁴ The federal class action, seen only six years

10. In analyzing the reasons fewer litigants were settling in federal courts in the mid-sixties, Professor Carrington has suggested that the addition of many new federal judgeships cut into the backlog of cases temporarily, diminishing the pressure to settle. Carrington, *Crowded Dockets and the Courts of Appeal: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 545 (1969).

11. Business and consumer class actions have a much greater potential for unmanageability than civil rights or environmental class actions, for example, because the latter are usually injunctive suits which do not involve the assessment of damages on behalf of large numbers of people. Cf. *Diamond v. General Motors Corp.*, 20 Cal. App. 3d 374, 97 Cal. Rptr. 639 (2d Dist. 1971).

12. The author does not suggest that the American system of private law is without fault. Nearly seventy years ago, Dean Pound shocked the profession by denouncing its unwillingness to discard the adversary system, "the sporting theory of justice." Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 8 BAYLOR L. REV. 1, 14 (1956). There may very well be something to be said for such a radical departure from the adversary system. See EHRENZWEIG, *PSYCHOANALYTIC JURISPRUDENCE* 259-81 (1971); Cappelletti, *Social and Political Aspects of Civil Procedure—Reforms and Trends in Western Europe*, 69 MICH. L. REV. 874 (1971); Kaufman, *The Philosophy of Effective Judicial Supervision over Litigation*, 29 F.R.D. 191, 207 (1962). However, judicial reshaping in the class action field is proceeding without recognition or study of its impact on the American system. Worse is that these changes are occurring under the ruse of strengthening the adversary system. See generally Louisell, Miller & West, *Comments on Vasquez v. Superior Court*, 18 U.C.L.A.L. REV. 1042, 1056 (1971).

13. See note 11 *supra*.

14.

In the past few years, complaints have been filed on behalf of all consumers of gasoline in a given state or states, all homeowners in the United States, and even all persons in the United States. The class action has been hailed as "one of the most socially useful remedies in history," a device which will open up the federal courts to literally millions of small claimants. A similar attitude is reflected in the consumer protection bill which was recently reported by the Senate Commerce Committee which adopts the class action as the apparent panacea for all consumer grievances. A wave of emotionalism has been generated, with the result that anyone who does not enthusiastically endorse consumer class suits becomes an enemy of progress and a disciple of the devil. Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 6 (1971) (footnotes and citations omitted).

A class action brought on behalf of plaintiff "and all other possessors of real prop-

ago as a device which would make the federal courts more efficient,¹⁶ has instead mired those courts in complicated and protracted litigation. This situation has led one federal judge to conclude that "unless prudence and caution are exercised soon by the bench and the bar, the class action device can be transformed from a useful tool to an engine of destruction."¹⁶ Chief Judge Lumbard of the Second Circuit, lodging a bitter dissent in the famous case of *Eisen v. Carlisle & Jacquelin*, wrote:

Class actions were not meant to cover situations where almost everybody is a potential member of the class. Nor were they even intended to compel any court to entertain an alleged controversy with so many potential parties, or to compel any court to entrust the interests of numerous plaintiffs to representation by one plaintiff whose interest is all of \$70. [We must] put an end to this Frankenstein monster posing as a class action.¹⁷

Most class actions which are fortunate enough to come to a conclusion¹⁸ result in miniscule recoveries to the relatively few plaintiffs who finally file claims,¹⁹ although attorneys on both sides often do very

erty in, and residents of, the County of Los Angeles" was dismissed because of a lack of community of interest among the class members and the action's unmanageability. *Diamond v. General Motors Corp.*, 20 Cal. App. 3d 374, 376, 97 Cal. Rptr. 639 (2d Dist. 1971).

15. See, e.g., Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39 (1967); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356 (1967); Wright, *Class Actions*, 47 F.R.D. 169 (1968). But Professor Wright has also written that if a liberal interpretation of rule 23 "encourage[s] courts to allow maintenance of class actions in controversies that are unmanageable by this device, the rule may come into disrepute even for the cases to which it is well suited." *Id.* at 171.

16. *Smith v. Beneficial Fin. Co.*, Civil No. 860-71 (D.N.J., July 23, 1971).

17. 391 F.2d 555, 571-72 (2d Cir. 1968) (Lumbard, C.J., dissenting) [hereinafter cited as *Eisen II*].

The *Eisen* case has occupied the courts for the past seven years: 41 F.R.D. 147 (S.D.N.Y. 1966) [hereinafter cited as *Eisen I*], *aff'd*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967), *rev'd and remanded*, *Eisen II*, *rehearing* 50 F.R.D. 471 (S.D.N.Y. 1970) [hereinafter cited as *Eisen III*], *rehearing* 52 F.R.D. 253 (S.D.N.Y. 1971) [hereinafter cited as *Eisen IV*], *rehearing* 54 F.R.D. 565 (S.D.N.Y. 1972) [hereinafter cited as *Eisen V*], *rev'd*, 479 F.2d 1005 (2d Cir. 1973) [hereinafter cited as *Eisen VI*], *en banc hearing denied*, (2d Cir. May 24, 1973), in N.Y.L.J., May 25, 1973, p. 3, col. 3, *cert. granted*, 42 U.S.L.W. 3226 (U.S. Oct. 16, 1973) (No. 203).

18. More than 53 percent of the class actions commenced in the southern district of New York in the last six months of 1966 were still pending in December, 1971. AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE 13 (1972) [hereinafter cited as ACTL REPORT].

19. In *Grossman v. Playboy Clubs Int'l, Inc.*, Civil No. 882939 (Super. Ct., L.A., Cal., Jan. 16, 1969), a class action brought on behalf of 460,000 lifetime members of the

well.²⁰ Furthermore, many successful consumer and shareholder class actions will require individual actions to adjudicate damage and reliance issues.²¹

With its decisions in *Vasquez v. Superior Court*²² and *La Sala v. American Savings & Loan Association*,²³ the California Supreme Court has followed the winding and bumpy class action road created by the federal judiciary, where ethical considerations, court congestion, due process violations, and disguised substantive law alterations may hopelessly entrap plaintiffs, defendants, and the courts themselves.²⁴

Playboy Club in California, the court permitted a settlement which provided each member \$8 worth of expenses at the Playboy Club and \$275,000 to the attorney, who happened to be the named plaintiff.

In another recent case under the shareholders' derivative rule, FED. R. CIV. P. 23.1, it has been estimated that after deducting the \$1,250,000 attorney fee from the \$5,000,000 settlement, victorious shareholders will receive approximately \$0.02 per share. *Newman v. Stein*, CCH FED. SEC. L. REP. ¶ 93,316 (S.D.N.Y. Dec. 29, 1971).

Even in the renowned case of *Eisen v. Carlisle & Jacquelin*, *Eisen I-VI*, which has been pending in the southern district of New York since 1966 and has been immortalized in at least six pretrial written opinions, the named plaintiff alleges damages to himself of only \$70.00. It has been estimated that the average recovery in that suit brought on behalf of 6,000,000 odd-lot traders would be \$3.90 (treble damages). ACTL REPORT 14-15.

Two notable exceptions to the miniscule recovery category are *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), and *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967). In *Pfizer*, the district court accepted a proposed compromise to settle 66 civil class actions claiming that the defendant had violated antitrust laws in the sale of antibiotics. In *Daar*, the settlement was not refunded to cab users but was applied as a "fluid recovery" to lower Yellow Cab's fares—certainly not a horrible fate in a competitive market. Considering the driving habits of Southern Californians, it is probable that few individuals will "recover" more than a miniscule amount through the fare reductions. It is amusing that many attorneys will benefit from the fare reductions, however, since taxi transportation is the favorite mode of travel between downtown Los Angeles offices and the county courthouse. The plaintiff-attorney in *Daar* received approximately \$250,000 in fees.

20. See note 18 *supra*. Since many class actions are brought against large corporations, it is safe to assume that lawyers defending such corporations in prolonged litigation receive their customary fees.

21. See generally text accompanying notes 65-93, 108-19 *infra*.

22. 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

23. 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971).

24. Even Professor Louisell, a strong proponent of expanded class actions offered the lyrical caveat, in an article which he co-authored, that

[i]n the hands of those judges who are heedless of the shoals of legislative or even constitutional restraints, and who are overly eager to jump aboard flimsy crafts provided that they be thought to be headed for the waves of the future, the class suit can be a dangerous means to a due processless end. . . .

. . . Great tyrannies could be worked in Ecology's or Consumers', no less than in Liberty's name.

Louisell, Miller & West, *supra* note 12, at 1064. This author believes we are much closer to those due processless ends and great tyrannies than Professor Louisell supposed.

After analyzing class actions in the federal system and in California, this article recommends certain legislative and judicial measures which should be taken in order to protect the class action and to prevent its abuse.

I. EXPANSION OF THE CLASS ACTION DEVICE

A. *Federal Law*

1. *Old Rule 23 of the Federal Rules of Civil Procedure.*

The basic philosophy of class actions has remained unchanged through the centuries. . . . Class actions were known to English chancery practice since the 17th century. They developed as an exception to the broad and flexible equity rule that all persons materially interested in the subject of the litigation should be joined as parties. . . . Notwithstanding its departure from the more traditional notions of procedural due process, the class action device found ready acceptance in the United States.²⁵

Borrowing from English chancery, early American decisions accepted the class action in these equity cases where absent parties necessarily would be bound by judgments.²⁶ A series of equity rules²⁷ preceded rule 23 of the Federal Rules of Civil Procedure as the jurisdictional bases for class actions in federal courts.

The states which adopted the Field Code generally promulgated the rule that when parties were united in interest and

where the question is one of a common or general interest of many persons, or where the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.²⁸

For more than 100 years, state courts grappled with the question: When are parties united in interest? Stressing the equity history of representative actions, the courts usually answered this question by

25. Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 610-11 (1971) (footnotes omitted). For a thorough historical analysis of the development of class actions in the English Court of Chancery, see Simeone, *Class Suits Under the Codes*, 7 W. RES. L. REV. 5 (1955).

26. Homburger, *supra* note 25, at 611.

27. *E.g.*, Eq. R. 38, 226 U.S. 659 (1912).

28. N.Y. CIV. PRAC. LAW § 1005 (McKinney 1963) (identical in substance to the Field Code of 1848).

allowing class actions only when the relationships among the parties were such that a judgment for or against one party would bind or reward an absent party.

Rule 23, adopted in 1938, authorized class actions

when the character of the right sought to be enforced for or against the class is

(1) joint or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.²⁹

The suits permitted by rule 23 became known, respectively, as “true,” “hybrid,” and “spurious” class actions. In the “true” class action, every member of the class was bound by the judgment. Members of the class were bound in the hybrid suit “only as to rights, if any, in the property involved.”³⁰ The spurious class action was an anomaly because it was interpreted to be no more than a permissive joinder device³¹ and “it was supposed not to adjudicate the rights or liabilities of any person not a party.”³² Although Professor Moore, draftsman of the original rule 23, intended a limited use of the spurious action,³³ a

29. FED. R. CIV. P. 23 (a)(1)-(3) (1938).

30. C. WRIGHT, FEDERAL COURTS 310 (1971).

31. See *Carroll v. American Fed. of Musicians*, 372 F.2d 155 (2d Cir. 1967) (decided under the old rule 23); *Oppenheimer v. F. I. Young & Co.*, 144 F.2d 387 (2d Cir. 1944).

32. Advisory Committee's Notes, *Proposed Rules of Civil Procedure*, 39 F.R.D. 98, 99 (1966) [hereinafter cited as Advisory Committee Notes].

33. According to Professor Homburger:

The “spurious” class suit was intended merely as a device to facilitate permissive joinder of members who were not originally named as representatives of the class. As drafted by Professor Moore, the rule would have provided that, absent collusion, only the citizenship of the original parties should be considered where jurisdiction is founded upon diversity of citizenship. However, the Advisory Committee did not consider it proper to deal with these matters in the rule. The result was a truncated rule which established the three Moore categories, but said nothing about either subject matter jurisdiction or the effect of the judgment. The federal courts, however, generally accepted the draftsman's point of view and construed the rule in accordance with his intent.

Homburger, *supra* note 25, at 627-28. But for the view that the “spurious” action was applied in situations not contemplated in the original draft, see notes 24-36 *infra* & accompanying text.

few federal and some state courts which had adopted the language of the federal rule extrapolated several class benefits from the otherwise innocuous subdivision (3) action. These courts tolled the statute of limitations at the time a spurious suit was commenced, and thus permitted the subsequent joinder of parties who would otherwise have been barred by the statute.³⁴ Some courts even permitted one-way intervention, which allowed class members to join the suit after a favorable judgment.³⁵ This procedure bestowed upon potential class members the luxury of avoiding the costs of a losing suit while simultaneously preventing collateral estoppel on behalf of the party opposing the class.³⁶

Under the Field Code and the old federal equity rule, decisions were often concerned with whether a judgment would have a binding effect on absent parties. This concern continued under the 1938 rule, but the courts soon became confused about the meanings of "joint, or common, or secondary" rights,³⁷ as well as the meanings of "several" rights in "specific property,"³⁸ and "several" rights in a common "question of law or fact."³⁹ The Advisory Committee Notes to the 1966 amendments to rule 23 indicate that this confusion was one of the reasons for amending the rule.⁴⁰ As Professor Wright has said:

If matters of importance turn on the classification given a particular suit, then it is vital that it be clearly understood which classification applies. The fact was that the task of determining which label was appropriate for a particular suit "baffled both courts and commentators."⁴¹

34. See *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 569 (10th Cir. 1961), *cert. denied*, 371 U.S. 801 (1962); Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433 (1960). *Contra*, *Weeks v. Bareco Oil Co.*, 125 F.2d 84 (7th Cir. 1941) (dictum).

35. See *York v. Guaranty Trust Co.*, 143 F.2d 503, 529 (2d Cir. 1945), *rev'd on other grounds*, 326 U.S. 99 (1945); *Nagler v. Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957); *Hormel v. United States*, 17 F.R.D. 303 (S.D.N.Y. 1955). See also Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1940); Starrs, *The Consumer Class Action*, 49 B.U.L. REV. 407, 467-69 (1969); Comment, *The Spurious Class Suit: Procedural and Practical Problems Confronting Court and Counsel*, 53 Nw. U.L. REV. 627, 630-33 (1958).

36. Unlike most other jurisdictions which adopted the federal rule of 1938, Missouri courts collaterally estopped nonparties from bringing new actions if a previous spurious class action had been decided against the previous party-plaintiff. See Starrs, *supra* note 35, at 467-68.

37. FED. R. CIV. P. 23(a)(1) (1938).

38. *Id.* (a)(2).

39. *Id.* (a)(3).

40. Advisory Committee Notes 98-100.

41. C. WRIGHT, *supra* note 30, at 311 (footnotes omitted).

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Since absent parties were bound not merely by decree of the court but by the very nature of the plaintiff's or defendant's judgment, one would have expected adequacy of representation to be of paramount interest in class actions. Surprisingly, neither the pre-1938 Field Codes nor the federal decisions concerned themselves with that issue. Perhaps it was assumed that no party would bring or defend an action without using his best efforts. The 1938 rule recognized the problem and required that the party or parties allegedly representing the class do so adequately.⁴² The adequacy of the representation provision rule was tested within two years in the case of *Hansberry v. Lee*.⁴³

The petitioner in *Hansberry* asked the Supreme Court to declare a racially restrictive land covenant invalid on the ground that the covenant had not been approved by 95 percent of the landowners in the concerned tract as required by the terms of the covenant before it could become operative. The Supreme Court of Illinois had refused petitioner relief because it felt bound by a stipulation in a previous but related case⁴⁴ that the 95 percent requirement had been met, although the court admitted that the earlier stipulation was factually erroneous.⁴⁵ In challenging the Illinois decision, petitioner alleged that he and his class were denied due process of law under the fourteenth amendment⁴⁶ because the plaintiff in the earlier case, in agreeing with the 95 percent stipulation, had prevented the petitioner's class from litigating that issue.

Because the *Hansberry* case was brought under Illinois' class action procedures, the United States Supreme Court did not identify whether the action was "true," "hybrid," or "spurious." The Court concluded, however, that the Illinois Supreme Court had violated petitioner's due process rights by accepting the earlier stipulation. The Court found that the interests of the earlier plaintiffs were not

42. "If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued." FED. R. CIV. P. 23(a) (1938).

43. 311 U.S. 32 (1940). See Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327 (1948).

44. *Burke v. Kleinman*, 277 Ill. App. 519 (1st Dist. 1934)

45. *Lee v. Hansberry*, 372 Ill. 369, 24 N.E.2d 37 (1939), *rev'd*, 311 U.S. 32 (1940). The Illinois Supreme Court affirmed its circuit's finding that, in fact, only 54 percent of the landowners had signed. 372 Ill. at 372, 24 N.E.2d at 38.

