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RESTITUTION AND MASS ACTIONS: A SOLUTION TO THE PROBLEMS OF CLASS ACTIONS

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INTRODUCTION

A class action, whenever used within the bounds of its application, effectively transforms individual rights into joint and common ones. Whenever a separate and distinct part is small in comparison with the whole it loses much of its significance. An individual in such a situation loses at least part of his right to control his destiny, a right which due process was thought to protect. Accordingly, the effect of class actions, turning comparatively small individual rights into comparatively large joint and common ones, has not been fully recognized because the seemingly revolutionary consequences of that recognition appear to be in conflict with due process.

Without an efficient mechanism to redress mass *de minimus* wrongs by collecting the many small parts together, there would exist the potential for benefit through the commission of a mass of *de minimus* wrongs. By its decision in *Zahn v. International Paper Co.*,[1] the Supreme Court effectively closed the doors of the federal courts to class actions. The federal courts are usually the most appropriate forum for such actions, because of the almost inevitable diversity between the parties.[2] One term later, the Court in *Eisen v. Carlisle*[3]

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[1] 414 U.S. 291 (1973). *Zahn* held that every representative and every member of the class must meet the amount in controversy requirement if there is to be federal diversity jurisdiction under 28 U.S.C. § 1332(a) (1976). *See* notes 11–24 *infra* and accompanying text.

[2] Class actions are often interstate controversies. A denial of access of the federal courts is not a slight inconvenience, it is, in effect, a denial of the right to redress. To the extent that it is important for individuals in diversity suits to be allowed to litigate in federal courts, class actions developed, in part, to save time by consolidating numerous claims rather than having them litigated *seriatim*. They also were intended to function as a procedural device whereby individuals from diverse jurisdictions could mass their *de minimus* claims in one action in federal court.

[3] 417 U.S. 156 (1974). The holding in *Eisen* may be succinctly stated: "Individual notice must be sent to all class members whose names and addresses may be ascertained through

decided that federal courts require that individualized notice be sent to all members of the proposed class who can be identified through reasonable effort.[4] The practical effect of this burdensome requirement is to render such mass wrongs remediless within the private sector.

Those who believe that there should be such a mass remedy chose poor ground upon which to fight. They proceeded against historically entrenched theories of individual rights. To have reached contrary decisions would have seemed to the Court as undermining the entire concept of an individualized amount in controversy for federal jurisdictional purposes and, more importantly, as expropriating from absent individuals, without notice, an asset viewed as specific and particular to them. The goal could have been better accomplished without making a frontal assault upon such basic concepts, and without having to create a novel theory.

Using the *Zahn* and *Eisen* cases as prototypes, this article will endeavor to show how the goal could be met. Had the plaintiff in *Zahn* framed his action so as to allege a joint and common claim against International Paper Company (International) as a class action under Federal Rule of Civil Procedure 23(b)(1) rather than as a Rule (b)(3) class action, he could have avoided the problem of aggregation. Had he sued in restitution rather than in tort; that is, had he sought disgorgement of defendant's unjust gain rather than compensation for the alleged damages caused, he would have had a joint and common claim with the other members of the class. This also would have allowed him to avoid the aggregation barrier.

The problem in *Eisen* was not aggregation but notice. A higher quality of notice is required for Rule (b)(3) class actions than is mandated under Rule (b)(1) or Rule (b)(2) actions. It has not yet been determined whether the less demanding notice standards of Rule (b)(1) and Rule (b)(2) violate constitutional due process. If the plaintiff

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reasonable effort." *Id.* at 173. As to the burden of the cost of notice to the class, the Court stated that "[w]here, as here, the relationship between the parties is truly adversary, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit." *Id.* at 178–79.

Although the facts are relatively straight-forward, the history of the case and the nature of its issues are very complex. In the ultimate Supreme Court decision, Justice Powell, in delivering the Court's opinion, repeated the characterization of *Eisen*, "[i]n its procedural history, at least," as "a 'Frankenstein monster posing as a class action.' " *Id.* at 169 (citing Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 572 (2d Cir. 1968) (*Eisen II*)). For an excellent presentation of the case history and analysis, see Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97 (1975).

[4] 417 U.S. at 173–75 (1974).

in *Eisen* had framed his cause of action to allege a Rule (b)(1) rather than a Rule (b)(3) class action, he might have avoided that higher standard of notice envisioned by the drafters of the federal rules. This benefit could have been secured simply by changing Eisen's pleadings from the tort analogue to restitution.

Constitutional due process, of course, may not be avoided by such a shift in pleadings. If constitutional due process requires the same standard for Rule (b)(1) and Rule (b)(2) class actions as it does for a Rule (b)(3) class action, it may be necessary to avoid proceeding in a representative capacity. Other anomalous problems arise, however, when a party seeks restitution from a mass wrongdoer solely on its own behalf. The consideration of these problems offers insight into the remarkable opportunities for the use of restitution and provides even greater relief from the Supreme Court's position in this area.

The End of the Road

Although it was the Supreme Court's decision in *Zahn* which erected the massive jurisdictional barrier to class actions, that decision can be viewed as an extension of *Snyder v. Harris*.[5] *Snyder* dealt with the jurisdictional amount requirement of 28 U.S.C. § 1332 (1976) as applied to class actions involving separate and distinct claims.[6] The Court was confronted with the issue of "whether separate and distinct claims presented by and for various claimants in a class action may be added together to provide the $10,000 jurisdic-

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[5] 394 U.S. 332, *rehearing denied*, 394 U.S. 1025 (1969).

[6] *Id.* at 333–34. The claims in *Snyder* were presented by two unrelated cases in which a single plaintiff sued "on behalf of himself and 'all others similarly situated.' " *Id.* at 333. In the first, Mrs. Snyder was a shareholder who brought suits against the directors of a life insurance company which had allegedly sold shares of the company's stock for grossly excessive amounts. Under state law, plaintiff contended, the wrongfully extracted excess payments were recoverable and properly distributable among all the company's shareholders. Although lacking the requisite individual $10,000 amount for diversity jurisdiction, plaintiff sought to have her claim aggregated with the approximately four thousand other shareholders of the company stock. Had the district court permitted her to aggregate her claim with those of other shareholders as a class, the amount in controversy would have been well in excess of $1,000,000. *Id.*

In the second case, an individual named Coburn alleged that a corporation marketing natural gas had "billed and illegally collected a city franchise tax from [himself] and others living outside city limits." *Id.* at 334. The plaintiff brought suit in federal district court based upon diversity jurisdiction, although he "alleged damages to himself of only $7.81." *Id.* He sought relief, however, on behalf of the whole class of other customers of the gas company who had been wrongfully charged with the extra amount of tax. *Id.* The complaint alleged that by aggregating the claims of all the overcharged customers, the action would satisfy the $10,000 jurisdictional amount. *Id.*

tional amount in controversy."[7] *Snyder* held that aggregation of the claims was impermissible, and that at least one member of the class seeking federal diversity jurisdiction and Rule 23 status must have a claim which meets the $10,000 jurisdictional amount.[8] It did not necessarily follow that the class would meet the jurisdictional requirement if one or even all of the representatives of the class met the requisite jurisdictional standard. The *Snyder* Court was considering a case in which not a single member of the class alleged individual claims in excess of the $10,000 amount.[9] Under these extreme facts, the Court was able to dispose of the case without having to articulate an immoderate rule for jurisdiction of class actions.[10]

Under the more moderate facts of *Zahn v. International Paper Co.*,[11] however, the Court revealed the full extremity of its position by extending *Snyder* to require that every member of the class who does not meet the amount in controversy requirement must be dismissed from the suit even though other plaintiffs allege jurisdictionally sufficient claims.[12] In *Zahn*, a class action was brought against International by four people on behalf of approximately two hundred other individuals, all of whom owned or rented real estate on the shores of Lake Champlain.[13] The property owners sought damages from International for the harm done to the lake and surrounding properties by pollutants allegedly emitted from International's New York based pulp and paper-making plant.[14] The complaint, claiming

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[7] 394 U.S. at 333. The Supreme Court felt a need to resolve the conflict on this issue that had surfaced between the positions of several of the federal circuit courts. The Eighth Circuit, in the *Snyder* case, 390 F.2d 204 (8th Cir. 1968), and the Fifth Circuit, in Alvarez v. Panamerican Life Ins. Co., 375 F.2d 992 (5th Cir.) *cert denied*, 389 U.S. 827 (1967), held that the potential claims could not be aggregated to meet the jurisdictional requirement. 394 U.S. at 333. The Tenth Circuit, in the *Coburn* case, interpreted the 1966 amendment to Rule 23 of the Federal Rules of Civil Procedure as intending to permit the aggregation of separate and distinct claims for the purpose of satisfying the $10,000 amount requirement in diversity cases. Gas Service Co. v. Coburn, 389 F.2d 831, 834 (10th Cir. 1968). *See* Snyder v. Harris, 394 U.S. at 334.

that aggregation was permitted in all class actions under the amended Rule 23, and instead concluded that the rule's amendment did not change "[t]he doctrine that separate and distinct claims could not be aggregated," which is judge-made law. *Id.*

[9] *See Zahn*, 414 U.S. at 298–99.