46. "[N]or shall any state deprive any person of life, liberty, or property without due process of law . . ." U.S. CONST. amend. XIV, § 1.

the same as those of the petitioner and his class and, therefore, the earlier plaintiffs had not adequately represented them:

Because of the dual and potentially conflicting interests of those who are putative parties to the agreement in compelling or resisting its performance, it is impossible to say, solely because they are parties to it, that any two of them are of the same class. Nor without more, and with the due regard for the protection of the rights of absent parties which due process exacts, can some be permitted to stand in judgment for all.⁴⁷

By affirming the principle of adequacy of representation and by giving it constitutional stature, the Supreme Court created a new problem with which rule 23 did not deal: the adequacy of notice.⁴⁸ If class members had the constitutional right to be adequately represented, then surely they had a constitutional right to be notified of the pendency of a class action so that they might contest the representation or intervene. The constitutional right to notice was recognized in *Mullane v. Central Hanover Bank & Trust Co.*,⁴⁹ where the Court held that a trustee had a duty to personally notify beneficiaries when the law required notice and that published notice was not acceptable if the beneficiaries' addresses were known. The Court did not say when notice itself was required of the pendency of a class action.⁵⁰

The 1938 rule required that notice be sent of any proposed dismissal or compromise of a "true" class action but gave the court discretion whether to order notice of dismissal or compromise in "hy-

47. 311 U.S. at 44.

48. Advisory Committee Notes 99.

49. 339 U.S. 306 (1950).

50. Professor Homburger, disagreeing with most commentators, views *Mullane* within the limited context of its facts:

The court [in *Mullane*] lacked adjudicatory authority unless it acquired jurisdiction over each trust beneficiary. . . .

The situation in class actions is different. Notice is not needed to vest the court with adjudicatory jurisdiction over the absent members of the class. . . . [T]hey will be bound only if . . . adequately represented by the champions of the common cause.

Homburger, *supra* note 25, at 645. Professor Homburger's narrow interpretation would seem to imbue trial courts with omniscience, enabling them to judge adequacy of representation in class actions without notifying those who may be able to offer evidence on that issue. Unnotified class members may raise the adequacy issue after an adverse judgment—if they have learned of the judgment. However, it would seem obvious that any court would be reluctant to reverse an adequacy finding after spending years litigating the merits of the case.

In the most recent and definitive of the many opinions in *Eisen v. Carlisle & Jacquelin*, the Second Circuit interpreted notice to all known class members as constitutionally mandated. Eisen VI 1015.

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brid" or "spurious" class actions.⁵¹ Such a rule recognized the collusive potential of settlements in class actions where alleged representatives might accept a settlement which bound class members to a miniscule recovery (or a large liability) but which offered the representative a handsome fee. However, the courts and the draftsmen did not appear to view rule 23 (e) as a method of curtailing strike suits brought for their nuisance value in the hope of forcing settlement.

Aware of the problems of categorizing actions and judgments,⁵² of determining adequate representation and of requiring notice, the Supreme Court accepted the amendments proposed by the Judicial Conference in 1966.⁵³

2. *New Rule 23 and Its Application.* In subdivision (a), the new rule sets out four criteria that all class actions must meet:

- (1) the class must be "so numerous that joinder of all members is impracticable,"
- (2) there must be "questions of law or fact common to the class,"
- (3) "the claims or defenses of the representative parties" must be "typical of the claims or defenses of the class," and
- (4) "the representative parties" must "fairly and adequately protect the interests of the class."⁵⁴

The general criteria of subdivision (a) identify the requirements which courts, often unwittingly, had read into the old rule 23. Of course, language such as "common questions of law or fact" is subject to varying interpretations.

51. FED. R. CIV. P. 23(c) (1938):

A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule, notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

52. "The principal reason for rewriting rule 23 in 1966 was to get away from the conceptionally-defined categories of the old rule." C. WRIGHT, *supra* note 30, at 311. Professor Wright's statement underscores the draftsman's and the committee's desire to clearly define how and when a class action could be brought. It is not clear that the purpose of the revisions was to increase the number of class actions brought by making them more accessible to litigants. This is contrary to some contemporary opinion. *E.g.*, Eisen II; Kaplan, *supra* note 15, at 356. *But see* Eisen VI.

53. Justice Black dissented in the adoption of the amendments, claiming that they gave the trial court too much discretion in accepting or denying class action status. Mr. Justice Black's statement, 39 F.R.D. 272, 274 (1966).

54. FED. R. CIV. P. 23(a).

Subdivision (b) of the new rule defines the three types of class actions which may be brought. Although there are some similarities between the (b) definitions and the three categories under the old rule, the new rule does away with the "specific property" requirement of the hybrid action,⁵⁵ combines and more precisely defines what were formerly true and hybrid actions,⁵⁶ creates a specific class action for injunctive relief,⁵⁷ and eliminates the spurious action. The spurious action has been replaced by the (b)(3) action in which the court may permit a class action only when "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and [when] a class action is superior to other available methods for the fair and efficient adjudication of the controversy."⁵⁸ Class actions brought since 1966 have almost all been (b)(3) actions, and it is those actions which this paper will critically discuss.

Subdivision (c)(1) of the new rule requires a determination "[a]s soon as practicable after the commencement of an action brought as a class action, [whether the action may] be so maintained." Because of the extensive notice requirements of rule 23, Judge Weinstein, in *Dolgow v. Anderson*,⁵⁹ was concerned with the effect and costs of an erroneous decision permitting a class action to proceed. Therefore, before notifying potential class members, he ordered a "mini-hearing," purportedly under rule 23(c)(1), to determine the probable merits of the class action. A few courts accepted Judge Weinstein's innovation,⁶⁰ though many rejected it as improper under the statute.⁶¹ The Second

55. *Id.* (b)(1).

56. *Id.*

57. *Id.* (b)(2).

58. *Id.* (b)(3).

59. 43 F.R.D. 472 (E.D.N.Y. 1968).

60. *Milberg v. Western Pac. R.R.*, 51 F.R.D. 280 (S.D.N.Y. 1970), *appeal dismissed*, 443 F.2d 1301 (2d Cir. 1971). Several California Supreme Court cases have recommended that federal class action procedures be followed in the absence of controlling California statutes. *La Sala v. American Sav. & Loan Ass'n*, 5 Cal. 3d 864, 872, 489 P.2d 1113, 1117, 97 Cal. Rptr. 849, 853 (1971); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 821, 484 P.2d 964, 977, 94 Cal. Rptr. 796, 809 (1971); *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 433 P.2d 732, 742, 63 Cal. Rptr. 724, 734 (1967). The class action manual recently adopted by the Los Angeles County Superior Courts requires such pretrial merit hearings for all class actions. *MANUAL FOR THE CONDUCT OF PRETRIAL HEARINGS ON CLASS ACTION ISSUES OF THE LOS ANGELES SUPERIOR COURT* (1973).

61. *Miller v. Mackey Int'l, Inc.*, 452 F.2d 424 (5th Cir. 1971); *Gosa v. Securities Inv. Co.*, 449 F.2d 1330 (5th Cir. 1971); *Kahan v. Rosenstiel*, 424 F.2d 161 (3d Cir.), *cert. denied*, *Glen Alden Corp. v. Kahan*, 398 U.S. 950 (1970); *Katz v. Carte Blanche*

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Circuit recently held that federal courts have no jurisdiction to hold mini-hearings on the merits.⁶²

Under subdivision (c)(2) "the best notice practicable" of the pendency of a (b)(3) class action is to be sent to class members,⁶³ "including individual notice to all members who can be identified through reasonable effort."⁶⁴ Subdivision (c)(2) further provides that such notice shall inform the class member that he will be included in the class and will be bound by the judgment unless he requests exclusion from the class by a specified date. This type of notice has become known as "opt-out" notice and will be discussed in detail below.

Subdivision (e) repeats the old rule's command that class members must be notified of a proposed dismissal or compromise. The new rule, however, requires such notice for all three types of class actions, whereas the old rule made such notice mandatory only in "true" class actions.

One of the most frequently cited cases decided under new rule 23 is *Eisen v. Carlisle & Jacquelin*,⁶⁵ which arose under the Sherman

Corp., 52 F.R.D. 510 (W.D. Pa. 1971); *Berland v. Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969); *Fogel v. Wolfgang*, 47 F.R.D. 213 (S.D.N.Y. 1969); *Cannon v. Texas Gulf Sulphur Co.*, 47 F.R.D. 60 (S.D.N.Y. 1969); *Mersay v. First Republic Corp.*, 43 F.R.D. 465 (S.D.N.Y. 1968).

62. *Eisen* VI 1016.

63. There has been some dispute whether notice of (b)(1) and (b)(2) actions must be provided to class members. Some courts have said that notice in such actions is discretionary. *See, e.g., Ostapowicz v. Johnson Bronze Co.* 54 F.R.D. 465 (W.D. Pa. 1972). Others have said that due process requires notice, although the trial court may determine the type (published or mailed) and form ("opt-in" or "opt-out") of notice. *See, e.g., Eisen* II 564 (dictum). It is not clear whether the Second Circuit would uphold this dictum in light of its latest *Eisen* decision. *Eisen* VI 1015.

64. The clear language of (c)(2) was not followed by the district court in *Eisen*, *Eisen* IV, where Judge Tyler ordered that individual notice be sent to 5,000 class members picked randomly from an alleged class of 2,000,000. The remaining 1,995,000 class members whose names were known were to receive notice through publication, not only a statutory violation but probably a constitutional one. *See Mullane v. Central Hanover Bank Co.*, 339 U.S. 306 (1950). *See also* note 50 *supra* & accompanying text. Judge Tyler, who had originally ruled against class action status, *Eisen* I, believed he was compelled by the following holding of the circuit court to consider notice by publication: "Without an evidentiary hearing we do not see how this question [of notice by publication] can be answered." *Eisen* II 369. Because the class was so immense, Judge Tyler ordered published notice. The Second Circuit, faced with a growing number of class actions since 1968, rebuked Judge Tyler for misinterpreting its earlier decision, and it held that

[i]f identification of any number of members of the class can readily be made, individual notice to these members must be given and *Eisen* must pay the cost.

If this cannot be done, the case must be dismissed as a class action.

Eisen VI 1015. In view of the tone and language of the circuit court's earlier opinion, one must sympathize with Judge Tyler.

65. *Eisen* I-VI.

Act and the Securities Exchange Act of 1934. Plaintiff brought the action on behalf of himself and all other purchasers and sellers of "odd-lots"⁶⁶ on the New York Stock Exchange, alleging that the defendant brokerage firms had combined and conspired to monopolize the odd-lot trading market and "had fixed the odd-lot differential at an excessive amount"⁶⁷ Plaintiff also claimed that the defendant New York Stock Exchange breached its duties under the Securities Exchange Act of 1934.⁶⁸ District Judge Tyler, in the first *Eisen* case,⁶⁹ dismissed the class action, finding that the common issues did not predominate over the individual ones. Judge Tyler based that finding on the following facts: First, plaintiff made no compelling showing that he qualified as an adequate representative of the class. The opinion noted that more is needed than a mere allegation that one's attorneys are "well-qualified antitrust specialists." A class of possibly hundreds of thousands of members should not be represented by only one plaintiff who has not pleaded with particularity the details of his injury nor has estimated the value of his loss.⁷⁰ Second, the "most serious difficulty" would be notifying such a large class of the pendency of the action. Questioning the constitutionality of notice to the class members by publication, the court saw the cost of individually notifying each class member⁷¹ as an inherent limitation on the action.⁷² Judge Tyler believed that the plaintiff's concept of legally sufficient notice of a class action was so strained that it

raises the suspicion, which may or may not be justified, that [plaintiff, an attorney,] is more interested in notice for the sake of undesirable solicitation of claims than for proper protection of the interests of the other members of the class. . . .⁷³

66. An odd-lot transaction is one involving less than 100 shares. The odd-lot differential is a charge in addition to the brokerage fee which the customer pays to the broker because it is apparently more costly to buy and sell small amounts of stock. See *Eisen* II 559.

67. *Id.*

68. 15 U.S.C. §§ 78f(b), (d), s(a) (1970).

69. *Eisen* I.

70. "Plaintiff in his papers gives no compelling reasons and alleges no facts to support the proposition that he can adequately protect the interests of possibly hundreds of thousands of members of the alleged class except to assert that both of his lawyers are well-qualified antitrust specialists." *Eisen* I 150.

71. *Eisen* estimated there were at least 2,000,000 class members. In its most recent opinion, the Second Circuit believed the class numbered 6,000,000. *Eisen* VI 1008.

72. *Eisen* I 151-52.

73. *Id.* at 152.

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In reversing over Chief Judge Lumbard's bitter dissent, the court of appeals refuted each of Judge Tyler's reasons for denying the class action. Since the court of appeals saw the class action as a "device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group,"⁷⁴ it disagreed with Judge Tyler's finding that one plaintiff with an apparently small claim is unqualified to represent a large class. More is needed to show inadequate representation than the small size of the plaintiff's claim or the large size of the class. Furthermore, the failure of absent class members to intervene in the litigation was cited as an unpersuasive reason for finding a lack of common issues in the case.

Defendants had contended that an individual's reasons for trading in the market or his individual damage claims precluded a predominance of common issues among class members. The circuit court disagreed, finding that "the alleged underlying conspiracy does contain a so-called 'common nucleus of operative facts,'"⁷⁵ and noting that "after an initial finding of liability" individual damage claims of class members might have to be handled in "individual suits for damages."⁷⁶ The opinion advised the trial court that on remand it "should explore the problems which individual class members would be likely to encounter in filing and proving their claims."⁷⁷

On remand, Judge Tyler conducted a *Dolgow v. Anderson* "mini-hearing"⁷⁸ and responded to what seemed to be the Second Circuit's clear desire to give Eisen's action class status. After holding that personal notice of the action need only be sent to a random sample of the class members,⁷⁹ he held that since the class was more likely than not to prevail the defendant must pay 90 per cent of the costs of notifying the class.⁸⁰ Judge Tyler admitted that notice might not reach all

74. Eisen II 563, quoting *Escott v. Barchris Constr. Corp.*, 340 F.2d 731, 733 (2d Cir. 1965), cert. denied, 382 U.S. 816 (1966).

75. Eisen II 566.

76. *Id.*

77. *Id.* at 567.

78. See text accompanying note 59 *supra*.

79. Eisen IV 267-68. Judge Tyler's notice plan contains the following elements: (1) Notice would be sent to all member firms of the New York Stock Exchange and to all commercial banks with large trust departments; (2) notice would be sent to the 2,000 class members who had ten or more transactions during the relevant period; (3) notice would be sent to 5,000 other class members of the 2,000,000, chosen on a random basis; and (4) notice would be published once each month for two consecutive months in the *Wall Street Journal*, the *New York Times*, the *San Francisco Chronicle* and *Examiner*, and the *Los Angeles Times*.

80. Eisen V 573.

class members but found that his proposals would "increase the likelihood of reaching a significant portion of the class."⁸¹ The court's solution to the difficult notice problem was in obvious conflict with rule 23⁸² and so patently unfair to the defendant that it presented serious substantive and procedural due process issues.⁸³

When Judge Tyler's decisions on remand were reviewed after five years experience with "[c]lass actions [which] have sprouted and multiplied like the leaves of the green bay tree."⁸⁴ the same Second Circuit panel reversed Judge Tyler, castigated him for misinterpreting its earlier opinion, and dismissed the class action. The court held that the *Dolgow v. Anderson* "mini-hearing," adopted by Judge Tyler, was not authorized by rule 23 and that the district court, therefore, exceeded its jurisdiction by its

provisional or other makeshift determination of the issues . . . on the merits for the avowed purpose of deciding a collateral matter such as which party is to be required to pay for mailing, publishing or otherwise giving any notice required by law.⁸⁵

Insisting that its earlier opinion did not give Judge Tyler discretion to approve notice proposals when members of the class were easily

81. Eisen IV 267.

82. "[T]he court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." FED. R. CIV. P. 23(c)(2).

83. Requiring defendant to pay the costs of notifying his adversaries of the action against him when there is no hope of reimbursement even if victorious is unprecedented. Judge Tyler's decision to assess defendant 90 percent of the costs was arbitrary and apparently based upon his belief that there was a substantial possibility that defendant was liable. Furthermore, a victorious defendant, after spending large sums notifying the class, would never be certain his victory was *res judicata* against most class members, because they would still have the opportunity to show they did not receive notice of the original action. *Cf. Sertic v. International Bhd. of Carpenters*, 459 F.2d 579 (6th Cir. 1972).

84. Eisen VI 1018.

85. *Id.* at 1015. The court stopped short of holding that the assessment of costs of notice against defendant prior to judgment violated due process. However, the following language indicates the court was prepared to make such a holding:

It is a historical fact that procedural safeguards for the benefit of all litigants constitute some of the most important and salutary protections against oppressions [citing the fifth amendment's due process clause], including oppressions by those whose intentions may be above reproach.

Id. at 1013.

In most cases the so-called tentative findings and conclusions arrived at without the salutary safeguards applicable to all full scale trials on the merits will be extremely prejudicial to one or the other of the parties who bear the brunt of such findings and conclusions, and such prejudice may well be irreparable.

Id. at 1015.

identified, the court held that rule 23 required individual notice to be paid for by plaintiff.⁸⁶ Notice by publication, said the court, “[w]here there are millions of dispersed and unidentifiable members of the class . . . [is] a farce.”⁸⁷ In what must be considered a complete reversal of its earlier interest in experimenting with class action procedures, the circuit court further held that the fluid recovery system,⁸⁸ whereby class members do not recover individually but supposedly benefit through reduced rates in the future, was not authorized by rule 23⁸⁹ or by the due process clause.⁹⁰ The only permissible method of distributing damages is to individual claimants. However, with the six million potential claimants in *Eisen* there was little hope of efficiently proving claims. From another perspective, the court noted that a monumental waste of judicial effort would occur if damages were somehow assessed on behalf of six million members and only a relatively small number bothered to file claims.⁹¹ For the foregoing reasons, Chief Judge Lumbard’s earlier view that the case was unmanageable as a class action was belatedly, albeit reverently, accepted.⁹²

B. State Law—California as a Model

Several recent California Supreme Court decisions are among the most far-reaching class action experiments in the country. It is this writer’s opinion that attempts by state courts such as California’s, to mold the class action through case law into a device for vindicating consumers’ rights have been undertaken without due consideration of many constitutional and procedural questions. Therefore, it is important to analyze several of these recent decisions.⁹³

86. *Id.* at 1009, 1015.

87. *Id.* at 1017.

88. *See* Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967). *See also* West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff’d*, 440 F.2d 1079 (2d Cir. 1971) (affirming fluid recoveries arising out of settlements).

89. *Eisen* VI 1008.

90. *Id.* at 1013, 1015. The court did not explain why fluid recoveries violated due process. Most likely it was felt that an award of damages without proof of individual loss was constitutionally impermissible.

91. *Id.* at 1012. The obvious effect of such a poor class response was not discussed. The class’ attorneys, nonetheless, would receive contingency fees based upon the overall assessment of damages and not merely on the small amount claimed by members.

92. *Id.* at 1016.

93. The reader who is interested in pursuing more fully the history of the development of class actions in California should study the following cases: *La Sala v. American Sav. & Loan Ass’n*, 5 Cal. 3d 864, 489 P.2d 113, 97 Cal. Rptr. 849 (1971);

1. *Daar v. Yellow Cab Co.*⁹⁴ *Daar* was decided pursuant to section 382 of the California Code of Civil Procedure which provides in pertinent part that

[w]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impractical to bring them all before the court, one or more may sue or defend for the benefit of all.⁹⁵

The statute makes no express mention of "class actions," but it has been interpreted to permit them "upon the equitable doctrine of virtual representation."⁹⁶ Prior to *Daar*, this statute had been held to require (1) an ascertainable class and (2) a "well defined community of interest in the questions of law and fact involved"⁹⁷

In *Daar*, plaintiff brought an action for damages on behalf of himself and all users of Yellow Cabs in Los Angeles, alleging that defendant's meters were set in such a manner as to charge passengers more than the rate set by the Los Angeles Public Utilities Commission. In an opinion which ushered in the new era of class actions in California, the supreme court overruled a demurrer and permitted the action to be brought. The court found it unnecessary to identify the individual members of the class or to isolate a common recovery fund; it stated that class members need only come forward to prove individual claims if the liability of the defendant was established.⁹⁸ As a

Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971); Gerhard v. Stephans, 68 Cal. 2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968); *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967); Chance v. Superior Court, 58 Cal. 2d 275, 373 P.2d 849, 23 Cal. Rptr. 761 (1962); Weaver v. Pasadena Tournament of Roses Ass'n, 32 Cal. 2d 833, 198 P.2d 514 (1948); Slakey Bros. Sacramento, Inc. v. Parker, 265 Cal. App. 2d 204, 71 Cal. Rptr. 269 (3d Dist. 1968).

94. 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

95. CAL. CIV. PRO. CODE § 382 (West 1973).

96. *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 703, 433 P.2d 732, 739, 63 Cal. Rptr. 724, 731 (1967).

97. *Id.* at 704, 433 P.2d at 739, 63 Cal. Rptr. at 731.

98. *Id.* at 706, 433 P.2d at 740, 63 Cal. Rptr. at 732. Later in the opinion, the court recognized that most taxi users' claims would be small and users would have no receipts to prove damages. However, the court remarked that

[a]ssuming [the exact amount of overcharge is known to the defendant and can be ascertained therefrom], as we must here [on a demurrer review], no appearance by the individual members of the class will be required to recover the full amount of the overcharges in each count.

Id. at 716, 433 P.2d at 747, 63 Cal. Rptr. at 739.

The Second Circuit held the "fluid recovery" system prophesized in *Daar* to be illegal under rule 23 of the Federal Rules of Civil Procedure and, apparently, unconstitutional under the due process clause of the fifth amendment. Eisen VI.

corollary to its decision that a common fund was unnecessary for recovery, the court ruled that “a common recovery [is not needed] in order to establish a community of interest.”⁹⁹ It indicated that the only purpose of a common recovery requirement would be to insure fair representation of the class—an issue a court could decide without the presence or absence of a common fund.¹⁰⁰

As a result of *Daar*, the requirement of an ascertainable class was merged with the requirement that there exist a “community of interest among the class members in the questions of law and fact involved.”¹⁰¹ In other words, once the court finds a community of interest among certain parties, it necessarily will have ascertained the class.

In reaching its results, the *Daar* court applied a balancing test, weighing the advantages and disadvantages to the litigants and to the court of permitting a class action:

As we are not unmindful that substantial benefits resulting from class litigations, both to the litigants and to the court, should be found before the imposition of a judgment binding on absent parties can be justified, our determination depends upon whether the common questions are sufficiently important to permit adjudication in a class action rather than in a multiplicity of separate suits.¹⁰²

The court then proceeded to balance the following issues: (1) whether, absent a class suit, “a multiplicity of legal actions dealing with identical basic issues will be required in order to permit recovery by each of several thousand taxicab users”;¹⁰³ (2) whether, “absent a class suit, recovery by any of the individual taxicab users is unlikely,”¹⁰⁴ due to the small value of each individual claim; and (3) whether, “absent a class suit, defendant will retain the benefits from its alleged wrongs”¹⁰⁵—a type of unjust enrichment theory.

Unfortunately, the court’s balancing test does not ask the trial court to consider whether a class action, though desirable to the plaintiffs, might be so large and complex as to be burdensome and unmanageable to the court.¹⁰⁶ Nor were procedural and constitutional

99. 67 Cal. 2d at 707, 433 P.2d at 741, 63 Cal. Rptr. at 733.

100. *Id.* at 710, 433 P.2d at 743, 63 Cal. Rptr. at 735.

101. *Id.* at 710-13, 433 P.2d at 743-45, 63 Cal. Rptr. at 735-37.

102. *Id.* at 713, 433 P.2d at 745, 63 Cal. Rptr. at 737.

103. *Id.* at 714-15, 433 P.2d at 746, 63 Cal. Rptr. at 738.

104. *Id.* at 715, 433 P.2d at 746, 63 Cal. Rptr. at 738.

105. *Id.*

106. *See* Eisen I-VI.

problems of notice considered. Nevertheless, the California Supreme Court made it clear that with "proper" notice, the judgment in *Daar* would be binding upon absent class members and preclude any further actions against defendant arising from the same facts.¹⁰⁷

2. *Vasquez v. Superior Court*.¹⁰⁸ In *Vasquez*, the supreme court was squarely faced with the question whether "a group of consumers who [had] bought merchandise under installment contracts [could] maintain a class action seeking rescission of the contracts for fraudulent misrepresentation on behalf of themselves and others similarly situated"¹⁰⁹ Thirty-seven named plaintiffs brought the action on behalf of themselves and others who purchased frozen food and freezers from one of the defendants. The complaint alleged that all of the class members had signed identical contracts creating a community of interest which bound the class members. The crucial problem was whether the individual issues of reliance and misrepresentation were peculiar to each class member and thus predominant. The supreme court overruled the lower courts' sustaining of the demurrer and permitted the class action to proceed.

At the outset, the court considered policy reasons for giving as much leeway as possible to the maintenance of consumer class actions. Since only "informed, sophisticated" consumers understand their rights in business transactions—including the purchase of necessary products—"[p]rotection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society."¹¹⁰

The opinion stressed the importance of deterring potential sellers from cheating and exploiting the consumer.¹¹¹ In addition, it was noted that a consumer class action produces the "salutary by-products" of "aid[ing] legitimate business enterprises by curtailing illegitimate competition, and . . . [of assisting] the judicial process [by eliminating] the burden of multiple litigation involving identical claims."¹¹²

107. 67 Cal. 2d 695, 704-06, 433 P.2d at 739-40, 63 Cal. Rptr. at 731-32.

108. 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

109. *Id.* at 805, 484 P.2d at 966, 94 Cal. Rptr. at 798. Another issue not pertinent here was whether the class action for misrepresentation could be brought against the finance company to whom the installment contracts had been assigned.

110. *Id.* at 808, 484 P.2d at 968, 94 Cal. Rptr. at 800.

111. *Id.*

112. *Id.* at 808, 484 P.2d at 968-69, 94 Cal. Rptr. at 800-01.

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Plaintiffs alleged that defendant's salesmen memorized a standard statement which was recited from memory to each member of the class. The court held that

[i]f plaintiffs can prove their allegations at the trial, an inference that the representations were made to each class member would arise, in which case it would be unnecessary to elicit the testimony of each plaintiff as to whether the representations were in fact made to him.¹¹³

Had the food and freezer sales promotion been conducted strictly through the use of printed material, such as brochures or mailers, the notion that individual proof of misrepresentation is unnecessary would be logical. Although the cases arising under federal securities laws were not cited, they arguably provide some precedent for eliminating proof of individual misrepresentation when promotions are based on written statements.¹¹⁴

It appears that the court's holding shifted the burden of proof: once plaintiff showed that identical sales pitches were memorized, it would become defendant's burden to prove that they were not repeated or that class members did not rely on the statements. However, the opinion in *Vasquez* fails to provide any guidelines to the trial court in the event one of the defendant's salesmen declares that, although he memorized the statement, he seldom recited it. Would such a declaration defeat the inference of a common misrepresentation and thus invalidate the class action at the pleading stage or would it be mere evidence to be considered at the trial? And if the class members do not appear before the court to dispute the salesman's testimony, would such testimony be given conclusive weight?

Noting that "[t]he rule in this state and elsewhere is that it is not necessary to show reliance upon false representations by direct evidence,"¹¹⁵ the court cited Williston for the proposition that "[w]here representations have been made in regard to a material matter and action has been taken, in the absence of evidence showing the contrary, it will be presumed that the representations were relied on."¹¹⁶

113. *Id.* at 812, 484 P.2d at 971, 94 Cal. Rptr. at 803.

114. *See, e.g.,* *Anderson v. Dolgow*, 43 F.R.D. 481 (E.D.N.Y. 1968); Eisen I-VI. It will be argued that while common misrepresentations may be inferred from written statements, reliance on these statements cannot be presumed.

115. 4 Cal. 3d at 814, 484 P.2d at 972, 94 Cal. Rptr. at 804.

116. *Id.* at 814, 484 P.2d at 972, 94 Cal. Rptr. at 804-05, *citing* 12 WILLISTON ON CONTRACTS § 1515 (3d ed. 1970).

None of the cases cited for the rule that indirect evidence may raise a presumption of reliance involved class actions. Assuming, *arguendo*, that all salesmen uttered the same misrepresentations, purchase of a product should not of itself raise a presumption that the purchaser relied on the misrepresentation. Without having the class members before the court, how can the defendant possibly rebut that presumption with evidence that particular class members did not rely on the misrepresentations or would have bought the food and freezers anyway because they thought the transaction was beneficial despite the misrepresentations? Defendants can take depositions from the apparently hundreds of unnamed class members, but with the subsequent decision of *Southern California Edison Co. v. Superior Court*,¹¹⁷ a defendant cannot rely on plaintiff's attorney to produce an unnamed plaintiff for deposition but must subpoena the unnamed plaintiff as though he were a nonparty.¹¹⁸ Furthermore, if defendant finds that one or more of the unnamed parties did not rely on the misrepresentations it would appear that it must continue to depose all unnamed plaintiffs with the hope of eliminating them from the class seriatim. This situation might prolong the litigation indefinitely and would clog the court with subpoenas and possibly motions to strike various unnamed plaintiffs from the class. The desire of the court to evade the realities of the misrepresentation and reliance elements of the case and, instead, to focus on policy reasons for permitting the class action is manifested by its statement that "[f]requently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all."¹¹⁹

3. *La Sala v. American Savings & Loan Association*.¹²⁰ In this case, plaintiffs brought a class action alleging that defendant's trust deeds, which permitted defendant "to accelerate if the borrower execut[ed] a junior encumbrance on the secured property, constituted an invalid restraint upon alienation."¹²¹ After the action was filed, de-

117. 7 Cal. 3d 832, 500 P.2d 621, 103 Cal. Rptr. 709 (1972).

118. *Id.* at 842-43, 500 P.2d at 627-28, 103 Cal. Rptr. at 715-16. It is most likely that *Southern California Edison* would also rule out the more expedient discovery tools of interrogatories, requests for admission, and written deposition since these devices may be addressed only to parties.

119. 4 Cal. 3d at 808, 484 P.2d at 968, 94 Cal. Rptr. at 800.

120. 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971).

121. *Id.* at 868, 489 P.2d at 1115, 97 Cal. Rptr. at 851.

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defendant offered to waive the due-on-encumbrance clause in the named plaintiffs' trust deeds. Although the record does not show that the named plaintiffs accepted the tendered waiver, the trial court dismissed the action holding that "by reason of this waiver the named plaintiffs no longer represented the class."¹²² The court of appeals affirmed the lower court. The class action issue before the supreme court was whether defendant's grant of benefits to the named plaintiffs prior to notification of the pendency of the class action made the named plaintiffs ineligible to represent the class.¹²³ A subsidiary issue was whether plaintiff's contention that the trust deeds were contracts of adhesion precluded a class action because proof of the adhesive character of the trust deeds would require each borrower to take the witness stand.

At the outset the court emphasized that the trial court dismissed the action merely because it had found the plaintiffs unqualified to represent the class—not because a class action was improper in restraint on alienation and adhesion cases. By not discussing restraint on alienation and adhesion problems in class actions, the court apparently held, *sub silentio*, that class suits could be brought in those types of cases. The *Vasquez* rationale that plaintiffs might be able to prove the contracts were adhesive without bringing each borrower before the court was reiterated in *La Sala*:

The terms of the trust deeds used by American and competitors are matters of public record. Through the testimony of American's own officers plaintiffs may be able to prove American's bargaining policy and prowess relative to its borrowers.¹²⁴

While the issue of whom should bear the burden of proof may not be a constitutional one, allowing "matters of public record" to be the basis of a cause of action without offering the actual contracts into evidence "may effectively deprive defendants of their rights to confront and cross-examine adverse witnesses guaranteed by well established principles of procedural due process."¹²⁵

122. *Id.*

123. The substantive issue before the court was whether the due-on-encumbrance clause is an illegal restraint on alienation. On this issue, the court held that "*whenever the borrower's execution of a junior encumbrance does not endanger the lender's security,*" the due-on-encumbrance clause is unenforceable. *Id.* at 877, 489 P.2d at 1121, 97 Cal. Rptr. at 857 (emphasis in original).

124. *Id.*

125. Lobell, *Comments on Vasquez v. Superior Court*, 18 U.C.L.A.L. REV. 1042,

The court observed that the trial court had not found plaintiffs to be inadequate representatives at the time the action was filed. Since a representative owes a fiduciary duty to his class, the court held that a successful personal settlement on behalf of the representative does not divest him of his responsibility to continue the action for the class' benefit. Nevertheless, the case was remanded to the trial court to determine whether the plaintiffs were capable of representing the class. If the trial court finds that the plaintiffs were incapable of adequately and fairly representing the class, it must allow amendment of the complaint. If, after amendment, fair and adequate representation is still lacking, the court must give notice to the class that the action will be dismissed.