[10] *See* Mattis & Mitchell, *The Trouble With Zahn: Progeny of Snyder v. Harris Further Cripples Class Actions*, 53 NEBRASKA L. REV. 137 (1974).

[11] 414 U.S. 291 (1973).

[12] Zahn v. International Paper Co., 414 U.S. 291, 300 (1973). *See* Note, *Class Actions and the Need for Legislative Reappraisal*, 50 NOTRE DAME LAW. 285, 287 (1974).

[13] 414 U.S. at 291–92.

[14] 414 U.S. at 292. The plaintiffs alleged that the discharge into the lake of untreated or inadequately treated waste from International's plant caused large masses of sludge to move

diversity jurisdiction and alleging that the representative plaintiffs had individually suffered damages in excess of the $10,000 jurisdictional amount, was filed in federal district court for the District of Vermont.[15] The representative plaintiffs sought to maintain the suit as a class action under Rule 23(b)(3), on behalf of over two hundred lakefront landowners and lessees.[16] The district court determined that while the named plaintiffs individually met the $10,000 jurisdictional amount requirement, it was "not credible" that each member of the proposed class suffered pollution damage in excess of $10,000.[17] The court therefore concluded that the Supreme Court's decision in *Snyder v. Harris*[18] precluded the jurisdiction of the district court over any member of the proposed class who did not meet the $10,000 jurisdictional requirement.[19] A divided Court of Appeals for the Second Circuit affirmed the district court order that the suit could not proceed as a class action.[20] The Supreme Court affirmed,[21] holding that each and every plaintiff in the class action, whether named or unnamed, whether the representatives of the class or the beneficiaries of unsolicited representation, must individually satisfy the

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through the lake to the shores of the lakefront properties, rendering the property unfit for recreational or other reasonable use and permanently diminished in value. *See* Zahn v. International Paper Co., 469 F.2d 1033, 1034 (2d Cir. 1972).

[15] 53 F.R.D. 430 (D. Vt. 1971). The complaint relied upon 28 U.S.C. § 1332(a) for subject matter jurisdiction, requiring that the matter in controversy be at least $10,000. 28 U.S.C. § 1332(a)(1) (1976).

[16] 53 F.R.D. at 430. Under Rule 23(b)(3), an action may be maintained as a class action when the prerequisites to a class action under Rule 23(a) are met, plus when

> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy . . . .

FED. R. CIV. P. 23(b)(3). For a more thorough discussion of class actions, see notes 56–112 *infra* and accompanying text.

[17] 53 F.R.D. at 431.

[18] 394 U.S. 332 (1969). *See* notes 5–10 *supra* and accompanying text.

[19] 53 F.R.D. at 431–32. The district court, however, reached its conclusion "with great reluctance." *Id.* at 433. It was their concern that

> the requirement that each class member meet the jurisdictional amount clearly undermines the usefulness of Rule 23(b)(3) class suits, because the problem of defining an appropriate class over which the court has jurisdiction will often prove insuperable.

Id. The court recognized that the problem was indeed "insuperable" under the facts of *Zahn*, for they could "find no appropriate class" of *Zahn* plaintiffs over which the court would have jurisdiction. *Id.*

[20] 469 F.2d 1033, 1034 (2d Cir. 1972). The majority of the court was satisfied that the district court had properly interpreted the nonaggregation doctrine of *Snyder* in refusing jurisdiction over the class of plaintiffs as proposed in *Zahn*. *Id.* at 1036.

[21] 414 U.S. 291 (1973).

jurisdictional requirement.[22] The *Zahn* holding stands for the proposition that all class actions must be dismissed if each and every member of the class does not have a claim which meets the jurisdictional requirement of $10,000.[23] This is true even if the total amount of damages for all of the members of the class far exceeds the $10,000 amount.[24]

The jurisdictional requirement examined by the Court in *Zahn* has an extensive and complex history. The amount in controversy requirement has previously been interpreted to permit suits involving multiple plaintiffs in which some or even all of the plaintiffs did not individually have claims which met the requisite amount.[25] In those cases allowing aggregation, it was sufficient that the total sum of all the claims met the jurisdictional requirement. In writing for the majority in *Zahn*, Justice White felt compelled to recognize the possibility of aggregation and to explain the reasons for its inapplicability to the circumstances of that case. Justice White described a "dichotomy that developed in construing and applying" the requirements of diversity and federal question jurisdiction, both of which require that the amount in controversy exceed a jurisdictional minimum.[26] The *Zahn* majority sought to distinguish those multiple plaintiff cases that had allowed aggregation from the proper treatment of *Zahn's* multiple plaintiff action. In the aggregation cases, the plain-

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[22] *Id.* In dismissing the class action in *Zahn*, it was necessary not only to prevent the use of aggregation but also to preclude the application of ancillary jurisdiction. In a dissenting opinion in *Zahn*, Justice Brennan argued that "the practical desirability of sustaining ancillary jurisdiction" over those members of the proposed class who do not meet the traditional jurisdictional requirements was within both the logic and policy of prior Supreme Court decisions. 414 U.S. at 308–09 (Brennan, J., dissenting). *See also* 469 F.2d at 1036–40 (Brennan, J., dissenting); Note, *supra* note 12, at 288.

[23] 414 U.S. at 294–95. The holding was stated succinctly: "Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride on another's coattails.' " *Id.* at 301 (quoting the Second Circuit opinion, 469 F.2d at 1035).

[24] In fact, the complaint originally filed in district court on behalf of the over two hundred landowners and lessees sought compensatory and punitive damages in the total amount of $40,000,000 for pollution damage to their property rights. 469 F.2d at 1034.

[25] *See, e.g.*, Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39, 40–41 (1911).

[26] 414 U.S. at 293–94. Justice White observed that a "classic statement" of this dichotomy was found in *Troy Bank v. G.A. Whitehead*, where the Court stated:

> When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.

Troy Bank v. G.A. Whitehead, 222 U.S. 39, 40–41 (1911).

tiffs were seeking "to enforce a single title or right."[27] The plaintiffs in *Zahn* were seeking damages for separate and distinct wrongs.[28] Although Justice White carefully distinguished the facts of *Zahn* from a joint, common, and undivided action, there was no significant discussion of the policies behind the distinction. If the plaintiffs in *Zahn* had pleaded a joint, common, and unitary action, the jurisdictional amount requirement would not bar individual plaintiffs. It would not be the aggregation of separate claims. The class has one joint, common, and unitary claim, one claim in which all members of the class may have a right to share.

Eisen dealt with the very different problem of managing the adjudication of individual and severable claims. It is the possibility of the loss of individual rights and potential defenses to each individual claim that creates problems with Rule 23(b)(3) class actions. Rule 23(b)(3) class actions require that members of the class must be sent the "best notice practicable under the circumstances, including individual notice to all members of the class who can be identified through reasonable effort."[29] It is in recognition of such problems that the Supreme Court has been careful to insist upon procedures that would limit such class actions to appropriate cases.[30]

In *Eisen*, the Court determined that it would be inappropriate to extinguish the rights of absent class members where appropriate notice would be theoretically possible even though infeasibly expensive.[31] Eisen sought to recover excessive fees charged to millions of odd-lot investors in the New York Stock Market.[32] Proceeding pursuant to the Sherman Act,[33] Eisen also sought treble damages, in-

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[27] *See id.*

[28] 414 U.S. at 292. Obviously, the amount of damages suffered by each property owner in *Zahn* must have varied. Even if there had been a uniform amount of pollution throughout the lake, the effect upon the different lakeshore properties would produce differences in degrees and kinds of damages. The properties differed as to location, size, improvements, and private and commercial usages.

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

[30] *See, e.g.*, Hansberry v. Lee, 311 U.S. 32, 38–46 (1940).

[31] 417 U.S. 156, 173–76 (1974). Because of the prohibitively high cost of providing individual notice and the burden imposed upon the plaintiffs to meet that cost, the remedy of the traditional class action is not effectively available to the individual who lacks the ability to share in the cost of individualized notice.