The named plaintiffs had encumbered their properties to the defendant six and eleven years, respectively, prior to the filing of the suit. The complaint, however, was brought on behalf of those who had encumbered within four years of the filing of the suit. The four year limitation of the class was arbitrary, since the statute of limitations did not begin running at the time the trust deeds were issued; it commenced running at the time each borrower was threatened with acceleration.¹²⁶ In limiting the class in such a manner, plaintiffs' attorney apparently copied the form of the *Daar* complaint. If the trial court found that the plaintiffs were not proper representatives merely because they were not members of the limited class, plaintiffs could amend to extend the class. Such an amendment would be a tacit admission that at the outset plaintiffs were not members of the class they sought to represent. That admission ought to prevent amendment and require dismissal,¹²⁷ but the court thought the class limitation was a mere technical error. In any case, it observed that if the action were dismissed, plaintiffs might bring a new action on behalf of an extended class. The court ignored the fact that its liberal allowance of

1052 (1971) (footnote omitted). Professor Lobell has reacted strongly to shifting of the burden of proof in *Vasquez*:

Clearly, in suggesting that the falsity of a representation as to each member of the alleged class may be shown by introducing evidence that neither relates nor is necessarily relevant to any one class member, the court has extended traditional concepts of proof.

Id. at 1050-51.

126. 5 Cal. 3d at 875, 489 P.2d at 1119-20, 97 Cal. Rptr. at 855-56.

127. "Dismissal for lack of a representative plaintiff constitutes, in substance, a holding that the suit does not qualify as a class action; hence, notice of the dismissal becomes unnecessary." *Id.* at 872-73, 489 P.2d at 1118, 97 Cal. Rptr. at 854.

amendment might save the action on behalf of class members who had not relied on plaintiffs' class action and whose rights would have been cut off by the running of the statute of limitations in the period between filing of the original action and filing of the new action.¹²⁸

If the plaintiffs properly amend their complaint to include themselves within the class, the trial court could still rule that the benefits offered to the plaintiffs preclude a finding of adequate and fair representation.

In making that determination, the trial court may take into account that the named plaintiffs have already obtained their individual benefits from the action; plaintiffs who have nothing at stake often will not devote sufficient energy to the prosecution of the action; further, the receipt of benefits by the named plaintiffs may sometimes create a conflict of interest between the class and its would-be representatives.¹²⁹

Those guidelines appear to give the trial court complete discretion in deciding the representation issue, and it would not be surprising for the trial court to dismiss the action on the ground that "the named plaintiffs have already obtained their individual benefits from the action"¹³⁰—the very reason the action was originally dismissed. The guidelines do not recognize, however, that in nearly every class action it is not the named plaintiff but the attorney who is actually the class representative. The named plaintiff is the vehicle through whom the attorney gains the opportunity to recover for a class and generate a hefty legal fee. The *La Sala* court's insistence that named plaintiffs and not their attorneys be adequate representatives reveals the unstated fear that class action pleading must not be liberalized to the extent that attorneys would be permitted to proceed without actual plaintiffs. Such a holding would be a license for attorney solicitation

128. *Cf. Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); *Esplin v. Hirshi*, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969); *Escott v. Barchris Constr. Corp.*, 340 F.2d 731 (2d Cir. 1965); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1962); *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 275 F. Supp. 146 (E.D. Pa. 1967); Comment, *Class Actions Under New Rule 23 and Federal Statutes of Limitation: A Study of Conflicting Rationales*, 13 VILL. L. REV. 370 (1968).

129. 5 Cal. 3d at 871-72, 489 P.2d at 1117, 97 Cal. Rptr. at 853; *cf. Rothman v. Gould*, 14 Fed. Rules Serv. 2d 1541 (S.D.N.Y. 1971); *Richland v. Cheatham*, 272 F. Supp. 148 (S.D.N.Y. 1967).

130. 5 Cal. 3d at 871-72, 489 P.2d at 1117, 97 Cal. Rptr. at 853.

of class actions—a violation of various canons,¹³¹ statutes,¹³² and precedents.¹³³

Unfortunately, the fear of solicitation conflicts with the most startling holding in *La Sala*: If the trial court finds that the named plaintiffs do not adequately represent the class, the court must notify the class of the proposed dismissal. Citing by analogy Federal Rule 23(e) and California Civil Code section 1781(f),¹³⁴ the court noted that defendants must not be permitted to avoid class actions merely by settling with plaintiffs. Without that prohibition, defendants could settle seriatim with any class members who joined the action and thus avoid class litigation.

If defendant is permitted to succeed with such revolving door tactics, only members of the class who can afford to initiate or join litigation

131. ABA CANONS OF PROFESSIONAL ETHICS No. 28, states in pertinent part:

It is unprofessional for a lawyer to volunteer to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit . . . or to breed litigation by seeking out . . . those having any other grounds of action in order to secure them as clients

ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(1) prohibits a lawyer, who in an unsolicited manner recommends that an individual should obtain counsel, from representing that layman unless they are friends, relatives, or already have an attorney-client relationship.

132. CAL. BUS. & PROF. CODE § 6129 (West 1962) states:

Every attorney who, either directly or indirectly, buys or is interested in buying evidence of debt or thing in action, with intent to bring suit thereon, is guilty of a misdemeanor.

Cf. id. § 6152.

Rule 2, *Rules of Professional Conduct*, 1 Cal. 3d Rules 51-52 (1970) reads, in part: "A member of the State Bar shall not solicit professional employment" by advertisement or otherwise.

133. *See generally* *Millsberg v. State Bar*, 6 Cal. 3d 65, 490 P.2d 543, 98 Cal. Rptr. 223 (1971). An interesting twist to the class action/solicitation problem is found in *Collins v. Rocha*, 7 Cal. 3d 232, 497 P.2d 225, 102 Cal. Rptr. 1 (1972), where the defendant contended that if the alleged class was ascertainable, plaintiff's counsel should discover the names of the class members and join them as parties. The court rejected that suggestion because of the "ethical inhibition upon solicitation of professional employment." *Id.* at 237 n.5, 497 P.2d at 227 n.5, 102 Cal. Rptr. at 3 n.5.

134. Consumer Legal Remedies Act, CAL. CIV. CODE § 1781(f) (West 1973) states:

A class action shall not be dismissed, settled, or compromised without the approval of the court, and notice of the proposed dismissal, settlement, or compromise shall be given in such manner as the court directs to each member who was given notice pursuant to subdivision (d) and did not request exclusion.

This Act also offers remedies to consumers for 16 enumerated deceptive business practices. *Id.* § 1770.

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will obtain redress; relief for even a portion of the class would compel innumerable appearances by individual plaintiffs.¹³⁵

The court failed to consider the impact of its notice ruling on solicitation. Attorneys now may look for individuals who may be within a potential class. Reluctant to become involved in complicated and prolonged class litigation, these potential plaintiffs may tell the attorney that they wish merely to settle their own claims. The lawyer could bring a class action on behalf of his client and others, although his client would have no interest in the class suit. He might then propose a modest or even generous settlement to the defendant on behalf of his named client which would be accepted by both parties.¹³⁶ If the trial court determined that the client did not adequately represent the class, it would give notice to the class that dismissal is pending. Class members would not have relied to their detriment on the filing of the class action because they had not heard of the action before. Nevertheless, if one class member responded affirmatively to the notice, the entire class would have the benefit of the class action originally created by the attorney.¹³⁷ All of these class members would receive the benefits of the tolling of the statute of limitations with the original complaint, although they did not rely on its filing. It is an inescapable conclusion that if a new named plaintiff came forward, he would be the product of an action and settlement created and proposed by the original plaintiff's attorney.

The court cited California Civil Code section 1781(f) and Fed-

135. 5 Cal. 3d at 873, 489 P.2d at 1118, 97 Cal. Rptr. at 854.

136. Attorneys are obligated to perform the best possible service to their clients. Nevertheless, the hypothetical settlement situation discussed in the text presents a grand opportunity for some lawyers to evade their responsibilities to their named plaintiffs in the face of a potential class action pot of gold for themselves. One author has stated that "perhaps the enthralling prospect of homing in on a large contingent fee is sufficient temptation for some lawyers to abandon forever the opportunities their clients once had to recover substantial fractions of their claims." Franks, *Rule 23—Don Quixote Has a Field Day: Some Ethical Ramifications of Securities Fraud Class Actions*, 46 CHI.-KENT L. REV. 1, 3-4 (1969).

137. In effect, a bizarre combination of opt-out/opt-in notice would be created: If one member opts in, the silence of the other members is presumed to be acquiescence in the action. If no one opts in, the class members' silence will be construed as opting out and their rights will be unaffected by dismissal of the action. It may be argued with some seriousness that class members who do not affirmatively respond to the notice should not be permitted to bring individual actions, since the purpose of the notice is to save the class action, not to stir up litigation. *Cf.* Papilsky v. Barndt, 333 F. Supp. 1084 (S.D.N.Y. 1971), *aff'd*, 466 F.2d 251 (2d Cir. 1972), *cert. denied*, 409 U.S. 1077 (1973).

eral Rule 23(e) as authority for the proposition that the dismissal of a consumer class action due to settlement of the named plaintiff's claim may not be ordered without notification to the class. These two statutes were considered because there existed no controlling California authority.¹³⁸ Even by analogy, however, section 1781(f) is inapposite because it orders notice of pending dismissal to class members "who [were] given [previous] notice [of the action] and did not request exclusion."¹³⁹ Section 1781(f) would appear to support the view that when class members have not been notified of the existence of a class action, they need not be notified of its dismissal.¹⁴⁰

Federal precedents under rule 23(e) are more in line with the *La Sala* holding.¹⁴¹ In a very recent case, however, the United States Supreme Court vacated judgment and remanded a class action to a

138. 5 Cal. 3d at 872, 489 P.2d at 1117, 97 Cal. Rptr. at 853; see *Vasquez v. Superior Court*, 4 Cal. 3d 800, 821, 484 P.2d 964, 977-78, 94 Cal. Rptr. 796, 809-10 (1971), for the proposition that the federal rule is to be utilized in the absence of controlling California authority.

139. CAL. CIV. CODE § 1781(f) (West 1973).

140. It is also provided that a class action may be maintained 30 days after plaintiff has notified defendant of his and of his purported class' claims unless defendant shows he has corrected or offered to correct all of the alleged deceptive business practices. *Id.* § 1782. This section does not prevent the named plaintiff from settling with the defendant, nor does it require the plaintiff to continue the class action. The statute allows plaintiff to represent the class; it does not force him to do so. Section 1782 shows that the legislature was more concerned with providing a tool to allow the individual to settle and withdraw from the action than with forcing him to proceed. Balancing the possibilities for collusion against the desire to provide individual relief, the legislature decided to allow individual settlement and withdrawal as long as the class has no notice of the pendency of the action. For a generally contrary view, see *Reed, Legislating for the Consumer: An Insider's Analysis of the Consumer Legal Remedies Act*, 2 PAC. L.J. 1 (1971).

141.

Although case authority is sparse, the rule appears to be that a suit filed as a class action is "treated as such for purposes of dismissal or compromise, until there is a full determination that the class action is not proper." . . . Thus, the fact that a class action determination has not yet been made in this case does not remove this proposed dismissal from the requirements of Rule 23(e).

Yaffe v. Detroit Steel Corp., 50 F.R.D. 481, 483 (N.D. Ill. 1970) (citations omitted). See also *Dolgow v. Anderson*, 43 F.R.D. 472, 487 (E.D.N.Y. 1968) (discussion of the history of strike suits brought as class actions merely to coerce settlements). But see note 140 *supra* for the view that CAL. CIV. CODE § 1782 (West 1973) legitimizes strike suits in consumer deceptive practices cases.

An amusing but legally questionable case wherein old rule 23(c) was relied on in an action which went to trial in 1967 is *Daugherty v. Ball*, 43 F.R.D. 329 (C.D. Cal. 1967). In that case the court held that notice of dismissal was unnecessary because merger of the defendant corporation with another corporation mooted the action on the merits. It is unfortunate that courts choose to misstate substantive law in order to avoid class actions rather than to confront the procedural difficulties of class actions head-on.

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three-judge district court to determine if the grant of benefits to a welfare claimant mooted a class action brought by that claimant for alleged state violations of federal welfare hearing requirements.¹⁴² Furthermore, the California Supreme Court's comparison of Civil Code section 1781(f) with rule 23(e) is highly questionable.¹⁴³ In *Philadelphia Electric Co. v. Anaconda American Brass Co.*,¹⁴⁴ cited in *La Sala*, the district court faced the issue whether an action must be given retroactive class status to the time the action was filed for the purpose of rule 23(e) notice. Several named plaintiffs in *Anaconda* settled their claims before the class was notified of the action. Various parties to the litigation wanted the court to approve the settlement with the named plaintiffs only, so as to dismiss with prejudice class and individual actions against the settling defendants. The court refused to grant dismissal with prejudice without first notifying the class, even though the class had never received notice of the pendency of the action. The distinction between *Anaconda* and *La Sala* is clear: In *Anaconda* the defendants and settling plaintiffs asked the court to dismiss the action with prejudice so the non-settling class members would be prevented from bringing suit again. The proposed *La Sala* settlement waiver was merely between the named plaintiffs and the defendant; dismissal with prejudice against the class was not requested.

According to the *La Sala* defendant's counsel, there are apparently millions of outstanding encumbrances on which the American Savings and Loan Association is trustee and beneficiary.¹⁴⁵ The cost of merely producing a list of potential class members may be astronomical, without even considering the cost of actually mailing the notice. American does not keep separate records of which trustors have been "threatened"

142. *Indiana Employment Sec. Div. v. Burney*, 409 U.S. 540 (1973) (per curiam). By citing *Bailey v. Patterson*, 369 U.S. 31, 32-33 (1962), the Court implied that when a named plaintiff's claim is mooted, the issue becomes whether that plaintiff has standing to sue for the class. 409 U.S. at 542. No mention was made in *Burney* of rule 23(e) notice of dismissal requirements nor was rule 23(a)(4) adequacy of representation discussed. By basing its remand on the standing question, the Court may be signaling its desire to circumvent rule 23 and lower court decisions regarding settlement and dismissal of class actions.

143. Compare CAL. CIV. CODE § 1781(f) (West 1973), with FED. R. CIV. P. 23(e). "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." *Id.* Note that rule 23(e) does not limit notice of dismissal to those previously notified of the action.

144. 275 F. Supp. 146 (E.D. Pa. 1967).

145. Information supplied by Professor John R. Hetland, counsel for American Savings & Loan Association in the *La Sala* litigation.

with enforcement of their due-on-encumbrance clauses or against whom such clauses have actually been enforced. To obtain a list of potential class members it would be necessary to read every loan file dealing with deeds outstanding at the time of suit or foreclosed or paid off in the four years preceding the suit. Nevertheless, as was the case in the other California decisions discussed above, the supreme court did not order the trial court to include defendant's burden in the substantial benefits balance.

The named plaintiffs in *La Sala* sued for compensatory and punitive damages as well as declaratory relief. The declaratory relief was granted by holding that due-on-encumbrance clauses are invalid absent a showing that the security would be endangered without acceleration. The court was under no obligation to provide compensatory relief to those whose obligations were accelerated or altered prior to its decision. Due-on-encumbrance clauses were traditional in the real estate security business. The defendant could not have supposed they were illegal and should not be forced to litigate damages for clauses enforced years before, especially in the complicated setting of this class action. In its drive to make the class action readily available against corporate defendants, the court has rejected its role of a dispassionate arbiter of legal rights and instead has become a consumer advocate.

II. SOME RATIONALES FOR LIBERALIZATION REBUTTED

In recent years, a much needed awareness of consumer problems has emerged in the United States. It is obvious that one of the tools of "consumerism" is the class action.¹⁴⁶ However, in their drive to make capitalism responsive to the public, the courts have gone far beyond legislative intent without considering the consequences of the widespread use of large class actions.

A. *The Fallacy of Aiding the Small Claimant*

The most often cited purpose for liberalizing class action requirements is the desire to aid the small claimant who would otherwise be

146. See Goldhammer, *The Consumer Class Action in California*, 45 L.A.B. BULL. 235 (1970); Reed, *supra* note 140; Stars, *supra* note 35.

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unable to afford filing his own action.¹⁴⁷ The Second Circuit, for example, said in its earlier *Eisen* opinion

we think it highly unlikely that any one potential plaintiff would have sustained sufficient damages to warrant, as a practical matter, individual prosecution of his claim. Thus the present case appears to fall within that class of cases in which "the interests of individuals in conducting separate lawsuits" are more "theoretic than practical" since "the amounts at stake for individuals (are) * * * so small that separate suits would be impracticable." This belief is reinforced by the fact that there is no other pending litigation dealing with the subject matter of this suit.¹⁴⁸

In another case, the Second Circuit quoted a famous article which concluded that

the type of injury which tends to affect simultaneously the interest of many people is also apt to involve immensely complex facts and intricate law, and redress for it is likely to involve expense totally disproportionate to any of the individual claims.¹⁴⁹

In examining the validity of such an analysis, one might ask whether it is not a mistake to allow a large class action where immensely complex facts and intricate law are involved. The courts have constantly forgotten that complex fact issues are not avoided by permitting the large class action: the day of reckoning will come when individual damage claims are proffered.¹⁵⁰

The most obvious reply to the small claimant theory is that the court is not providing a forum for the frustrated potential plaintiff, but it is creating an unmanageable lawsuit where the small claimant previously had no interest in suing.

Thus, when a multitude of small claimants who would not otherwise sue become, willy-nilly, parties to the suit merely because they ignore

147. See, e.g., *Korn v. Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971), *rev'd*, 456 F.2d 1206 (2d Cir. 1972); *Eisen II*; *Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 345 U.S. 977 (1969); *Katz v. Carte Blanche Corp.*, 53 F.R.D. 539 (W.D. Pa. 1971); *Shulman v. Ritzberg*, 47 F.R.D. 202 (D.D.C. 1969).

148. *Eisen II* 566-67 (citation omitted). It is quite amusing that in its recent *Eisen* opinion, the same Second Circuit panel reinforced its finding that relatively few of the 6,000,000 class members would ever file claims even if the class won by noting that "[n]o claimant in the 6 years of the progress of the action had shown any interest in Eisen's claim." *Eisen VI* 1010.

149. *Green v. Wolf Corp.*, 406 F.2d 291, 296 n.7 (2d Cir. 1968), quoting Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

150. The Second Circuit has recently recognized the potential difficulty in processing large numbers of individual claims. *Eisen VI* 1017.

a notice, and when attorneys are given an incentive to foment litigation and, considering the realities of the situation, to solicit clients with the assistance of the court, the danger exists that the rule will be used to achieve results diametrically opposed to those intended by its draftsmen.¹⁵¹

As Chief Judge Lumbard noted in his earlier dissent in *Eisen*, "[r]ule 23 does not require or contemplate that courts will hear causes of action as class actions merely because they will not get to hear the case any other way."¹⁵²

There is a basic and unsolvable conflict between the primary purpose of rule 23—efficiency—and the desire of class action "liberalizers" to aid small claimants. According to the Advisory Committee Notes,

[s]ubdivision (b) (3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated. . . . [I]t is only where this predominance exists that economies can be achieved by the class action device.¹⁵³

It cannot be argued that liberalized class action procedures increase court efficiency by consolidating claims when plaintiffs have not even considered suing until notice of the class action was received.¹⁵⁴ Moreover, if each potential claim is only a few dollars, administrative costs and attorneys fees may reduce a class member's share to mere pennies.¹⁵⁵ Furthermore, even that amount is subject to diminution if the defendant does not have sufficient resources to satisfy a large judgment.¹⁵⁶ Named plaintiffs who might have had valid and recoverable individual claims may recover nothing when the class action helps to bankrupt a defendant. Finally, whatever small individual recovery is had may be lost when a losing defendant subsequently raises prices to absorb the judgment.

151. Handler, *supra* note 14, at 10.

152. *Eisen* II 572.

153. Advisory Committee Notes, *supra* note 32, at 103.

154. Plaintiffs have often argued that without the benefit of the class action they would not be able to afford bringing individual actions, or joined ones, even if attorneys' fees were later granted to them. Occasionally a court replies in a manner similar to that of Chief Judge Lumbard in *Eisen*. See quote cited in text accompanying note 152 *supra*. "It is not the purpose of the class action to save every suit from dismissal because it is too insignificant to receive its own day in federal court." *Bailey v. Sabine River Auth.*, 54 F.R.D. 42 (W.D. La. 1971).

155. See Handler, *supra* note 14, at 9-10; ACTL REPORT, *supra* note 18, at 21-25.

156. See Franks, *supra* note 136, at 3.

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B. *The In Terrorem Effect*

Another reason given for increasing the availability of the class action is the *in terrorem* effect the action has on potential defendants. It is argued that once businesses realize they can be sued for seemingly insignificant misrepresentations, they will be more likely to deal fairly with consumers.

Class actions have a prophylactic effect, similar to stockholders' derivative actions in the corporate field, providing a potent deterrent against large-scale antisocial behavior. . . . The preventive aspect of class actions in areas of social concern often makes them a potent ally to administrative agencies in the pursuit of goals that are often prospective, rather than restorative and retrospective. The receptacle for many class actions capable of performing these functions is subdivision (b) (3).¹⁵⁷

The therapeutic value of the securities fraud class action was discussed in *Dolgow v. Anderson* in the following manner:

Those who criticize the class action on the grounds that it stirs up plaintiffs and serves only to provide fees for attorneys overlook the fact that we are not dealing with the traditional lawsuit which concerns primarily those litigants before the court. The public's concern with openness and honesty in public securities markets gives it an interest no less significant than that of particular plaintiffs and defendants.¹⁵⁸

Nowhere, however, in the Advisory Committee Notes is there any intimation that the class action should serve the purpose of policing business misconduct or punishing wrongdoers. If there were no undesirable consequences resulting from such "private attorney general" suits, one would be less inclined to argue against the *in terrorem* theory. However, the massive and indiscriminate use of the class action threatens the courts as well as those claimants who need the action to handle claims of substantial pecuniary value.¹⁵⁹ Furthermore,

157. Homburger, *supra* note 25, at 642. See also Goldhammer, *supra* note 146, at 235.

158. 43 F.R.D. 472, 487 (E.D.N.Y. 1968).

159.

The potential recovery in this case—calculated to be at least \$18,000,000 for each alleged violation of the act—would certainly be a powerful deterrent to violation of the Truth in Lending Act. On the other hand, it must be questioned whether the deterrent effect of the rule should be granted such high priority. "The cost in judicial time and consequent impairment of rights

the desired deterrent effect is doubtful in many instances because of uncertainty in the applicable substantive law.¹⁶⁰

The class action is not the only means for providing consumer protection from unscrupulous businessmen. Legislatures can pass statutes which permit attorney's fees to prevailing plaintiffs in consumer cases.¹⁶¹ Legislatures can make more business practices unlawful and can provide more funds for attorney general¹⁶² and agency action. Commentators, however, have voiced their dismay at the ineffectiveness of administrative agencies in dealing with consumer problems.

It is the class suit as an adversary technique that we see as the tool *par excellence* for socio-legal reform, compared to administrative agencies. Human nature being what it is, there is no substitute for self-interest as the motivating power for socio-legal reform.¹⁶³

It must be remembered that the foundation of a class action is that it is "a semi-public remedy administered by the lawyer in private practice." Kalven and Rosenfield, *The Contemporary Function of the*

of other litigants appears too high a price to pay for deterrence which can be effected through alternative means."

Wilcox v. Commerce Bank, 55 F.R.D. 134, 138 (D. Kan. 1972), quoting ACTL REPORT, *supra* note 18, at 22.
160.

If the antitrust laws were precise and crystallized something might be said in favor of such an enormous expansion of potential treble damage liability, speculative as the damages might be. But the fact remains that because there are few "bright lines" in the area, even experts who have devoted their entire professional lives to the practice of antitrust law often find it impossible to advise a client with any degree of certainty whether his contemplated conduct will transgress lawful bounds.

Calderone Enterprises Corp. v. United Artist Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971). For an annotation on this case, see 1972 Trade Cas. 91,327 (1972).

161. The district court in Wilcox v. Commerce Bank, 55 F.R.D. 138 (D. Kan. 1972), pointed out that a class action was unnecessary in a Truth in Lending Act suit because attorneys' fees are provided to a prevailing plaintiff under the Act. A recent amendment to the New Jersey consumer laws requires courts to award reasonable attorneys' fees in consumer actions. N.J. STAT. ANN. §§ 56:8-19 (West Supp. 1974). However, the statute would award such fees in favor of prevailing defendants as well as prevailing plaintiffs. *See also* Eisen VI 1019.

162. In one recent case, the California Attorney General took the lead in consolidating and settling five private class actions and the state's fraud action against Boise Cascade for \$24 million in damages to alleged defrauded land buyers. According to Attorney General Younger: "We have negotiations with other developers on the front burner . . . We'd like to think this will set a pattern for the others . . . and show we are serious." L.A. Times, Dec. 19, 1972, at 1, col. 7. This writer has expressed general displeasure with the use of coercive settlements in class actions. However, where the state is involved in negotiating a criminal fraud settlement the benefits are more likely to reach the class members rather than the attorneys.

163. Louisell, Miller & West, *supra* note 12, at 1064.

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Class Suit, 8 U. Chi. L. Rev. 684, 717 (1941). It is often the only practical effectuation of remedial provisions of legislative policies. The action of Federal agencies entrusted with the enforcement of public policy is limited to compelling compliance with a statute. Private litigation, particularly in the form of a class action, serves to supplement administrative action in furthering the public policy.¹⁶⁴

It has also been pointed out that agency action does not provide the same deterrence as private action, since agencies cannot seek damages from offenders.¹⁶⁵ In California, however, civil penalties are available in governmental consumer fraud actions.¹⁶⁶ Also, where individual

164. *Katz v. Carte Blanche Corp.*, 53 F.R.D. 539, 543 (W.D. Pa. 1971).

165. *Id.* See also Eisen IV 270; *Cherner v. Transiron Elec. Corp.*, 201 F. Supp. 934, 937 (D. Mass. 1962).

166. Under CAL. BUS. & PROF. CODE § 17500 (West 1964), it is illegal to advertise any product or service, or to make any statement designed to induce a business transaction in an untrue or misleading manner. Succeeding sections of the code enumerate the types of untrue and misleading statements which are prohibited. *Id.* §§ 17501 *et seq.* A corollary statute, CAL. CIV. CODE § 3369 (West Supp. 1973), declares these statements to constitute unfair competition. Actions for injunctive relief may be brought by the Attorney General, district attorneys, other local officials "or by any person acting for the interests of itself, its members or the general public." CAL. BUS. & PROF. CODE § 17535 (West 1964). The Attorney General and local officials are empowered to seek civil penalties of \$2,500 for each violation. *Id.* § 1736 (West Supp. 1973). It is conceivable that discovery will lead the plaintiff to multiple, alleged violations, aggregating the potential penalties so that they will be "large enough to be effective against even the largest corporations and chains." Lorenz, *Consumer Fraud and the San Diego District Attorney's Office*, 8 SAN DIEGO L. REV. 47, 50 (1970).

Under the current statutory scheme, funds recovered from such suits or settlements are not disbursed to complaining citizens. However, in a few settlements, the Attorney General has required that trusts be created to benefit private citizens. See, e.g., *People v. Ball Enterprises, Inc.*, Civil No. 185521 (Super. Ct., Sacramento, Cal., Aug. 28, 1968); *People v. Portrait Arts of America*, Civil No. 938005 (L.A., Cal., Super. Ct., Aug. 23, 1968). The California statutory scheme can be amended to resemble a *qui tam* action, which would allow penalties collected under section 17536 to be disbursed to individuals who can prove their claims. See generally Lorenz, *supra*; *Project—The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A.L. REV. 883, 955-67 (1969). The statutory methods avoid the solicitation problem, the notice difficulty and the issue of huge attorneys' fees. If used on a broad scale with trusts created for injured consumers, these statutes might be viable partners of the consumer class action. Cf. *California v. General Motors Corp.*, 431 F.2d 732 (9th Cir. 1970) (improper to remove an action arising under the California code to federal court merely because the defendant's alleged misstatement of prices violated a federal requirement that manufacturers list, among other items, the suggested retail price).

One writer has suggested that the *parens patriae* suit brought by the state on behalf of its citizens (damages to be recovered for the state's use) may be a plausible alternative to the consumer class action. Blecher, *Is the Class Action Rule Doing the Job? (Plaintiff's Viewpoint)*, 55 F.R.D. 365 (1972). In *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), the Supreme Court dealt with the *parens patriae* concept, under which the state alleges a general injury to its economy. The Court rejected this theory on the ground that the state would normally have no standing in antitrust cases unless its own commercial interests had been injured directly. *Id.* at 264. It was suggested,

claims are small and the unmanageable consequences of a class action are large, an injunctive order may offer enough remedial value.¹⁰⁷ In the securities area, Chief Judge Lumbard wrote:

Even if plaintiff is unable to maintain an action, when controversy touches the interest of so many members of the public it is sufficient that Congress has provided a public agency whose duty it is to supervise and regulate such matters. Comment, *Recovery of Damages in Class Actions*, 32 U. Chi. L. Rev. 768, 785 (1965). The matter of proper commissions to be paid by those who engage in odd-lots transactions is within the jurisdiction of the SEC. It has been the subject of study and in due time the commission will take appropriate action.¹⁶⁸

One court has suggested that

the burgeoning in recent years of interest in publicly supported legal service organizations and of private support for legal aid and public interest law firms cannot be disregarded. Many small but important claims heretofore, for purposes of litigation, beyond the pale of financial practicability, have been successfully litigated by such organizations in recent years. Thus an adverse class action decision may ring out as a death knell on far fewer occasions than superficial analysis would suggest.¹⁶⁹

In a 1967 opinion, wherein Judge Will was faced with the question of whether individual damages of class members could be aggregated for the purpose of attaining the minimum federal jurisdictional amount he observed that

however, that a private class action for the alleged antitrust violations (price fixing) would be permitted. *Id.* at 266. Had the *parens patriae* argument been accepted, a state would have been able to sue for damages based on a loss of commerce to its citizens. While the method of setting damages would be guesswork, as it is in so many antitrust cases, the *parens patriae* suit would avoid the difficulties of notifying class members. The *res judicata* effect of this type of suit on potential private plaintiffs was not discussed in the *Standard Oil* case, because it was unnecessary to the decision.

167. In government consumer actions brought under the California statute, CAL. BUS. & PROF. CODE §§ 17500 *et seq.* (West 1964), no bond is required for temporary or permanent injunctions.

168. Eisen II 572 (Lumbard, C.J., dissenting). It has also been said that [t]hose typical consumer class actions in which the Eisen rule would be likely to operate involve areas of federal law in which public enforcement co-exists with private remedies. There is no compelling need to go beyond those inducements to the bar which already encourage a lively pursuit of private enforcement remedies.

Hackett v. General Host Corp., 15 Fed. Rules Serv. 2d 871, 877 (3d Cir. 1972).

169. Hackett v. General Host Corp., 15 Fed. Rules Serv. 2d 871, 875 (3d Cir. 1972).

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[w]ithout the searching and determined scrutiny of gadfly taxpayers, often solitary in their pursuit of justice, many excesses of governmental administration might escape unnoticed. In order for the taxpayer suit to remain effective as a watchdog instrument for the public welfare, the ability of a single individual to maintain such an action must be recognized.¹⁷⁰

However in 1969, the United States Supreme Court rejected the aggregation of claims for federal jurisdictional purposes in *Snyder v. Harris*.¹⁷¹ In so doing, the Court balanced the advantages of more consumer and taxpayer class actions with the intent of the diversity jurisdiction statute¹⁷² and concluded that class action policy could not alter the meaning of the statute.

It is not suggested that if class actions are made more difficult to bring, agencies and attorneys general will fill the gap. It is contended, however, that the class action itself is not capable of handling every conceivable consumer or shareholder claim and new procedures must be devised in order to make the class action an effective tool in truly necessary cases.¹⁷³

III. SOME ABUSES ARISING FROM LIBERALIZATION OF THE CLASS ACTION

A. Solicitation by Attorneys

The potential for widespread solicitation in the wake of *La Sala* was noted above.¹⁷⁴ Even some champions of the expanded availability

170. *Booth v. General Dynamics Corp.*, 264 F. Supp. 465, 471 (N.D. Ill. 1967).

171. 394 U.S. 332 (1969). *See also Zahn v. International Paper Co.*, 94 S. Ct. 505 (1973) (in which the Court refused to permit the named plaintiffs, each of whom alleged damages greater than \$10,000, from representing class members whose damages were less than the jurisdictional minimum).

172. 28 U.S.C. § 1332 (1970).

173. One truly unnecessary case for use of the class action was *Stilson v. Reader's Digest Ass'n*, 28 Cal. App. 3d 270, 104 Cal. Rptr. 581 (1st Dist. 1972), wherein plaintiff brought an action on behalf of himself and all others whose names were allegedly used without permission in a Reader's Digest promotional scheme. Plaintiff sought an injunction and nominal damages on behalf of each class member. The court affirmed the trial court's dismissal of the complaint, saying

[a]lthough an award of but nominal damages to each of the millions of unnamed plaintiffs would impose a heavy penalty upon defendants, it would hardly serve the interest of any plaintiff. Yet to award nominal damages, the court would be required to examine the mental and subjective state of each of the millions of plaintiffs, since in each case such individual appraisal is of the essence of the claim for damages and, indeed, of the cause of action.

Id. at 274, 104 Cal. Rptr. at 583.