[32] 41 F.R.D. 147 (S.D.N.Y. 1966). The complaint charged that the respondents, an odd-lot trading company and the New York Stock Exchange, had monopolized odd-lot trading and had charged excessive fees in odd-lot transactions, in violation of antitrust and securities laws. *See* 41 F.R.D. at 148. "Odd-lots" are units of stock of less than 100 shares, which is the established unit of trading. *Id.* The normal trading units on the stock exchanges are in multiples of 100 shares, sometimes called "roundlots." *Id.*

[33] 15 U.S.C. §§ 1, 2 (1976).

junctive relief, and attorneys fees. On behalf of himself and all other members of the class, Eisen claimed damages totalling one hundred-twenty million dollars.[34] He was suing on behalf of a class which was originally believed to consist of nearly four million investors, and was subsequently considered to be as large as six million.[35] Only two million members of the class could be identified with reasonable effort.[36]

It was the notice requirements of Rule 23(c)(2) that served as the basis for the determination that Eisen's class action could not be litigated.[37] After a long and involved procedural battle, the case was remanded to the district court for an evidentiary hearing on the issues of notice and manageability.[38] The Second Circuit had recognized that maintenance of Eisen's class action was jeopardized by the due process requirements of individualized notice as set forth in *Mullane v. Central Hanover Bank*.[39] The district court's hearing would have to determine which members of the class could be identified through reasonable effort so that they could receive individualized notice.[40]

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[34] 52 F.R.D. 253, 257 (S.D.N.Y. 1971). Obviously, the damages varied with each investor, depending upon their own particular transactions. For example, while Eisen's own claim was for seventy dollars, the damages for the average investor was approximately six dollars. *Id.* at 257–58. Because the action was based upon the Sherman Act, and not upon diversity jurisdiction, the $10,000 jurisdictional amount requirement was not in issue.

[35] *Id.* at 257.

[36] *Id.*

[37] 41 F.R.D. 147, 151 (S.D.N.Y. 1966). The rule requires "the best notice practicable" to the class, including an explanation to the class members of the suit's binding nature unless they specifically opt out. *See id.* In full, Rule 23(c)(2) reads as follows:

> In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

FED. R. CIV. P. 23(c)(2).

[38] 391 F.2d 555, 570 (2d Cir. 1968).

[39] 339 U.S. 306 (1950). The Supreme Court in *Mullane* stated that:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id. at 314.

[40] 391 F.2d 555, 568 (2d Cir. 1968). The cost of mail notice was estimated at $400,000. Eisen argued that since requiring such notice would foreclose all opportunity for relief, it should be deemed impracticable under Rule 23(c)(2). *Id.*

The district court determined that *Eisen* did not present serious manageability problems.[41] The court emphasized the importance of contemporary antitrust, consumer and environmental litigation in dictating a notice resolution which both protected class interests and did not impose "an insuperable tariff on prosecution of the case."[42] The court did not, however, decide the question of who should bear the notice expense,[43] although in *dictum* it indicated that if evidence showed that Eisen could ultimately succeed, a substantial cost burden would be borne by defendants.[44] Judge Tyler instead ruled that a preliminary hearing would be held to determine allocation of notice costs.[45]

At the ensuing hearing, the parties were afforded the opportunity to present evidence showing the likelihood that one party or the other would prevail at trial.[46] The district court, through Judge Tyler, ruled that Eisen was more than likely to prevail on his claim and therefore required defendants to pay ninety percent of the notice costs, with one-half of the burden to be borne by the New York Stock Exchange and one-half by the odd-lot dealers.[47] Upon appeal of the district court's order, the Second Circuit ruled that the reliance on publication notice would be violative of the Rule 23(c)(2) requirement of individual notice to reasonably identifiable class members.[48] The

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[41] 52 F.R.D. 253, 261–65 (S.D.N.Y. 1971). Although printing, paperwork, publication and postage costs were revised to $500,000, the court was satisfied that the other mechanics of administering the suit, such as estimating damages, the intervention of other class members, and the filing of claims, were resolvable without the appointment of a special master. *Id.* at 263.

[42] 52 F.R.D. at 266–67. The district court required mail notice to two thousand members with ten or more transactions during the relevant time period, and to five thousand members selected at random from the approximately two million identifiable persons and firms. *Id.* at 267. Publication notice in the financial sections of four major New York and California newspapers was also required "once each month for two consecutive months." *Id.* at 268. It was reasoned that although these notice devices were "somewhat arbitrary," they would "fairly accommodate the interests of both the class and the defendants." *Id.*

[43] *Id.* at 269.

[44] *Id.* at 270–72.

[45] *Id.* at 271. The district court concluded that "the most efficient way for the court to become sufficiently aware of the merits of plaintiff's claims to make a reasoned decision on the cost of notice is to hold a preliminary hearing on the merits similar to that originally suggested in *Dolgow v. Anderson*, [43 F.R.D. 472, 501–02 (E.D.N.Y. 1968)]." *Id.*

[46] 54 F.R.D. 565, 567 (S.D.N.Y. 1972). According to the court, if after this preliminary "mini-hearing" it was satisfied that "the evidence showed that the '. . . chances of ultimate success of plaintiff and the class were sustained,' defendants would be required to pay all or part of the costs of notice." *Id.* at 566–67 (quoting Dolgow v. Anderson, 438 F.2d 825, 827 (2d Cir. 1971)) (citation omitted).

[47] 54 F.R.D. at 567, 573. The court's order concluded that "[t]he remaining 10%, which represents the 'hazards of litigation,' must be put up by plaintiff." *Id.*

[48] 479 F.2d 1005, 1008 (2d Cir. 1973).

court of appeals further stated that the district court had no authority to conduct a preliminary hearing on the merits for the purpose of determining the proper allocation of notice costs.[49] In any event, the court concluded, the entire expense should fall on Eisen as representative plaintiff. Eisen's suit was dismissed as unmanageable under Rule 23(b)(3).[50] It was subsequent to this holding that the Supreme Court in *Eisen* decided that the notice requirements of Rule 23(c)(2) had not been met,[51] and that notice costs must properly be imposed on petitioner and not on defendants.[52]

The Supreme Court, by its decisions in *Zahn* and *Eisen*, has virtually removed the availability of class actions as a device for the resolution of *de minimus* mass wrongs in the federal courts. At the core of the management dispute in *Eisen* was the contention that notice procedures should not be prohibitively cumbersome. Nevertheless, in Eisen's case the price of the privilege to litigate on the merits would have amounted to hundreds of thousands of dollars, even though the district court estimated Eisen's chances of prevailing on the merits to be substantial. The Supreme Court decided that the notice procedures of Rule 23(b)(3) required that the representatives of the class must bear the cost burden of notifying all identifiable members of the class, despite the prohibitive effect of the cost burden and regardless of petitioner's encouraging chances of ultimate victory.

The Deterioration of Class Actions

If *Zahn* and *Eisen* do signify the demise of class actions, the device had already experienced substantial deterioration. The Supreme Court's restrictive decision could not have greatly unexpected, as *Snyder v. Harris* had clearly indicated the court's direction.[53] Class actions have an extensive and erratic history which is reflected in

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[49] *Id.* at 1015–16.

[50] *Id.* at 1016–18.

[51] 417 U.S. at 173–77. *See* notes 37–39 *supra* and accompanying text.

[52] 417 U.S. at 177–79.

[53] Professor Wright has stated:

> [T]he Supreme Court, which had given such a hospitable reading to the 1966 amendment of Rule 19, has considerably lessened the usefulness of amended Rule 23 by its decision in *Snyder v. Harris*, in which it held that the old conceptualisms that it was sought to discard are still controlling in class actions in determining the amount in controversy.

Wright, *Class Actions*, 47 F.R.D. 169, 171 (1969) (footnotes omitted). *See generally* Strausberg, *Class Actions And Jurisdictional Amount: Access to a Federal Forum—A Post Snyder v. Harris Analysis*, 22 AM. U.L. REV. 79 (1972).

both legislative and judicial history.[54] Virtually all of the turmoil is directed toward the problems of applying class actions and not opposition to or disagreement with the purpose of or need for the device.[55]

The use of the class action device is not a recent development.[56] Whenever mass wrongs exist there is a need for a procedure which will both redress the individual injuries which comprise the mass and promote judicial economy.[57] Mass suits originated as an expansion of the English equity rule which required the joinder of all interested persons.[58] The English chancery courts permitted an action by or against representative parties where there were numerous persons involved who shared a joint interest in the question being adjudicated and whose interests could be adequately represented by the named parties.[59] If all three conditions were met, the judgment was binding upon all members of the group.[60] When the device was initially adopted in the United States, however, it had no such binding effect.[61] Equity Rule 48, one of the earliest rules governing class

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[54] *See, e.g.*, Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the Class Action Problem*, 92 HARV. L. REV. 664 (1979).