174. *See* note 120 *supra* & accompanying text.

of class actions have observed that class actions could become a tool for client solicitation to the detriment of individual litigants, the courts, and the profession itself. According to one plaintiff's lawyer:

Having an evangelical view about enforcement of the antitrust laws, it appeared to me from the outset that Rule 23 would be prostituted for the obvious reason that it had the capacity to produce astronomical fees. Such a legal mechanism encourages strike suits and produces resentment. And that resentment has predictably produced, in turn, the current tidal wave of protest against the rule. And in this whole process my fear is that the antitrust laws, out of which the whole problem originated, will be the innocent bystander victim. . . . Class actions should be permitted *only* in limited circumstances and *only* where there is no better way to insure that a far-reaching antitrust (or securities) violation does not leave its willful perpetrators unjustly enriched.¹⁷⁵

In arguing that legal aid attorneys are free from the solicitation taint because they do not profit from successful class actions, one consumer class action proponent has written that

the economic inducements to a class action may lead [private] attorneys to flirt with violations of the Canons of Professional Ethics¹⁷⁶ or those criminal statutes, i.e. those concerning champerty, which prohibit the solicitation of legal business. Indeed, the possibility that an attorney might be tempted to use the class action as an instrument for the improper procurement of clients or to intimidate defendants into a settlement (the so-called strike suit) has resulted in some courts viewing the class action with considerable disfavor.¹⁷⁷

Not only can an attorney use the class action as a device for soliciting clients, but there is the danger he may do so under the apparent

175. Blecher, *Is the Class Action Rule Doing the Job? (Plaintiff's Viewpoint)*, 55 F.R.D. 365, 366-67 (1972).

176. For an outline of the various applicable canons and statutes, see notes 131-36 *supra*.

177. Starrs, *supra* note 35, at 409. Even the "liberal" class action courts have perceived the problem. In its earlier *Eisen* opinion, the Second Circuit said, "Bearing in mind the desirability of providing small claimants with a forum in which to seek redress for alleged large scale anti-trust violations, we are still reluctant to permit actions to proceed where they are not likely to benefit anyone but the lawyers who bring them." *Eisen II* 567 (footnote omitted). In another case, a district court which granted class action status to several hundred governmental entities denied such status to a subclass of private builders. The court believed the builders' subclass was too large (18,000) and amorphous to expect that the named plaintiff could adequately represent potential competitors in the suit. In addition, the court concluded that notice to the builders would take on "ambulance-chasing connotations." *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 464 (E.D. Pa. 1968).

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egis of the court. In *Korn v. Franchard*,¹⁷⁸ plaintiff's counsel allegedly sent misleading notice to the class without the court's approval and also used a discovered list of defendant's investors to solicit information on a case unrelated to the *Korn* class action. In *Kronenberg v. Hotel Governor Clinton, Inc.*,¹⁷⁹ plaintiff's lawyer allegedly misrepresented certain facts to the judge and included an unauthorized and misleading letter with the court approved notice.

The class action solicitation problem was discussed in depth in *Halverson v. Convenient Food Mart, Inc.*¹⁸⁰ In that case, an association of franchisees hired a lawyer to assert certain rebate rights against their franchisor. Unable to negotiate successfully with the franchisor, the association asked the lawyer to file an antitrust suit. The lawyer drafted a letter for the association president soliciting more franchisees to join both the association and the lawsuit. The trial court dismissed the class action holding that the lawyer's drafting of the solicitation letter constituted either a violation of local federal court rule 39, a breach of the canons of ethics (although no canon was specifically cited), or inadequate representation under Federal Rule 23 (a) (4). The circuit court reversed the dismissal, holding that the only impropriety involved was the attorney's failure to cite the possible disadvantages of the suit in his letter. Since the attorney had been previously retained by the association it was held proper to inform association members of their opportunity to join a mutually rewarding lawsuit. The court also held that the attorney had the right to solicit non-association members for the suit since "[a] lawyer whose client will

178. 456 F.2d 1206 (2d Cir. 1972). The circuit court reversed the trial court's dismissal of the class action, holding in part that in whatever misconduct plaintiff's attorney had engaged, the class action should not be prejudiced since "qualified, experienced and generally able" counsel had replaced the original attorney. *Id.* at 1212.

179. 281 F. Supp. 622 (S.D.N.Y. 1968). Remarking that the court's primary concern should be for the interests of the members of the class, the court permitted the class action to continue in spite of the ethical and legal violations of the attorney. Perhaps the court realized that if it dismissed the action, it might have to notify the class under rule 23(e). *See also* *Taub v. Glickman*, 14 Fed. Rules Serv. 2d 847 (S.D.N.Y. 1970), where the court dismissed a class action because the plaintiff's attorney not only sent out a solicitation letter with the court approved notice, but also failed to appear two consecutive times to answer calendar calls. In *Shulman v. Ritzberg*, 47 F.R.D. 202 (D.D.C. 1969), the court permitted "reverse solicitation," dismissing a class action after one potential class member (and apparently his attorney) personally secured opt-out affidavits from the vast majority of class members who had not yet received notice of the pendency of the action. One may speculate on whether such a large majority of class members would have opted out had not an opponent of the class personally contacted other potential class members.

180. 458 F.2d 927 (7th Cir. 1972).

benefit from joinder of others similarly situated may seek out claimants if his motive is not to secure fees for himself."¹⁸¹ Standing alone this holding would seem to make sense. If the only purpose of a solicitation is to secure a group of plaintiffs large enough to bring an action, and if the lawyer will not receive a larger fee with the expansion of the class, the fear that the class action will be used only to benefit the attorney is unjustified.¹⁸² However, it is not clear whether the attorney in *Halverson* was on a retainer to the association (and hence would not receive a fee based on the overall recovery of the class).

Faced with the solicitation problem, some courts have prohibited counsel from communicating with potential class members until the time for opting out to the court's notice has passed.¹⁸³ In order to avoid the appearance of court participation in the solicitation of class members, the Federal Judicial Center¹⁸⁴ in its *Manual for Complex and Multidistrict Litigation* (1970) has made the following recommendations:

In order to guard against unapproved action of this sort, it is recommended that each court adopt a local rule forbidding unapproved direct or indirect written and oral communications by formal parties or their counsel with potential and actual class members, who are not formal parties, provided that such proposed written communications submitted to and approved by order of court may be distributed to the party or parties designated or described in the Court order of approval.¹⁸⁵

Regardless of the measures taken to eliminate solicitation or to mitigate its impact, the fact remains that "the notification of the class members has as its very basis for existence the bringing into court of a multitude of additional claimants and litigants . . . [although] no

181. *Id.* at 931 (citations omitted).

182. The analysis is similar to the one regarding class actions brought by legal services attorneys. *See* Starrs, *supra* note 35, at 409. *See also In re Lashbrook*, 146 Kan. 752, 73 P.2d 1106 (1937) (only technical violation where lawyer helped plaintiff organize a society to sue insurer, since otherwise plaintiff would not have had the funds to sue alone).

183. *See, e.g., Illinois v. Harper & Row Publ., Inc.*, 301 F. Supp. 484, 494 (N.D. Ill. 1969); *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 463 (E.D. Pa. 1968); *Siegel v. Chicken Delight, Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967).

184. The Federal Judicial Center was established by Congress in 1968 to study the problems of the federal court system.

185. FEDERAL JUDICIAL CENTER, *MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION* 16 (1970).

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substantial sentiment to make claims [may] exist among members of the alleged class."¹⁸⁶

There are several reasons for fearing solicitation in addition to the court congestion and inflated fees problems.¹⁸⁷ First, an attorney interested in representing, settling, and getting paid by a large class may not be sufficiently concerned with his individual client's welfare.¹⁸⁸ The pressure on both sides to settle an otherwise unwieldy class action may produce marvelous fees for plaintiff's attorney, some "windfall" compensation to each member of the class, but far less compensation to the named plaintiff than he would have received had he litigated or settled separately. As Justice Harlan wrote in dissent in *NAACP v. Button*:

Running perhaps even deeper [than the fear of a lawyer's unjustified pecuniary gain] is the desire of the profession, of courts, and of legislatures to prevent any interference with the uniquely personal relationship between lawyer and client and to maintain untrammelled by outside influences the responsibility which the lawyer owes to the courts he serves.¹⁸⁹

A second problem is the converse of the first: Many lawyers bring class actions in an attempt to frighten defendants into settlement disregarding their own fiduciary duties to protect the interests of the entire class under rule 23(e) and state common law counterparts.¹⁹⁰ The adequacy of representation requirement of all class actions is violated in such instances. Uninterested lawyers may tie up the courts for years with class actions which will be dismissed or forgotten in the end. Even if the court finally orders notice of dismissal under *La Sala*

186. Weithers, *Amended Rule 23: A Defendant's Point of View*, 10 B.C. IND. & COMM. L.R. 515, 521-22 (1968). See *Buford v. American Fin. Co.*, 333 F. Supp. 1243 (N.D. Ga. 1971).

187. "[R]egulations which reflect hostility to stirring up litigation have been aimed chiefly at those who urge recourse to the courts for private gain, serving no public interest." *NAACP v. Button*, 371 U.S. 415, 440 (1962).

188. For a general discussion of solicitation, see *id.* at 440 n.19. The possibility of compromising a client's interest in order to represent the class is discussed in connection with *La Sala*. See text accompanying notes 120-145 *supra*.

189. 371 U.S. 415, 460 (1962) (dissenting opinion). While accepting Justice Harlan's viewpoint as it applies generally to solicitation, this author agrees with the majority decision in *Button* that state statutes prohibiting solicitation must not be applied to inhibit the constitutional rights of individual or group litigants.

190. An exception to the fiduciary rule is found in CAL. CIV. CODE § 1782 (West 1973), which encourages a potential plaintiff to threaten a class suit in writing but to withdraw prior to commencement of the action if his own claim has been satisfied. Maintenance of the class action is optional unless the complaint has been filed.

or *Anaconda*,¹⁹¹ the years of delay may have destroyed the interest of any potential named plaintiffs or may have made it unlikely that potential class members have saved appropriate bills or receipts. All of these problems lead to the conclusion that

[t]he principal—perhaps only—beneficiaries have been lawyers. In combining great incentive for unprofessional conduct by lawyers with little potential benefit to their clients, the amended Rule, as interpreted by some District Courts [as well as circuit and state courts], poses serious threats to public confidence in the judiciary and the integrity of the bar.¹⁹²

B. Attorneys' Contingent Fees¹⁹³

It has often been asserted that large attorneys' fees are necessary in order to induce private lawyers to take on the demands of major class actions. "Quite obviously, a major incentive to forceful prosecution is the substantial counsel fee plaintiffs' attorney believes he may be awarded if he is successful."¹⁹⁴ Assuming *arguendo* that the public and the courts need and want more large class actions, one must wonder whether astronomical attorneys' fees are necessary to achieve this. The American College of Trial Lawyers has estimated that while the average recovery of each of the six million potential claimants in the *Eisen* case would be \$3.90, plaintiffs' attorneys are likely to receive

191. *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 42 F.R.D. 324 (E.D. Pa. 1967).

192. *Simon, Class Actions—Useful Tool or Engine of Destruction?*, 55 F.R.D. 375, 377 (1972).

From a viewpoint different than that advanced in this paper, Justice Brennan five years ago wrote the following:

Not only has little been accomplished within the profession to prepare to meet the challenges of today's problems, but the obsolescence of our code of ethics and institutions has been dramatically compounded. An institutional framework designed for the service of the law's traditional clients, with their ready access to legal services, cannot now satisfy the profession's responsibility to the client born of more recent social upheavals, a task that implicates quite different and practical considerations. The profession must, indeed, purge itself of the inbred precepts of another day, rethink its code of practice and reshape its internal mechanisms for meeting its public responsibilities. Else the dangerous cleavage between a public sector of the bar devoted to the developing issues of society and a private sector—the practicing Bar—which ignores them will only widen.

Brennan, *The Responsibilities of the Legal Profession*, 54 A.B.A.J. 121, 122 (1968).

193. See generally Comment, *Attorney's Fees in Individual and Class Action Antitrust Litigation*, 60 CALIF. L. REV. 1656 (1972).

194. *Dolgow v. Anderson*, 43 F.R.D. 472, 495 (E.D.N.Y. 1968). See also Goldhammer, *supra* note 146, at 235.

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\$5,400,000 if they are successful.¹⁹⁵ The College also notes the case of *Newman v. Stein*,¹⁹⁶ in which a \$5,000,000 settlement was approved by the court. Here, attorneys for the plaintiff class "have indicated that they will apply for an allowance in the amount of \$1,250,000."¹⁹⁷

The courts have occasionally expressed concern over the large counsel fees awarded in class actions. In an old rule 23 case, one circuit court disallowed counsel fees totaling \$500,000. In modifying the lower court's judgment for plaintiffs, the circuit court held that 15 percent of the amount recovered, whatever that was found to be, would be a reasonable fee for the attorneys.¹⁹⁸ It is not clear, however, whether the percentage method lowered counsel fees in that case. In another action, the Third Circuit displayed "some concern" in allowing counsel fees totaling 25 percent in a class action which was settled before trial.¹⁹⁹ However, the court deferred to the discretion of the trial judge on that issue and permitted the 25 percent fee.

The *Manual for Complex and Multidistrict Litigation* makes the following recommendations regarding attorneys' fees:

If the action is concluded by settlement, the Court should require a statement of all proposed charges for fees and expenses by the counsel for the class and any subclasses, including the identity of all counsel sharing in the fees. Only reasonable charges for fees and expenses should be authorized upon approval by the Court after notice and hearing. All other such charges should be expressly forbidden by Court order.

If the litigation is concluded by determination on the merits, the Court should expressly provide in judgment, or in one of the earlier class action management orders, for control by the Court of the charges for attorneys' fees and expenses. The cost of the legal representation and of expenses seems to be a proper consideration in determining the identity of the representative parties for the class in an affirmative class action determination under Rule 23.²⁰⁰

195. ACTL REPORT, *supra* note 18, at 24. The ACTL figures assume that all six million potential class members will submit claims.

196. GCH FED. SEC. L. REP. ¶ 3,316 (1971).

197. ACTL REPORT 24.

198. *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 587 (10th Cir. 1962).

199. *Ace Heating & Plumbing Co. v. Crane Co.*, 15 Fed. Rules Serv. 2d 625, 628 (3d Cir. 1971). The settlement totaled \$2,000,000 and the \$500,000 was split among several plaintiffs' and defendants' attorneys who participated in lengthy settlement negotiations.

200. FEDERAL JUDICIAL CENTER, *MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION* 20 (1970).

The manual makes no recommendation regarding what are "reasonable" attorneys' fees and thus is of little use in aiding the courts or proposing policy in this area.²⁰¹

It seems that there is one ramification of the class action attorneys' fees issue which has seldom been discussed by the courts or the commentators. Let us assume that a class action has been settled for a certain sum based on a percentage of what the parties and the court agree would be the approximate aggregate claims of all the members of the class. It is from that settlement figure the attorney's contingency fee is calculated regardless of whether any members of the class return their proofs of claim. If no class member responds to the settlement, the attorney still receives his fee based on the total settlement figure. Since the bulk of the settlement will not be disbursed, defendants suffer only to the extent of the attorney's fees paid. Plaintiff's attorney is well compensated, but class members do not recover because they are not interested or because they cannot prove their claims.

There is no sound reason for awarding attorneys hundreds of thousands or even millions of dollars when the class member "clients" receive virtually nothing. At the conclusion of a lawsuit or settlement, victorious class members may conclude that there is more justice in letting the defendant keep its alleged unlawful gains than in generating large attorneys' fees. In spite of the advent of public interest and neighborhood law firms, as well as the growth of class actions, the legal profession is still looked upon with distrust by certain segments of society.²⁰² Hobbes' statement in *Leviathan* that "[u]nnecessary laws

201. ABA CANONS OF PROFESSIONAL ETHICS No. 12 states in part: "In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade."

202. Justice Powell made the following remarks at an American Bar Association Convention in 1965:

I have found, far and wide, a growing dissatisfaction with the adequacy of the discipline maintained by our profession This dissatisfaction is justified. It is found among thoughtful lawyers . . . and it is widely prevalent among laymen.

Powell, *The President's Annual Address: The State of the Legal Profession*, 51 A.B.A.J. 821, 825 (1965). See also Kaufman, *supra* note 12.

Journalist Martin Mayer told the American Bar Association in 1972 "[y]our work as lawyers is perceived by the public as inefficient, old-fashioned and overpriced." Mayer, *Professional Performance: An Outside View*, 44 N.Y.S.B.J. 441, 443 (1972). Mr. Mayer implied the need for changes in the American legal system, including the use of more administrative tribunals to handle disputes. However, Mr. Mayer offered the following comment:

The ardent young lawyers who hope to change the world seem to me less admirable than their placid and more selfish elders when they speak of their work

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are not good laws; but traps for money”²⁰³ may have a special meaning to a class member who has waited curiously for years to find out whether he will recover any money from “that class action” and then learns that he will receive a few dollars while his lawyer receives a few hundred thousand—or a few million.