[55] Class actions serve three important functions: lessening court congestion, eliminating inconsistent determinations by different courts, and providing a vehicle for redressing small injuries to numerous persons. Modern society seems to be in increasing need of the benefits of the device. Nonetheless, the problems associated with the device have grown proportionately with the benefits. Controversy has centered on procedural questions; namely, the adequacy of representation, notice requirements, methods of discovery, and the common question requirement. For an early discussion of the need for class suits and their inherent problems, see Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941). Professor Kaplan, in a discussion of the 1966 federal rules amendments, has examined the ambiguities of the original rule 23 and the difficulties courts have encountered in applying the rule. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1)*, 81 HARV. L. REV. 356, 375–400 (1967). *See* Ford, *Federal Rule 23: A Device For Aiding the Small Claimant*, 10 B.C. INDUS. & COM. L. REV. 501 (1969).

[56] Professor Chafee has traced the use of the device back as far as 1676. Z. CHAFEE, SOME PROBLEMS IN EQUITY 201 n.6 (1950).

[57] There is a class of cases in the private sector for which we must develop a procedure to redress certain mass wrongs, or else the individual wrongs which comprise the mass will go unredressed. Class actions are especially appropriate when the injured are in a poor position to seek redress, whether because they lack sufficient knowledge of their means of redress or because their means of redress are prohibitively expensive. Kalven & Rosenfield, *supra* note 55, at 686 (1941). *See also* note 111 *infra* and accompanying text.

[58] Note, *Federal Civil Procedure—Aggregation of Claims*, 17 LOY. L. REV. 187, 188 (1970).

[59] J. COUND, J. FRIEDENTHAL & A. MILLER, CIVIL PROCEDURE 566–71 (2d ed. 1974). Chancery was most able to effectively, inexpensively, and conveniently handle mass suits because chancery "was accustomed to [handling] polygonal controversies." Z. CHAFEE, *supra* note 56, at 201.

[60] J. COUND, *supra* note 60, at 566.

[61] Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589, 590 (1974).

actions in America, contained a clause limiting the judgment's binding effect solely to the rights and claims of present parties.[62] In 1912, Equity Rule 38 replaced Equity Rule 48.[63] Rule 38 allowed one or more persons to sue or defend for the entirety where "the question [was] one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court."[64] The new rule did not incorporate the limiting clause, presumably to establish the decree as binding upon all members of the group, including absent members.[65]

Mass actions are both important and troublesome, not because of the wide variety of causes of action for which they may be brought, but because of the large number of people potentially involved.[66] Virtually all the problems of modern class actions, as well as their effectiveness, accrued after the judgment became binding upon absent members of the class.[67] This ironic development results from the conflict between the inherent benefit of class actions on the one hand,[68] and the need to protect those who are being involuntarily represented on the other. Contemporary judicial concern with notice reflects this dichotomy.[69]

Just as the problem of notice originated early in the evolution of class suits, so too did the concept of aggregation.[70] Aggregation is the practice of grouping claims together in order to obtain the necessary jurisdictional monetary base. Traditionally, in an action involving

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[62] Equity Rule 48 provided in full:

> Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all of the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

Id.

[63] 226 U.S. 629 (1912).

[64] *Id.* at 659.

[65] *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 928–29 (1958). On the eve of the adoption of the Federal Rules of Civil Procedure, the Supreme Court apparently limited the binding effect of judgments rendered pursuant to Equity Rule 38 to absentees' interests in the property within the jurisdiction of the court. *See* Christopher v. Brusselback, 302 U.S. 500, 505 (1938).

[66] Kaplan, *supra* note 55, at 376.

[67] *Hansberry v. Lee* is one of the leading cases which examined the concept of res judicata as applicable to class actions. 311 U.S. 32 (1940).

[68] *See* note 55 *supra* and accompanying text.

[69] *See generally* Dam, *supra* note 3.

[70] Oliver v. Alexander, 31 U.S. (6 Pet.) 143 (1832). The issue in *Oliver*, seen as one of "great practical importance," was whether the jurisdictional minimum could be fulfilled by the "aggregate" amount in controversy. *Id.* at 145.

multiple plaintiffs each had to satisfy the requisite jurisdictional amount in controversy.[71] The Supreme Court qualified this rule in *Shield v. Thomas.*[72] The plaintiffs in *Shield* were the representatives of an intestate who sued Shield.[73] None of the individual plaintiffs met the jurisdictional amount.[74] Nonetheless, the court decided that the plaintiffs had a common, undivided interest in the claim.[75] The sum due to the representatives of the deceased collectively was the matter in dispute.[76] Therefore, the amount in controversy requirement was fulfilled.[77] *Troy Bank v. Whitehead* was one of the principal decisions which distinguished between those multiparty claims which are joint and those which are separate and distinct.[78] Five years later, this distinction was firmly established in *Pinel v. Pinel.*[79] The Court in *Pinel* acknowledged that where "two or more plaintiffs" with "separate and distinct" claims unite in a single action "it is essential that the demand of each be of the requisite jurisdictional amount," but where "several plaintiffs unite to enforce a single title or right" in which they possess a common, undivided interest "it is enough if their interests collectively equal the jurisdictional amount."[80] This rule, which became known as the *Pinel* doctrine, established that the right to aggregate varies according to the type of class action.[81]

By 1938 class actions were still relatively rare, certainly rare enough to call for encouragement and support.[82] In a major effort to effectuate mass suits, Equity Rule 38 was radically revised and incorporated into the Federal Rules of Civil Procedure as Rule 23.[83] The Federal Rules merged law and equity and the new class action applied to all actions whether legal or equitable.[84] The Rule itself

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[71] Oliver v. Alexander, 31 U.S. (6 Pet.) 143 (1832), is the principal case establishing this rule.

[72] 58 U.S. (17 How.) 2 (1854).

[73] *Id.* at 3.

[74] *Id.*

[75] *Id.* at 4.

[76] *Id.*

[77] *Id.*

[78] 222 U.S. at 40–41. The court found that the sum in dispute exceeded the jurisdictional minimum. It held that where several plaintiffs bring an action in equity to enforce a vendor's lien, they possess a common, undivided interest. "Thus, while their claims under the notes were separate . . . their claim under the vendor's lien was . . . undivided." *Id.* at 41.

[79] 240 U.S. 594 (1916).

[80] *Id.* at 596.

[81] C. WRIGHT, LAW OF FEDERAL COURTS 122 (2d ed. 1970).

[82] Z. CHAFEE, *supra* note 56, at 199.

[83] 3B MOORE'S FEDERAL PRACTICE ¶ 23.01[2] (2d ed. 1976).

[84] *Id.*

set forth three distinct types of class actions: true, hybrid, and spurious.[85] A true class action existed where there was a joint and common claim among the members of the class.[86] It entailed a unity of interest, such as a trust fund, between the members of the class.[87] In fact, the courts often determined whether true class actions existed depending upon the "presence of a fund."[88] Where the cause of action encompassed a series of separate and distinct claims on behalf of individual class members, it was denominated either hybrid or spurious.[89] A hybrid class action required a mutuality of interest in the questions involved.[90] The rights of the individual class members, however, were several.[91] The spurious class suit was often viewed as a permissive joinder device wherein numerous persons held claims or defenses grounded in a common question of law or fact.[92] The ability to differentiate between these classifications was essential since significant procedural consequences attached to each.[93] The matter of aggregation continued to be governed by the *Pinel* doctrine.[94] Therefore, only in the true class action was aggregation permissible.[95] In both hybrid and spurious class suits, the claim of each class member appearing on record as an original party had to equal or exceed the amount in controversy requirement.[96]

It was frequently arduous to apply the conceptual criteria which distinguished these classifications to the classes seeking relief. Be-

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[85] 3B MOORE'S FEDERAL PRACTICE, *supra* note 83, at ¶ 23.08(1). *See generally* Moore, *Federal Rules of Civil Procedure: Some Problems Raised By the Preliminary Draft*, 25 GEO. L. REV. 551, 570–76 (1937).

[86] Rule 23(a)(1) provided that a true class action existed where the right sought to be enforced by or against the class was "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." 1 F.R.D. XCIII (1941).

[87] 3B MOORE'S FEDERAL PRACTICE, *supra* note 83, at ¶ 23.08(1).

[88] *Id.* In describing the various tests which were proposed to determine the existence of a true class suit, Professor Moore states that the theory that the presence of a fund is the determinant had fallen into disrepute. *Id.*

[89] C. WRIGHT, *supra* note 81, at 310.

[90] Rule 23(a)(2) provided that a hybrid class existed where the right was "several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action." 1 F.R.D. XCIII (1941).

[91] *Id.*

[92] Rule 23(a)(3) defined a spurious class suit as one in which the right to be enforced was "several, and there is a common question of law or fact affecting the several rights and a common relief is sought." *Id.*

[93] *See, e.g.*, Moore and Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555 (1938) (binding effect of the judgment varies according to classification).

[94] 3B MOORE'S FEDERAL PRACTICE, *supra* note 83, at ¶ 23.95.

[95] *Id.*

[96] *Id.* at ¶ 23.13.

cause of this, these classifications and the distinctions upon which they were founded failed.[97] Rule 23 was amended in 1966 in a forceful endeavor to redefine these three categories.[98] The amendments were intended to confirm and to expand the broad scope and applicability of the class action device.[99] Three functional categories of Rule 23(b) replaced the former classifications in an effort to meet due process concerns.[100] The revised rule was applicable whether the claim or claims were legal, equitable, maritime, or a combination thereof.[101] Despite observations to the contrary, there is no direct correlation between the former true, hybrid and spurious classifications and the three functional categories contained in the revised rule.[102] Any attempt at parallel identifications is "not only wrong but dangerously wrong."[103]

Although the Rule (b)(1) action is not co-extensive with the former true class action, in the majority of Rule (b)(1) suits, aggregation is apparently permissible.[104] It is necessary, however, to determine whether the right is a joint and common one or several.[105] According to the original rule, problems of aggregation are avoided only where the members of the class share a joint and common claim.[106] Despite proclaimed legislative intent to enlarge the possibilities of class actions, the courts have severely hampered expansion of the device by drawing analogies between the original and the revised rules.[107]

Three years after the enactment of the 1966 amendment, the Supreme Court decision in *Snyder v. Harris* reaffirmed the *Pinel* de-

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[97] The cause of the failure of this classification system is best described by Professor Chafee: "Perhaps I am color-blind with respect to class suits, but I often have a much perplexity in telling a 'common' right from a 'several' right as in deciding whether some ties and dresses are green or blue." Z. CHAFEE, *supra* note 56, at 257.

[98] *See* Kaplan, *supra* note 55, at 356.

[99] *Id.*

[100] Note, *supra* note 61, at 592–93.

[101] 3B MOORE'S FEDERAL PRACTICE, *supra* note 83, at ¶ 23.02–1.

[102] C. WRIGHT, *supra* note 81, at 311.

[103] *Id.*

[104] *Id.* at 315–16.

[105] *Id.* Despite legislative attempts to amend the rule and thereby increase its usefulness, the concepts of joint, common and several rights have remained controlling. "[N]o matter how meaningless and arbitrary [the] distinction[s] may seem." *Id.* at 316.

[106] *Id.* at 122.

[107] The court in *Eisen* concluded that the old spurious class action corresponds to the present (b)(3) suit. 391 F.2d at 565. The Court had previously applied the old terminology and its conceptual derivation to the facts in *Snyder*, 394 U.S. 332 (1969).

cision and applied it to all Rule (b)(3) class actions.[108] The Court reasoned that aggregation of damages to satisfy the jurisdictional amount is not permitted in spurious class actions and held that at least one member of the class must fulfill the monetary requirement.[109] This decision seriously limited access to such actions in the federal courts.[110] *Zahn* was the next logical step in the progressive limitation of class suits in the federal courts.[111] *Eisen* further curtailed use of the device by the imposition of costly and burdensome notice requirements.[112]

The New Direction

The legal process, like all creative processes, is often afflicted by a failure of nerve which restricts freedom of thought. Like explorers who are confronted by an impenetrable obstacle or an unascendable mountain, legal theorists need not be dissuaded from their goals by these barriers. Instead, they must create or discover other routes to

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[108] *Id.* *See* notes 5–10 *supra* and accompanying text. It seems undeniable that the Court in *Snyder*, as in *Zahn* and *Eisen*, was motivated by an underlying concern with the federal workload. *See* Note, *Zahn v. International Paper Co.: Meeting the Federal Jurisdictional Amount in Class Actions*, 28 Sw. L.J. 815, 821 (1974). Pervading the consideration of all class actions is the fear of court congestion which could result if judicial redress was, in fact, available for all causes of action for which it is ostensibly appropriate. "The class action is at once most useful and yet most dangerous [to judicial economy] where the individual stake is small—so small that it would not itself justify participation in a lawsuit." O. FISS, INJUNCTIONS 514 (1972). Many more legitimate, though perhaps minimal, wrongs may be litigated by means of a class action that would be litigated without the device.

This overriding concern with federal judicial economy is ironic inasmuch as the class action device was developed, at least in part, to save time by consolidating numerous claims rather than having them litigated *seriatim*. Although federal judicial economy is achieved by restricting access to the federal courts, it is achieved at the expense of either state courts or of deserving class members left with no forum. Judicial economy calls not for a reduction in the total number of disputes to be resolved, but rather for the most efficient resolution of the greatest number of disputes.

[109] 394 U.S. 332 (1969).

[110] It resulted in the dismissal of the class suit in *Snyder* and eliminated any possibilities for future expansion of the device—possibilities which had been fostered by the recent amendments to the rule.

[111] *Snyder* held that at least one of the members of the class had to meet the jurisdictional minimum. 394 U.S. 332 (1969). *Zahn* held all members of the class must meet the jurisdictional minimum. 414 U.S. 291 (1973).

Even if the jurisdictional prerequisite merely denies access to the federal courts, it is not a slight denial. To the extent that it is important for an individual in a diversity suit to be able to litigate in federal court, it is important for large groups of individuals to be able to do so. Class actions are frequently interstate controversies which require a federal forum at least as much, if not more, than most individual diversity litigation. *See* Note, *supra* note 12, at 295–96 (1974).

[112] The Supreme Court in *Eisen* acknowledged the court of appeal's finding that "as a practical matter, the dismissal of the class action aspect of petitioner's suit was a 'death knell' for the entire action." 417 U.S. at 162.

their destination. Legal theorists must recognize that the Supreme Court has erected formidable barriers to the effective use of traditional class actions. A new approach must therefore be discovered to conquer the mountain that the traditional class action cannot otherwise ascend.

The advent of the class action was "mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals . . . from enforcing their . . . rights."[113] This practical necessity continues unabated despite the Supreme Court's recent decisions, compelling the discovery of an alternative route to circumvent these procedural barriers. The new route is restitution, using the theory of disgorgement of unjust enrichment. Although the application of the theory may be new, the theory itself is not foreign to the purposes for which class actions were designed. The prevention of unjust enrichment was one of the original purposes behind the legislation.[114]

It is sometimes assumed that the idea of restitution is abstruse and that the concept resists understanding; however, nothing could be further from the truth. The lack of clarity arises not from the concept but from the perceptual problems of the beholder.[115] Much of the confusion surrounding the law of restitution can be attributed to its developmental history, rather than to the complexity of its theory. The main source of confusion is the diverse nature of the cases applying its theories, linked only by a recently recognized common principle.[116] The sole thread which runs through all restitution cases is the general principle of disgorgement of an unjust enrichment. In short, "restitution is the law relating to all claims, quasi-contractual or otherwise, which are founded upon [this] principle."[117]

While the term "restitution" is of recent origin, its concepts have been embedded in the common law for many centuries.[118] In 1937

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[113] Montgomery Ward & Co., Inc. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948).

[114] *See* Note, *supra* note 12, at 295. "The original legislative goals in approving class actions were fourfold: compensation of the named plaintiffs, compensation of the unnamed plaintiffs, *prevention of unjust enrichment*, and deterrence." *Id.* (emphasis added).

[115] *See generally* Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175 (1959).

[116] *Id.* at 175. As Professor Dawson noted, "[t]he remedies aimed at restitution of unjust enrichment have grown like Topsy. They could be better described as a diversified litter of Topsies, with a common parentage that was only recently discovered." *Id.*

[117] R. GOFF & G. JONES, LAW OF RESTITUTION 5 (1966).