If class actions are beneficial to society, then the astronomical contingent fee must be abolished so that class members can take a greater share of the recovery. Where class members have not responded to a settlement or a judgment notice, the attorney should not receive a fee based on the entire judgment. Lowering the fees will not only provide more recovery to the class members who do respond, but will also promote public esteem for the profession. Twenty to twenty-five percent contingency fees may be appropriate in personal injury actions where the individual plaintiff has been grievously injured and his lawyer needs strong inducement to pursue recovery to the utmost. But where the class member would receive \$3.90 if he is able to prove his claim, does it really make sense to award the attorney \$5,400,000? One commentator has noted that in a class action settlement, “virtually no additional work is involved beyond that contemplated for the retained clients.”²⁰⁴ While that may be an understatement, it is certainly true that an increase in the size of the class is not met by a concomitant increase in the amount of work done by the lawyer.²⁰⁵ In comparing the contingency fee in class actions with the contingency fee elsewhere, another commentator has written,

[i]n non-representative suits it has long been held that contingent fee contracts contemplate arm’s length bargaining. Where an attorney volunteers his services in an easy case, the contingent contract is deemed to have been procured by fraud. Counsel may not solicit a contingent fee contract. But even the common ambulance chaser has

in terms of principles they hope to establish rather than clients they hope to serve.

Id. at 447. For a critical layman’s viewpoint, see M. BLOOM, *THE TROUBLE WITH LAWYERS* (1969). For a more laudatory “insider’s” opinion, see Schwartz, *The Legal Profession in the United States: 1960-1980*, 5 J. BEVERLY HILLS B. ASS’N, Sept., 1971, at 60.

203. T. HOBBS, *LEVIATHAN* 227-28 (M. Oakeshott ed. 1935).

204. Simon, *supra* note 192, at 391.

205. ABA CANONS OF PROFESSIONAL ETHICS No. 12 makes the following admonition:

In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client’s ability to pay cannot justify a charge in excess of the value of the service though his poverty may require a less charge, or even none at all.

at least the written consent of all his clients which is more than can be said of the securities fraud attorney [who proceeds on behalf of class members because they have not notified him otherwise].²⁰⁶

The New Jersey Supreme Court recently adopted a rule which limits contingent fees in tort cases.

In any matter where a client's claim for damages is based upon the alleged tortious conduct of another, including products liability claims, and the client is not a subrogee, an attorney shall not contract for, charge, or collect a contingent fee in excess of the following limits:

- (1) 50% on the first \$1000 recovered;
- (2) 40% on the next \$2000 recovered;
- (3) 33 $\frac{1}{3}$ % on the next \$47,000 recovered;
- (4) 20% on the next \$50,000 recovered;
- (5) 10% on any amount recovered over \$100,000²⁰⁷

This author would support the adoption of such a rule in all class actions. Another possibility is for the court to award a lawyer his normal hourly rate times the hours spent on the case plus five percent of the recovery. In any event, ceilings should be set on class action fees. For an interested lawyer, a \$300,000 or \$400,000 possible contingency fee cannot be a great deal less appealing than a \$1,000,000 potential fee—especially if he is imbued with the messianic spirit. Another possibility is to avoid the class action by modifying and extending to consumer actions the now limited policy of awarding attorney's fees, to the prevailing party, subject to the court's discretion.²⁰⁸ While such a policy might increase the number of consumer actions brought, it would eliminate many gargantuan class actions and would reward the individual plaintiff who is truly interested in bringing a lawsuit. To avoid burdening consumer plaintiffs with possible costs if they should lose, the law could prevent the awarding of attorney's fees to successful defendants in such consumer actions.

206. Franks, *supra* note 136, at 8.

207. For contrasting discussions of the contingency fee in general, see Arnould & Corley, *Fee Schedules Should Be Abolished*, 57 A.B.A.J. 655 (1971); Miller & Weil, *Let's Improve, Not Kill, Fee Schedules*, 58 A.B.A.J. 31 (1972).

208. See, e.g., Truth in Lending Act, 15 U.S.C. § 1640(a)(2) (1970); cf. CAL. CIV. CODE § 1717 (West 1973). The New Jersey statute, N.J. STAT. ANN. §§ 56:8-19 (West Supp. 1974), orders the trial judge to award reasonable attorneys' fees in consumer actions, but it appears the fees can be awarded to a prevailing defendant as well as a prevailing plaintiff.

C. Notice Abuses

Rule 23(c)(2) requires that in (b)(3) actions, the court must "direct to the members of the class the best notice practicable," advising class members that they will be excluded from the class if they so request by a specified date. The rule is silent on whether notice must be sent in (b)(1) and (b)(2) actions. The few courts faced with that problem have concluded that notice to the class is a due process requirement but have also concluded that opt-in notice may be used in (b)(1) and (b)(2) actions.²⁰⁹

The Advisory Committee Notes do not explain why the opt-out notice form was chosen for (b)(3) actions. Most likely the committee realized that where relatively small claims were involved, class members would have a tendency to disregard the court notice or to neglect to opt-in. As one court put it: "We would be naive not to recognize that where . . . the maximum amount recoverable on behalf of each of thousands of stockholders would be quite small, those receiving notice would in all probability not have enough incentive to take any action."²¹⁰ The realization that many class members will be uninterested in the litigation should have led the Committee to recommend opt-in notice rather than opt-out.

Failure to opt out cannot be interpreted as interest in the class action. This is shown by the fact that in settled cases, where members of the class get an automatic recovery by responding, most of those who do not opt out do not bother to file claims. The result therefore, is not the consolidation of many viable claims in a single simplified lawsuit, but rather the generation of claims for people who have no interest in pursuing them.²¹¹

In *City & County of Denver v. American Oil Co.*,²¹² only two out of 126 potential class members opted-in when the trial court specifically requested the opt-in notice. In *Korn v. Franchard*, only 233 out of 1,000 potential class members responded to a type of opt-in notice; 77 of those replying requested exclusion.²¹³ In another action, only

209. Eisen II 565; Advisory Committee Notes 107. See also *Ostapowicz v. Johnson Bronze Co.*, 54 F.R.D. 465 (W.D. Pa. 1972); *Katz v. Carte Blanche Corp.*, 53 F.R.D. 539 (W.D. Pa. 1971).

210. *Berland v. Mack*, 48 F.R.D. 121, 129 (S.D.N.Y. 1969).

211. *Simon*, *supra* note 192, at 377-78.

212. 53 F.R.D. 620 (D. Colo. 1971).

213. 50 F.R.D. 57 (S.D.N.Y. 1970), *rev'd*, 456 F.2d 1206 (2d Cir. 1972). In reversing the trial court's denial of class status, the circuit court pointed out that the

15 percent of a class of 90,000 filed a claim in response to a notice of settlement.²¹⁴ The message is clear: the opt-out notice needlessly burdens overcrowded courts by bringing "a multitude of disinterested claimants"²¹⁵ into litigation. The opt-out notice has been condemned as an "unprecedented" extension of the federal courts' jurisdiction over the person by binding nonappearing, nonresident parties without their formal consent.²¹⁶ Rule 23 and its state common law counterparts should be changed to require opt-in instead of opt-out notice or to at least give the trial judge discretion as to which form of notice to order.

Occasionally a feeble effort has been made to force class members to submit proofs of claim in response to notice of the action.²¹⁷ By requiring proofs of claim these courts have attempted to circumvent the opt-out provision of rule 23(c)(2). They have also attempted to gauge the potential liability of the defendant in order to avoid one of the most unfair consequences of rule 23(c)(2)—the defendant cannot suggest a settlement with any degree of accuracy nor can he make a knowledgeable decision whether to settle or proceed with the litigation since he has no idea how many potential claims exist. Nevertheless, the appellate courts have overruled the lower courts' demands

"opt-in proof of claim" was optional and thus could not be relied on as an accurate picture of the class' interest in the suit. It is not clear why the circuit court viewed the proof of claim form as optional; the notice appears to have been phrased in mandatory language. One would assume, therefore, that the court decided it was optional because rule 23(c)(2) calls for opt-out notice; any other notice is outside the scope of the statute. 456 F.2d at 1210.

214. *City of Detroit v. Grinnell Corp.*, Civil No. 68-4026 (S.D.N.Y., Dec. 13, 1971) (unreported decision), *aff'd sub nom. Supermarkets Gen. Corp. v. Grinnell Corp.*, 59 F.R.D. 512 (S.D.N.Y. 1973).

215. ACTL REPORT 11.

216. *School Dist. v. Harper & Row Publ., Inc.*, 267 F. Supp. 1001, 1005 (E.D. Pa. 1967). The order denying class status was vacated in a later consolidated action. *Illinois v. Harper & Row Publ., Inc.*, 301 F. Supp. 484 (N.D. Ill. 1969). In presenting its "jurisdictional extension argument," the earlier opinion was most likely wrong when it said:

By its silence, a proposed class member not only forfeits in previously unfettered right to choose its own forum and to initiate its own litigation, but apparently waives any objections it might have concerning the lack of personal jurisdiction and venue of the Court.

267 F. Supp. at 1005. Other courts have held that a class member may later contest a judgment, for or against him, on the basis that he did not receive notice of the action. *See, e.g., Sertic v. International Bhd. of Carpenters*, 459 F.2d 579 (6th Cir. 1972).

217. *See, e.g., Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452 (E.D. Pa. 1968); *School Dist. v. Harper & Row Publ., Inc.*, 267 F. Supp. 1001 (E.D. Pa. 1967); *cf. Korn v. Franchard Corp.*, 50 F.R.D. 57, 59-60 (S.D.N.Y. 1970). *See also Miller, Problems in Administering Judicial Relief in Class Actions Under Federal Rule 23(b)(3)*, 54 F.R.D. 501 (1972); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1788 (1972).

for proofs of claim in all but one case.²¹⁸ Still, in overruling these demands, the courts have recognized that class members will eventually need to submit such proof if their action is successful. "Until liability is established, however, it would be wasteful for thousands of plaintiffs to search their files for similar data."²¹⁹ Such shortsightedness belies the court's interest in providing the most manageable action under rule 23(b)(3)(D) and in deciding whether individual issues predominate over class issues. It would seem much *more wasteful* to continue a class action for years, incurring huge notice costs and accumulating many hours of court and attorney time, only to find that very few class members can prove damages. In some instances, it is probable that class members will misplace their proofs of claim in the interim between notice and settlement or judgment. Except in cases where it is clear the defendant's records will disclose each class member's damages, rule 23 and its state law counterparts should be changed to permit proof of claim with the opt-in notice.

D. *Altering of Substantive Law*

The *Vasquez*²²⁰ and *Dolgow*²²¹ decisions have altered the substantive law of misrepresentation and fraud. Under those cases, plaintiffs in class actions no longer need prove individual reliance upon alleged misrepresentations.²²² As a result of *Vasquez*, it has become defendant's burden to prove that he is not guilty of misrepresentation. Courts have obfuscated these changes in the substantive law by stating that "procedural difficulties" must not create obstacles when "the class action device is the most practicable method . . . of vindicating . . . claims."²²³ Whether or not a plaintiff must prove reliance upon alleged

218. See, e.g., *Korn v. Franchard Corp.*, 456 F.2d 1206, 1209, 1211 (2d Cir. 1972); *Eisen IV*; *Illinois v. Harper & Row Publ., Inc.*, 301 F. Supp. 484, 491 (N.D. Ill. 1969); cf. *Wainwright v. Kraftco Corp.*, 54 F.R.D. 532 (N.D. Ga. 1972).

219. *Illinois v. Harper & Row Publ., Inc.*, 301 F. Supp. 484, 491 (N.D. Ill. 1969).

220. *Vasquez v. Superior Court*, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

221. *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968).

222. The plaintiffs in *Vasquez* must show that the freezer salesmen memorized a misleading sales pitch—not that they always used the pitch. Purchase of securities at "inflated prices" will be enough proof that shareholders relied on defendants' misleading statement in *Dolgow*. In *Fisher v. Wolfbager*, CGH FED. SEC. L. REP. ¶ 93,235 (W.D. Ky. 1971), the court held that class recovery for a 10b-5 violation would be proper if only the named plaintiffs proved reliance.

223. *Siegel v. Realty Equities Corp.*, 54 F.R.D. 420 (S.D.N.Y. 1972), citing *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968).

misrepresentation is not a procedural difficulty but goes to the very core of the common law tort of fraud. According to Professor Prosser's definition of fraud,

[t]he false representation must have played a material and substantial part in leading the plaintiff to adopt his particular course; and when he was unaware of it at the time that he acted, or it is clear that he was not in any way influenced by it, and would have done the same thing without it for other reasons, his loss is not attributed to the defendant.²²⁴

If the elements of fraud and misrepresentation are changing in order to accommodate the class action, these changes must be brought into the open and discussed, not dismissed as mere "procedural difficulties."²²⁵

The enabling act under which the Federal Rules of Civil Procedure are promulgated provides that the "rules shall not abridge, enlarge or modify any substantive right . . ."²²⁶ The act does not specify whether merely substantive statutory rights are protected,²²⁷ but the decision of the Supreme Court in *Provident Tradesmen Bank & Trust Co. v. Patterson*²²⁸ indicates that the substantive rights protected by the enabling act may be nonstatutory. In two cases decided under the *Erie* doctrine,²²⁹ the Court held that questions regarding burden of proof are substantive issues so that federal courts must follow the burden of proof rules of the forum state as to non-federal causes of

224. W. PROSSER, *LAW OF TORTS* § 103 (3d ed. 1964).

225. One court has realistically evaluated the problem:

It cannot be lightly overlooked that as a class gets larger it may transform into a gigantic burden on the Court's resources beyond its capacity to manage or effectively control. The practical possibility, then, is that the use of the procedural remedy of a class suit might provide an administrative need if not, incentive, to erode and impair observance of the substantive law requirements for compensable claims under the Securities Laws.

Morris v. Buchard, 51 F.R.D. 530, 535 (S.D.N.Y. 1971).

226. 28 U.S.C. § 2072 (1970).

227. See generally Comment, *Class Actions Under New Rule 23 and Federal Statutes of Limitation: A Study of Conflicting Rationales*, 13 VILL. L. REV. 370, 388-92 (1968).

228. 390 U.S. 102 (1967). At issue was whether rule 19(b), which gives a trial court discretion in whether to dismiss or proceed with an action when a party who may be affected by the action cannot be joined because of jurisdictional problems, interfered with the substantive right of an indispensable party to be joined in the action. While questioning whether the right to joinder is a substantive right, Justice Harlan did not dispute the contention that there are nonstatutory substantive rights which the enabling act protects from encroachment by the Federal Rules. *Id.* at 119.

229. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

action.²³⁰ Thus, since burden of proof is considered a substantive issue, certainly the question of whether reliance is necessary for an action in fraud or misrepresentation is also a substantive one.²³¹

The following language in the Advisory Committee Notes is occasionally cited as authority for eliminating the reliance requirement:

[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds of degrees of reliance by the persons to whom they were addressed.²³²

While recognizing that "the kinds or degrees of reliance" might pose problems for a class action, the Advisory Committee totally disregarded the problem of how plaintiff can prove reliance at all without bringing the class members before the court.

Alteration of substantive law in the wake of *Vasquez* can be seen in a recent California case, *Melvin v. First Charter Financial Corp.*²³³ That case involved a class action brought on behalf of junior lienholders against senior lienholders who allegedly solicited and encouraged their common lienees to take out certain property-related loans which were added to the senior encumbrance. The complaint alleged that the seniors had notice of the junior liens and thus the new loans created liens subordinate to the juniors liens. In passing on the class allegation, the court used *Vasquez* type reasoning in holding that plaintiffs may be able to prove defendants had notice of all the junior liens through defendants' own testimony and records. The court went further, however, and held that

if, at a later stage of the proceedings, the court found actual notice would have to be proven on an individual basis, if such appeared

230. *Palmer v. Hoffman*, 318 U.S. 109 (1943); *Cities Serv. Oil Co. v. Dunlop*, 308 U.S. 208 (1939). The fact that these decisions were limited to non-federal causes of action is insignificant. The important fact is that the Court decided burden of proof is a substantive issue. *But see United States v. Montreal Trust Co.*, 35 F.R.D. 216 (S.D.N.Y. 1964).

231. In *Snyder v. Harris*, 394 U.S. 332, 336 (1969), the Court held that individual claims cannot be aggregated for the purpose of establishing federal jurisdiction under 28 U.S.C. § 1332 (1970). *See also Zahn v. International Paper Co.*, 94 S. Ct. 505 (1973).