[118] In England, most of the concepts embodied in the Restatement of Restitution are present in the law. However, until Goff and Jones compiled the precedents into a cohesive unit in 1966, restitution was not recognized as a body of law unto itself. *See* note 117 *supra*. The authors

the American Law Institute published the Restatement of Restitution.[119] This brought the major concepts together for the first time, using the element of unjust enrichment as the common factor to link this diversified body of law.[120]

Although the Restatement provided a conceptual nexus between the diverse cases in this area, the legal community has yet to completely understand or accept this new branch of the law. The most obvious explanation is that restitution has only recently been developed as a unitary body of law. When one recognizes the tender age of restitution as compared to the field of contract law, with its development in the eighteenth century, and tort law, with its antecedents in the nineteenth century, it is little wonder that some confusion still surrounds the subject.[121] Understanding and acceptance have been further deterred due to the virtual invisibility of case law on the subject. It has been noted that the absence of research headnotes tying the precedents together has made it difficult to find cases on point when researching in the field.[122] Compounding the problem is the fact that courts have often applied restitution without using the recognized terminology or developing their reasoning sufficiently. In any event, the traditional definition of restitution succinctly states the principle which is threaded through the history of its application.[123] That principle provides that "[*a*] *person who has been un-*

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noted that "though all restitutionary claims are unified by principle, English law has not yet recognized any generalized right to restitution in every case of unjust enrichment." R. GOFF & G. JONES, *supra* note 117, at 13. Thus, "English lawyers are acquainted with quasi-contract, but are unfamiliar with restitution." *Id.* at 3.

[119] RESTATEMENT OF RESTITUTION (1937).

[120] Patterson, *The Scope of Restitution and Unjust Enrichment*, 1 MO. L. REV. 223, 228 (1936).

[121] *Id.* at 224. In his article discussing the scope of the Restatement of Restitution and its role in American law, Professor Patterson explained:

> Contracts emerged from the interstices of procedure near the close of the eighteenth century. Torts appeared as a distinct subject matter about the middle of the last century. It was not until the publication of Professor William A. Keener's treatise in 1893 that quasi contracts became a recognized part of the system of English and American private law.

Id.

[122] Patterson, *supra* note 120, at 236. Professor Patterson concluded:

> The law of quasi contracts is not a well understood subject. No digest headings bring together its precedents. They are scattered from Abandonment to Zoning, and only the practiced eye can pick them out. Even one who has studied the subject for many years has difficulty in recognizing quasi contract decisions under their many disguises.

Id.

[123] *See* J. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS (1951).

justly enriched at the expense of another is required to make restitution to the other."[124]

Restitution

In analyzing the remedy of restitution and its application to class actions, the above definition provides a useful starting point. The two key concepts are "unjustly" and "enriched." The term "enriched" means that a benefit has been received,[125] which includes "any form of advantage" which a defendant has acquired.[126] The term "unjustly" is more difficult to briefly define, since the fact that one person has benefitted from another does not necessarily mean that the benefit was unjust. The importance placed upon the concept of "unjust" indicates that the mere receipt of a benefit is insufficient to warrant restitution.[127] "[O]nly if the circumstances of [the enrichment's] receipt or retention are such that, as between two persons, it is unjust for him to retain it,"[128] does it rise to the sufficiently culpable level which warrants restitutionary relief.[129]

When an "unjust enrichment" is present, the law requires that the wrongdoer "disgorge" his ill-gotten gains, regardless of the classification under which the action was originally brought.[130] Considering its diverse applications,[131] restitution provides a viable alternative to the standard damage remedy in a tort action.[132] It has been stated in general terms that damage remedies can be ignored and

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[124] RESTATEMENT OF RESTITUTION, *supra* note 119, § 1 (emphasis added).

[125] *Id.* § 1, comment a at 12.

[126] *Id.* § 1, comment b at 12. Comment (b) provides in pertinent part:

> A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels or choses in action, performs services, beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss.

Id. See also Orwell v. Nye & Nissen Co., 26 Wash.2d 282, 285, 173 P.2d 652, 653 (1946).

[127] *See* RESTATEMENT OF RESTITUTION, *supra* note 119, § 1 comment e at 14–15.

[128] *Id.* § 1, comment c at 13.

[129] *Id.*

[130] *Id.* § 3, comment a at 17. This is true regardless of whether the action was originally brought as a breach of contract, tort or some other action. *See id.*, Ch. 7 Introductory Note §§ 128–38 at 522–26.

[131] D. DOBBS, REMEDIES § 3.1 at 137 (1973). "Restitution, when used to mean restoration, is not a form of action, but a general description of the relief afforded. It is thus not a parallel to terms like assumpsit, or trespass, or conversion, but a parallel to terms like damages, or injunction." *Id.* at 222.

[132] *See generally* Dawson, *supra* note 115.

quasi-contract used as to any kind of legal wrong from which gains are realized.[133]

In addition to its role as an alternative remedy,[134] restitution may also be used as a cause of action.[135] For example, an individual may have an unjust benefit which was not realized through a tort or breach of contract. In such a case, the aggrieved party may sue in restitution to have the defendant disgorge that enrichment, notwithstanding the lack of an underlying tort or breach of contract. Often restitution is the proper cause of action when a benefit has not been unjustly gained, but has been unjustly retained. Restitution does not require that a wrong be committed by the person who has received the property.[136] This situation may be found in a case of an honest mistake by one of the parties,[137] or where an individual defaults on a contract after making a down payment.[138] One court has noted that " '[t]he test is not whether the defendant acquired the money honestly and in good faith, but rather, has he the right to retain it.' "[139]

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[133] *Id.*

[134] *See* notes 131–32 *supra* and accompanying text.

[135] RESTATEMENT OF RESTITUTION, *supra* note 119, § 5. The Restatement addresses this issue in section 5, which deals with the appropriate action at law for relief in the form of restitution. It states that there exists:

> (a) in States retaining common law forms of action, an action of general assumpsit;
> (b) in States distinguishing actions of contract from actions of tort, an action of contract;
> (c) in States which have statutes providing for the abolition of the distinctions between forms of actions, an action in which the facts entitling the plaintiff to restitution are set forth.

Id.

[136] *Id.*

[137] Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (N.C. 1966). In *Beacon Homes*, the plaintiff was suffering under a justified, yet mistaken belief that the mother of the defendant was the true owner of several parcels of land. At the request of the defendant's mother, the plaintiff constructed a home on the land, for which both the mother and defendant refused to pay. The plaintiff sued in restitution to recover the amount of unjust enrichment conferred upon the defendant. The court held that even in the case of an honest mistake the plaintiff is entitled to restitution of the benefit conferred. *Id.*

[138] Caplan v. Schroeder, 56 Cal. 2d 515, 364 P.2d 321, 15 Cal. Rptr. 145 (1961). In *Caplan*, the plaintiff defaulted on a contract to purchase land. The court noted that the retention of said down payment could not be allowed as liquidated damages, since there was another clause denominated as such in the contract. Furthermore, since the defendant had resold the land at a higher price, the money could not be retained as compensatory damages for the breach. Thus the situation arose where the defendant had money properly received, but unjustly retained. The court granted restitution of the down payment to the plaintiff. *Id.*

[139] Beacon Homes, Inc. v. Holt, 266 N.C. 467, 474, 146 S.E.2d 434, 439 (1966) (quoting Allgood v. Willmington Savings & Trust Co., 242 N.C. 506, 512, 88 S.E.2d 825, 829 (1955)).

When the disgorgement of an unjust enrichment is sought, the focus of a portion of the litigation is radically shifted. Actions which seek damages for a breach of contract or a tort revolve around the detriment suffered by the plaintiff. An action for restitution, on the other hand, seeks to recover the quantum of enrichment obtained by the defendant, which "in equity and good conscience" he should not be allowed to retain.[140] In contract theory, "a person is entitled to receive what another has promised him."[141] In tort theory, "a person has a right not to be harmed by another, either with respect to his personality or with respect to his interests in things and in other persons."[142] In both the breach of contract or the commission of tort, however, the culpable party may cause both injury to the wronged party and enrichment for himself.[143] This dual result gives the injured party a choice of the most advantageous remedy.[144]

Often it is stated that the plaintiff must "waive the tort" before seeking restitution of an unjust gain. This phraseology is unfortunate,

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[140] D. DOBBS, *supra* note 131, § 4.1 at 224. Professor Dobbs has noted that:

> The damages recovery is to compensate the plaintiff, and it pays him, theoretically, for his losses. The restitution claim, on the other hand, is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep.

Id. (footnote omitted).

[141] Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 31 (1938).

[142] *Id.* at 32.

[143] RESTATEMENT OF RESTITUTION, *supra* note 119, Ch. 7 Introductory Note, §§ 128–38, at 522–26. In the introduction to Chapter 7 of the Restatement, which is entitled "Benefits Tortiously Acquired," it is noted that:

> in all [tort cases resulting in enrichment] a typical quasi-contractual situation exists and even though the tort actions normally produce results which are similar to those produced by the quasi-contractual actions, the fact that the defendant was a wrongdoer does not limit the injured party to a tort action.

Id. at 523.

[144] *See, e.g.*, Olwell v. Nye & Nissen Co., 26 Wash. 2d 282, 173 P.2d 652 (1946). In *Olwell*, the plaintiff sued for the restitution of an unjust enrichment. The plaintiff had sold the defendant a factory, but had retained one of the machines previously used in its operation. When manpower became scarce the defendant took the plaintiff's machine without permission and used it for several years. The plaintiff, notwithstanding an obvious right to sue for conversion, chose instead to seek disgorgement of the unjust cost savings wrongfully enjoyed by the defendant. The court allowed the restitutionary recovery despite the fact that it far exceeded the amount which would have been recoverable for the conversion. *Id.* In Edwards v. Lee's Adm'r, 265 Ky. 418, 96 S.W.2d 1028 (1936), Edwards discovered a cave under his property and began to develop it as a tourist attraction. As the attraction gained in popularity, Lee, a neighbor of Edwards, realized that a portion of the cave was under his land. Lee chose to seek restitution from Edwards for the gains realized through the use of that portion of the cave under his land. The court granted Lee the relief sought, although that recovery also exceeded the amount of damages which would have been recoverable for the tort of trespass. In fact, the damages for trespass would have been nominal, since Lee had no entrance to the cave on his property, and therefore suffered no actual damages.

since it gives the impression that the claimant's right to satisfaction for the tort is being relinquished. This, of course, is not the case. What is really waived is the right to sue for ordinary damages, as the plaintiff has merely chosen an alternative remedy.[145] In an action for restitution, the election of remedy does not change the essential elements of proof.[146] "The cause of action is [still] a tort, and the tort exists as the cause of action and must be proved as the cause of action from first to last."[147] The elements for establishing liability remain the same when seeking restitution for tortiously gained enrichment. The impact of the waiver and election for restitution upon the damage portion of the trial is fundamental to the role of restitution in class actions. When members of the class sue in tort, they are seeking recovery for the collective damages sustained by the individual members of the class. The damages to each plaintiff are often relatively small, thus failing to meet the jurisdictional requirements of the federal courts. On the other hand, if the class members were to "waive the tort" and sue in restitution, the court could look toward the quantum of unjust enrichment received by the defendant to determine whether the jurisdictional requirement has been met.[148] While the cases applying this principle have involved a singular plaintiff and defendant, there is no reason why the principle cannot be applied to even the largest of class actions.

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[145] RESTATEMENT OF RESTITUTION, *supra* note 119, Ch. 7 Introductory Note, §§ 128–38 at 525. It is stated therein that:

> A person upon whom a tort has been committed and who brings an action for the benefits received by the tortfeasor is sometimes said to "waive the tort." The election to bring an action of assumpsit is not, however, a waiver of a tort but is the choice of one of two alternative remedies.

Id.

[146] Corbin, *Waiver Of Tort And Suit In Assumpsit*, 19 YALE L.J. 221, 226 (1910). Professor Corbin stated that "[A] tort may be waived and a suit in *assumpsit* maintained only when a tort-feasor has been unjustly enriched by his tort." *Id.* at 226–27 (emphasis in original).

[147] *Id.* at 235.

[148] *See* C. WRIGHT, *supra* note 81, at 135. Professor Wright notes that several courts "have found jurisdiction if from the viewpoint of either plaintiff or defendant more than the statutory amount was involved." *Id.* Reasoning that since the purpose of the jurisdictional amount requirement "is satisfied where the case is worth a large sum to either party," Wright cites a case in which the court stated:

> [I]n determining the matter in controversy, we may look to the object sought to be accomplished by the plaintiffs' complaint; the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce.

Id. (quoting Ronzio v. Denver & R.G.W.R.R., 116 F.2d 604, 606 (10th Cir. 1940). *See also* Committee for F.I. Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975); Berman v. Narragansett Racing Ass'n, Inc., 414 F.2d 311 (1st Cir. 1969), *cert. denied*, 396 U.S. 1037 (1970); Government Employees Ins. Co. v. Lally, 327 F.2d 568 (4th Cir. 1964); Ridder Bros. v. Blethen, 142 F.2d 395 (9th Cir. 1944).

Valuation and Measurement of Restitution

The concepts underlying restitution appear to be contractual, regardless of the nature of the action resulting in the unjust enrichment. This anomaly is due to the historical quirks in the development of the action. At early common law there were often situations in which an acknowledged right went remediless due to the rigid procedural nature of the existing causes of action.[149] The development of assumpsit and quasi-contract was an attempt to ameliorate this harshness by providing the needed remedy "as law advanced haltingly toward humanitarian ideals."[150] This result was achieved through the implementation of a fiction, whereby courts found, as a matter of law, that the defendant had made a promise to pay the value of the unjust enrichment received.[151] It is obvious that no such promise existed,[152] since the very nature of the restitutionary action precludes its existence. Hence, although courts call this fictitious promise one implied-in-law, it might more appropriately be called an imposed-in-law promise.

Unfortunately, there is no mechanical method for ascertaining the value of benefit unjustly conferred. Therefore, there exists no definite way to compute the exact amount which the court "implies" that the defendant promised to pay the plaintiff.[153] The best that courts can do is to follow general rules of valuation utilized in various other cases. The initial step in the valuation process is the selection of either an objective or subjective standard. The objective standard values the benefit conferred according to its market value, without looking at the enrichment from the defendant's point of view.[154] The

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[149] Corbin, *supra* note 146, at 221. For a brief discussion of the historical developments and problems surrounding assumpsit and restitution, see *id.* at 221–24.

[150] R. NEWMAN, EQUITY AND LAW, A COMPARATIVE STUDY, 11–12 (1961).

[151] *See generally*, J. Dawson, *supra* note 123, at 10–26.

[152] R. GOFF & G. JONES, *supra* note 117, at 8. Professors Goff and Jones have stated that:

> While the forms of action continued in existence, it is not surprising that lip-service should have continued to be paid to the notion of "implied contract," for it was only through that fiction that quasi-contractual claims were enforceable at all in *indebitatus assumpsit* . . . . The abolition of the forms of action, which had for so long provided the skeleton of the law, forced lawyers to find some new method of classifying claims. This they found in the dichotomy of contract and tort; and the apparently intractable quasi-contractual claims were relegated to the status of an appendix to the law of contract.

Id.

[153] There are rare times when this does not pose a problem. Should the remedy be restitution "in specie," there is no valuation question. When there must be a translation of the benefit into monetary terms, however, one faces a multitude of solutions.

[154] It has been explained that if an individual constructed a house upon another's property, there are at least two feasible objective measures of restitution and one subjective

subjective valuation, on the other hand, concerns itself with the actual quantum of benefit received by the unjustly enriched party, as measured from the specific considerations applicable to that individual. These two approaches will obviously yield different results in most cases, yet there is no mechanical process by which one is chosen over the other. Courts reason that one approach will be more appropriate than the other in a given case,[155] but no one has genuinely analyzed the cases to find the general rule for selecting one method in any given type of case.[156]

The difficulties of valuation, however, do not end with this selection. Once either the objective or subjective standard is chosen, a multitude of other factors must be considered. These considerations range from the culpability of the defendant to the nature and type of enrichment involved,[157] be it an affirmative benefit or merely an enrichment in the form of cost reduction.[158] A case which illustrates the various possible valuation methods of restitution is *Jensen v. Probert*.[159] The plaintiffs, George and Elain Jensen, resided in Port Alexander, Alaska, and owned an undeveloped tract of land in Oregon.[160] In their absence and without their knowledge, another man by the name of George Jenson conveyed this tract of land to one Hollis Vicks by warranty deed.[161] Vicks in turn conveyed a portion of this land to Samuel Probert, who built a small house upon it.[162]

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measure. These are: (1) the value of the labor and materials that went into the house measured objectively by the market in such labor and materials; (2) the increased value of the land resulting from the addition of the house to it, whether this is greater or less than the value of the labor and materials that went into it; and (3) the personal value to the defendant for his particular purposes, whether this is greater or less than the objective values.

D. DOBBS, *supra* note 131, at 261.

[155] D. DOBBS, *supra* note 131, at 260. There is no rule which can apply to all of the diverse factual situations. "If there is any one rational principle that might be used to guide restitutionary measurements it is that the measure of restitution should reflect the substantive law purposes that call for restitution in the first place." *Id.*

[156] The Restatement of Restitution has attempted to delineate some general guidelines to assist courts in the preferable valuation method for some of the most common types of restitution cases. Most of these guidelines, however, are qualified by a general statement that the recovery should be set as "justice . . . requires." *See generally* RESTATEMENT OF RESTITUTION, *supra* note 119, §§ 150–59.