232. Advisory Committee Notes 103.

233. Civil No. 29692 (1st Dist., Cal., May 30, 1972) (memorandum of opinion).

to be insubstantial compared with the questions which could be proven commonly to all plaintiffs, the court should allow the plaintiffs Eatons to sue on behalf of the class.²³⁴

It is difficult to see how the *Melvin* court could imagine that proof of notice would be an insubstantial requirement since notice of a prior junior lien is the key element which bars a senior lienor from adding a future advance to his original lien.²³⁵

California Civil Code section 1711 can be interpreted to permit a class action for fraud, but the statute still requires that every member of the class must be misled by the alleged wrongdoing.²³⁶ One of the draftsmen of the California Consumers Legal Remedies Act²³⁷ has noted that intent or knowledge on the part of a seller need not be shown in order to prove any of the 16 deceptive business practices proscribed by the Act. Intent and knowledge were excluded "because the inclusion of a scienter requirement would have resurrected all the difficulties inherent in proving common law fraud and correspondingly diminished the utility of the statute."²³⁸ The Consumer Legal Remedies Act, however, does not purport to alter the common law requirement of reliance *by the buyer*.

It may be that in securities cases, it would be impossible to expect the millions of class members individually to prove reliance. But at least they could be required to submit a signed declaration that they relied. In consumer class actions, where the number of class members is often a few hundred or even a few thousand, the signed declarations of reliance would not create large procedural difficulties.²³⁹

234. *Id.* at 11.

235. *See* *Turner v. Lytton Sav. & Loan Ass'n*, 242 Cal. App. 2d 457, 51 Cal. Rptr. 552 (1st Dist. 1966); *Lumber & Builder's Supply Co. v. Ritz*, 134 Cal. App. 607, 25 P.2d 1002 (4th Dist. 1933).

236. "One who practices a deceit with intent to defraud the public, or a particular class of persons, is deemed to have intended to defraud every individual in that class, who is actually misled by the deceit." CAL. CIV. CODE § 1711 (West 1973).

237. *Id.* §§ 1750-84.

238. *Reed*, *supra* note 140, at 12.

239. A hearsay objection to the use of these declarations might arise if a defendant contests plaintiffs' reliance and in return plaintiffs attempt to offer declarations into evidence. That problem is no greater, however, than the problem which will occur under *Vasquez* if defendant offers evidence that class members could not have relied on his salesman's pitches because the memorized pitches were not recited in every case. The court in *Vasquez* would then have to dismiss the class action, further alter the reliance/misrepresentation doctrine, or require some of the unnamed plaintiffs to testify. *But see In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 333 F. Supp. 278 (S.D.N.Y. 1971). "[T]he court cannot conclude that defendants are constitutionally entitled to compel a parade of individual plaintiffs to establish damages." *Id.* at 289.

E. *Due Process and Other Violations*

Mention has already been made of the boilerplate character of many class action complaints.²⁴⁰ The distinctions between boilerplate class action allegations and other boilerplate pleadings, such as inflated damage prayers are obvious. With other boilerplate pleadings, the defendant has the opportunity to discover the accuracy of plaintiff's claims before any settlement negotiations begin. Such discovery is nearly impossible with class actions. The class action defendant does not know the size of the class nor does he have anything but the most extreme estimate of his potential liability. Most reprehensible is the use of the class action allegation to force settlements. Proponents of the pressure device are not bashful in their desire to use the judicial system as an instrument of coercion.

Where, in an individual action, evidence of the group nature of the wrong . . . might be irrelevant and inadmissible, in a class action the reach is broader, encompassing a wider limit for proof. This, of course, improves the chances of success by increasing the defendant's difficulties in replying to the allegations.²⁴¹

The same writer has noted the importance of newspaper publicity of the class complaint not only as a non-court approved method of notifying class members but also of punishing defendants long before trial:

The notoriety of the situation becomes such that newspaper reporting often gives the action front-page billing, and the greater the public awareness of the wrongs, the less the likelihood that the defendant will be able to continue his fraudulent practices. Not only will the defendant's business suffer the consequences of such notoriety, but other injured persons, who either have been hesitant to complain, or ignorant of their right to do so, will step forward to join in the action.²⁴²

With that statement, Mr. Starrs, like so many other class action proponents, appears to miss the basic nature of Anglo-American civil jurisprudence; a defendant is not liable merely because a complaint has been filed against him. Mr. Starrs assumes that every class claim

240. See note 14 *supra* & accompanying text.

241. Starrs, *supra* note 35, at 411. See also Goldhammer, *supra* note 146.

242. Starrs, *supra* note 35, at 410. "In the antitrust context, the effect of notice, rather than to enable a group to bring an action, may merely serve to provide leverage in settlement negotiations and to allow counsel to take advantage of the 'legitimized solicitation of claims.'" Comment, *supra* note 227, at 386-87 (footnote omitted). See also *Cherner v. Transitron Elec. Corp.*, 201 F. Supp. 934 (D. Mass. 1962).

against a business is valid.²⁴³ If it is the publicity of the plaintiffs' side of the controversy which Mr. Starrs deems to be so destructive to defendants, then a defendant's public protestation of innocence is likely to have little effect. The idea that civil cases ought to be tried through press releases, or perhaps through advertising agencies is absurd.

Proponents of the class action as a pressure device answer such criticism with policy arguments similar to the following: American business has used the courts to gouge American consumers for centuries—it is time to retaliate.²⁴⁴ Assuming, *arguendo*, the validity of the premise, the conclusion does not follow. The proved or unproved dishonesty of a single or a million corporations or businessmen over

243. Professor Lobell has remarked:

Instead of being employed to remedy obvious and well defined consumer wrongs, many class actions seek enormous statutory penalties based upon minor variations in form or on claims that are simply trivial and not in the public interest. Such actions are frequently brought against legitimate businesses in the hope of compelling a settlement without regard to the merits of the claim. And, again without regard to its merits, the mere filing of such an action, depending upon its magnitude, may adversely affect the market for a public company's securities as well as the company's ability to obtain financing for necessary activities. In all events, the expense of potential litigation may well ultimately have to be borne by all consumers in the form of higher prices.

Lobell, *supra* note 125, at 1053.

Another commentator has discussed the effect of huge class action claims and adverse publicity:

[T]he aggregate amounts claimed in some alleged class actions are of such magnitude that defendants must often accede to some settlement, regardless of the merits of the claim, and regardless of the difficulties in effecting such a settlement The credit status of an economically sound corporation can be critically affected by the mere existence of such an action.

Weither, *Amended Rule 23: A Defendant's Point of View*, 10 B.C. IND. & COM. L.R. 515, 522 (1968).

In ruling that a hearing would be necessary to determine if a class action would be proper, Judge Weinstein made the following comment:

[T]he notice provisions themselves may prove harmful to defendants since the attendant publicity and its official source may inflate the apparent importance of the action (If this Court were to grant plaintiffs' motion [for class standing], the normal consequence would be that many persons would incorrectly infer that this Court regarded the plaintiffs' complaint as prima facie well-founded). So much of the stock market depends upon faith and reputation that the Court should be reluctant to lend its weight to any unnecessary publicity in connection with a pending lawsuit.

Dolgow v. Anderson, 43 F.R.D. 472, 501 (E.D.N.Y. 1968).

244. Professor Louisell and his collaborators have phrased the argument not in terms of retaliation but in terms of the equalization of power:

[T]he class action is a significant step in equalizing the bargaining power of the consumer with that of the seller. This step helps achieve optimal working of the judicial system for, as so often, the adversary process functions best when the opposing parties are equally powerful.

Louisell, Miller & West, *supra* note 12, at 1062.

the last decade or the last few centuries has no bearing on the liability of any particular defendant against whom an action is filed. Consumer advocates have heralded recent cases and decisions which give to consumers due process rights against creditors' summary attachments or garnishments.²⁴⁵ Ironically, these consumer advocates view publicity and forced settlement as legitimate weapons of the class action, despite their summary nature and lack of due process.²⁴⁶

One of the most distressing trends of the recent class action liberalization has been the ascendance of the courts as class advocates. Professor Homburger has welcomed this trend:

The management of class actions requires a strong and active court which does not content itself with passing on the propriety of the maintenance of the class action, but is willing to share responsibility with the parties in developing the case. Class actions require a new approach to the functions of the courts and parties, reminiscent of the civil law approach where the judge often participates in the proceedings, guiding and assisting the parties, even at the risk of over-involvement. In short, the success of the class action may well depend on the willingness and the capability of the court to work with the parties in planning and organizing the trial in the interest of the efficient and fair adjudication of the litigation. The principle of ade-

245. See, e.g., *Fuentes v. Shevin*, 409 U.S. 902 (1972); *Swarb v. Lennox*, 405 U.S. 191 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969); *Randone v. Appellate Dep't*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971); *Truth in Lending Act*, 15 U.S.C. §§ 1601, 1671-77 (1970).

246. Some lawyers have argued that the class action is always a manageable device because of the strong possibility of settlement:

At the hearing on the class action issue in the *Newark Gasoline* cases, a prominent plaintiffs' antitrust lawyer assured the Court that a class action on behalf of eight million users was manageable because:

I have seen nothing so conducive to settlement of complex litigation as the establishment by the court of a class. When two very competently represented and major litigants have settled, I think it shows this. *It shows that the problem is manageable.* It shows that they feel that this is the way that the litigation can be disposed of by settlement, namely, by having a class; whereas, if there were no class, it would not be disposed of by settlement. So I think that you sow the seed for the possibility of a settlement.

The class action device can be used to coerce a settlement even without filing suit. Most experienced defense counsel have participated in negotiations toward settlement of a dispute at which counsel for the potential plaintiff threatens to file a massive class action to intimidate the potential defendant into a favorable settlement. The weaker the potential plaintiff's claim, the more likely he is to make such a threat since a litigant with a valid claim could not expect as large a recovery as a member of a large class. Where the client in fact has a valid substantial claim, a class action is actually not in his self-interest.

Simon, *supra* note 192, at 390 (footnotes omitted) (emphasis added by Simon).

quacy of representation by the representative parties must be complemented by the principle of adequacy of judicial management in order to justify dispensing with those fundamental rules that guarantee to each party his day in court in person or by a self-chosen representative. . . . A deliberate shift from the normal American mode of the adversary procedure to a procedure more oriented toward court-prosecution would seem justifiable on the ground that the public is vitally interested in the just disposition of controversies involving numerous parties whose claims or defense could not be adjusted fairly and efficiently by the application of more conventional methods.²⁴⁷

Professor Homburger's analysis begs the question. Perhaps it is a mistake to apply judicial resources so fully when, for the most part, individual class members have been slightly injured.²⁴⁸ Furthermore, it may be that "just disposition of controversies" is impossible when American courts alter their traditional role for the benefit of large groups of plaintiffs. For example, the common law tradition of partisan advocates and neutral judges is violated when prior to trial, the court makes a finding that there is a 90 percent probability that the defendant is liable and, therefore, the defendant must pay 90 percent of the costs of notice to the class at the *outset* of the litigation.²⁴⁹ Prejudgment of issues in that manner may be a violation of procedural due process. As the American College of Trial Lawyers' study stated:

[D]ue to the inherently unmanageable nature of certain class actions, some courts have exhibited a tendency to overlook fundamental procedural and substantive rights of the party opposing the class in order to implement what are claimed to be the policies underlying the provisions of Rule 23. Thus the rule becomes workable only in those instances where traditional notions of equity and fairness have been temporarily abandoned. . . .

The courts, thrust into the role of a protector of the public con-

247. Homburger, *supra* note 25, at 657-58.

248. The need to balance the tremendous amount of litigation brought today against the possible small recoveries of certain class suits was discussed above as was the question whether uninterested parties should be brought into litigation through opt-out notice. A startling example of the prejudice in favor of class plaintiffs, even against some plaintiffs' desires, can be found in the Second Circuit's handling of the first *Eisen* appeal:

[D]efendants argued that different members of the class will have varying theories as to what constitutes the 'excessive price,' and other class members may be satisfied with the present price policy. Nonetheless, all members of the class, including those who would otherwise prefer to abide by the status quo, will be helped if the rates are found to be excessive.

Eisen II 562.

249. *Eisen* V 573. See *Ostapowicz v. Johnson Bronze Co.*, 54 F.R.D. 465 (W.D. Pa. 1972) (costs shared equally between defendants and named plaintiffs).

science at the expense of their judicial function, are being forced to relieve these pressures on the basis of practicality rather than sound legal theory.²⁵⁰

A California court has recently said that one reason for allowing a class action in a real property security dispute is because "secured transactions [are] a rather complex area of law."²⁵¹ This implies that where the law is complex it is the court's duty to assist plaintiffs. The desire to "help" class plaintiffs obscures the court's function as an objective fact finder. For example, in the second *Harper & Row* case, while supposedly deciding the issue of the maintenance of the various cases as one class action, Judge Decker made the following statement: "[T]he extensive litigation already commenced illustrates the widespread, but diffuse nature of the injury inflicted upon the public libraries and schools."²⁵² Clearly, Judge Decker decided the merits of the case before he had even passed on the class issue.

In dealing with the problem of serving notice to the class, the early *Harper & Row* court was caught in the dilemma of not wanting plaintiffs' counsel to notify the class, yet not wishing to take upon itself such onerous burdens:

We have little doubt that our appearance of detached impartiality would be seriously impaired by any delegation to plaintiffs' counsel of the Court's duty to frame and serve suitable notice on all class members. Observation and long experience have taught us that the mere service of notice upon the hundreds who would be involved is far more likely to be the beginning, rather than the end, of frustrating complexities. Inquiries inevitably ensue, one upon another, which must be answered or ignored. To answer involves the Court in direct correspondence with a prospective litigant in a pending case, a very questionable judicial undertaking. To ignore an inquiry, which the Court appears to have invited by a notice to a prospective litigant to 'opt-out' or be joined, would cast doubt and suspicion upon the judicial process. . . . We are loath to impose upon the already overburdened clerical facilities of this court the onerous task of preparing and forwarding to all the proposed members of the class the notices required by new Rule 23(c), and the ensuing detail of the consequent record-keeping.²⁵³

250. ACTL REPORT, *supra* note 18, at 161.

251. *Melvin v. First Charter Fin. Corp.*, Civil No. 29692, at 11 (1st Dist. Cal., May 30, 1972) (memorandum of opinion).

252. *Illinois v. Harper & Row Publ., Inc.*, 301 F. Supp. 484, 489 (N.D. Ill. 1969).

253. *School Dist. v. Harper & Row Publ., Inc.*, 267 F. Supp. 1001, 1005 (E.D. Pa. 1967).

Partly because of that dilemma, the court dismissed the class action although its decision was subsequently reversed.²⁵⁴ The court's dilemma has been partially solved by the recommendations of the *Manual for Complex and Multidistrict Litigation*.²⁵⁵ Nevertheless, the first *Harper & Row* court understood the potential for undesirable consequences if it identified itself too strongly with the plaintiffs.²⁵⁶

While admitting that "serious due process questions" arise from the notice procedures of the California Consumers Legal Remedies Act, one of the draftsmen of that Act has written that such questions must be decided in the consumers' benefit since "the purpose of the Act is to protect consumers and provide them with efficient and economical procedures to secure such protection."²⁵⁷ In other words, when consumers bring a class action, the due process rights of the defendants are to be ignored.

CONCLUSION

This article has attempted to demonstrate that the class action is incapable of handling every conceivable consumer or stockholder claim. New procedures must be devised in order to make the class action an effective tool in truly necessary cases. Furthermore, other devices must be created or expanded to provide consumer relief. The class action is not the only means for providing consumer protection from unscrupulous businessmen. Legislatures can pass statutes which permit courts to award attorneys' fees to prevailing plaintiffs in consumer cases. Legislatures can strengthen business practice laws and can provide more funds for agency policing of unlawful commercial conduct. Recent California statutes, for example, have made civil penalties available in governmental consumer fraud actions. In addition, where individual claims are small and the unmanageable consequences of a class action are large, an injunctive order may offer sufficient remedial value.

254. *Illinois v. Harper & Row Publ., Inc.*, 301 F. Supp. 484 (N.D. Ill. 1969).

255. See note 185 *supra* & accompanying text.

256. Other due process violations have been attributed to rule 23, including violations of class members' right to know the conflicts of interest the class attorney may have. Simon, *supra* note 192, at 387. See also MANUAL FOR THE CONDUCT OF PRETRIAL HEARINGS ON CLASS ACTION ISSUES OF THE LOS ANGELES SUPERIOR COURT 19 (1973) wherein named plaintiffs' are required to divulge their potential conflicts of interest. Mr. Simon has commented regarding the bifurcation of liability and damage/reliance trials that "[t]he use of separate trials for liability and damages, either before separate juries or with damages decided by a master, violates defendants' due process rights . . ." Simon, *supra* note 192, at 386.

257. Reed, *supra* note 140, at 16-17.