[157] D. DOBBS, *supra* note 131, at 278.

[158] *Id. See, e.g.*, Olwell v. Nye & Nissen Co., 26 Wash. 2d 282, 173 P.2d 652 (Wash. 1946).

[159] 174 Or. 143, 148 P.2d 248 (1944).

[160] *Id.* at 146, 148 P.2d at 249.

[161] *Id.*

[162] *Id.* at 147, 148 P.2d at 250.

The trial court found that the plaintiffs were entitled to retain the land and house,[163] but placed a $1,500 lien upon the land in favor of Probert, since he had conferred a benefit upon the Jensens which it would be unjust for them to retain.[164] On appeal, the court was faced with the unusual situation wherein restitution was granted to the defendant when both parties had admittedly acted in good faith and without negligence.[165] The court was probably justified, however, in granting restitution. If the house could not economically be removed from the property,[166] and the Jensens wished to keep the land upon which the house was built, then the property should have remained with the Jensens.[167] A monetary figure representing disgorgement by the Jensens of the benefit conferred upon their unimproved property from the construction of the house would seem appropriate.

Had the subjective valuation been chosen, the Jensens' situation would be examined to determine what quantum of benefit they received from having a house on this previously vacant lot. Had they desired to build a different structure on the site, the existing house could in fact have been a detriment.[168] If they desired to keep that

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[163] *Id.* A similar result was reached in Somerville v. Jacobs, 153 W. Va. 613, 170 S.E.2d 805 (1969), where the plaintiffs erected a building on the defendants' land as a result of an honest mistake. The defendants were ordered to pay the plaintiffs for the value of the building, or alternatively, to sell the land to the plaintiff for the value of the improved property minus the improvements. *Id.* at 629, 170 S.E.2d at 813. The court recognized that its determination was a departure from traditional analysis, but felt compelled by equitable principles to prevent unjust enrichment. *Id.*

[164] 174 Or. at 147, 148 P.2d at 250.

[165] *Id.* at 148, 148 P.2d at 250.

[166] As a matter of traditional analysis, it was irrelevant whether it was practical to move it or not. "The most orthodox common law rule, indeed, would not even permit the improver to remove his improvements once they had become affixed to the land, since, in logic, they had become land itself and the property of the true owner . . . ." D. DOBBS, *supra* note 131, at 783–84. The more modern view permits more complete restitution in such cases when it is feasible. *See, e.g.*, Shick v. Dearmore, 246 Ark. 1209, 442 S.W.2d 198 (1969) (well digger entitled to recover casings from well which was mistakenly installed on another's property); Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966) (equity and good conscience require that landowner must pay amount by which value of his property increased by construction of house mistakenly upon his land).

[167] The court in the *Jensen* case, however, found that allowing Probert to remove the house was a more appropriate form of restitution than placing a lien on the property in Probert's favor for the value of the house. 174 Or. at 158–59, 148 P.2d at 254–55.

[168] Although not raised by either of the parties in *Beacon Homes, Inc. v. Holt*, the court addressed this issue in dictum. It was noted that "[t]he right of a landowner to remove from his premises a structure placed thereon by a trespasser, innocently or otherwise, and to sue the trespasser for damages, including the cost of such removal, is not involved in this action." 266 N.C. at 473, 146 S.E.2d at 438. This language implies that had the plaintiffs sought the removal of the home instead of restitution, they might have prevailed on other grounds.

house, or if it were similar to the one which they were planning to build, the value would be considerably more. In the alternative, the court might apply the objective valuation methods. Using a "bricks and mortar" approach, that value would be determined by the amount Probert would have spent to have the house constructed at the market price regardless of actual cost.[169] Thus, if Probert had managed to pay less than the market price for these goods and services he would be entitled to recover more than his actual costs.[170] By the same token, had he spent more than the market price he would receive less than his cost.[171] The actual costs to him are irrelevant because he is only seeking restitution of the landowner's unjust gain and not compensation for his own losses.[172] A second objective valuation approach, which would oftentimes yield a very different result, would measure the difference between the market value of the unimproved property and the property as it was after the construction of the house upon it.[173] Both of these objective methods would determine the amount of recovery without regard to the subjective benefit actually enjoyed by the Jensens.

One of the fundamental questions which remains unanswered, however, is what happens if and when the value of the benefit conferred is greater than the enriched party can afford to disgorge. Must the unjustly enriched landowners be required to pay that greater amount in order to retain their property? Wrongdoers often attempt to impose an extrinsic limitation upon the standards for measuring the value of the unjust gain. This appeal usually requests that the recovery be limited to the quantum of detriment suffered by the aggrieved party. Because it often appears, depending on how the gain is calculated, that a wrongdoer may have gained more, perhaps, far more, than the amount necessary to compensate the plaintiff for the actual damages he has suffered, such an appeal is initially very tempting. If the law of restitution followed its contract law analogy, this would be a very tempting proposition, since contract law awards the amount necessary to compensate the plaintiff for the actual damages he has suffered.[174] Restitutionary relief, however, does permit a plain-

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[169] *See* note 154 *supra*. *See generally* D. DOBBS, *supra* note 131, at 260–65.
[170] *See* D. DOBBS, *supra* note 131, at 260–65.
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *See generally*, RESTATEMENT OF CONTRACTS §§ 327–46 (1932).

tiff to recover an award which exceeds the amount which a tort or contract judgment would have provided for that same wrongful conduct. Restitution is not based upon the traditional contractual theory of compensating the injured party. Instead, restitution's primary concern is that the wrongdoer be forced to disgorge his entire unjust gain to the wronged party.[175]

While a potential "windfall" recovery for the plaintiff may appear inappropriate, it is really more moderate than the traditional damage theory in that it limits the liability of the wrongdoer to the amount of his unjust gain. In a tort or breach of contract, damages may far exceed the benefit enjoyed by the breaching party or the tortfeasor. Thus it has been stated that "in no case can the recovery in assumpsit exceed that enrichment" unjustly gained or retained by the wrongdoer.[176] This potential windfall has not been without criticism from leading commentators.[177] Nevertheless, since one of the parties must receive a "windfall," it seems more equitable to allow the plaintiff to enjoy the excess, for restitution requires that the wrongdoer must not keep his wrongful gain. Therefore, it is a fundamental principle of restitution that the plaintiff may be entitled to recover more

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[175] RESTATEMENT OF RESTITUTION, *supra* note 119, § 1, comment e at 14. The Restatement's comment e provides in part that:

> [t]here are situations, however, in which a remedy is given under the rules applicable to this Subject, where the benefit received by the one is less than the amount of the loss which the other has suffered. In such a case, if the transferee was guilty of no fault, the amount of recovery is usually limited to the amount by which he has been benefitted.
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> In other situations, a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust. In such cases, the defendant may be under a duty to give to the plaintiff the amount by which he has been enriched. Thus where a person with knowledge of the facts wrongfully disposes of the property of another and makes a profit thereby, he is accountable for the profit and not merely for the value of the property of the other with which he wrongfully dealt.

Id.

[176] Corbin, *supra* note 146, at 227.

[177] *See, e.g., id.* at 243–46. Professor Corbin persuasively enumerates the reasons why the defendant should not be required to disgorge an amount in excess of the harm caused to the plaintiff. Corbin asked:

> [i]f the defendant puts the plaintiff in the same position, is he not square with the world, or at least with the plaintiff? Is he not, as against the plaintiff, entitled to keep anything else that he has obtained? Perhaps the defendant ought to be *punished* for his tort, but if so the fine . . . ought to be measured by the character of the wrong and not by the amount of the profit made out of it by the defendant.

Id. at 244–45 (emphasis in original).

than he lost if that greater amount has been wrongfully conferred upon the defendant.[178]

Waive the Tort and Seek Restitution in a Class Action

While the barriers to class action relief imposed by *Zahn* have been heavily criticized,[179] the response to *Eisen* has not been quite so unified.[180] The *Zahn* Court restricted access to judicial redress for victims of mass wrongs in order to protect the federal courts. On the other hand, given the binding nature of class actions, the barrier created by *Eisen* might not necessarily stand for the protection of the court calendars, but rather for the protection of unrepresented persons and their unknown interests. Accordingly, any new route circumventing the *Eisen* impediment may be expected to be longer and more arduous than one circumventing the effect of *Zahn*.

In *Zahn* it was alleged that because of International's willful, intentional and unreasonable action polluting the waters of Lake Champlain, the plaintiff and other members of the class had experienced a loss of enjoyment of their lakeside properties and suffered a diminution in their rental values.[181] The plaintiff Zahn brought his class action sounding in tort against International, seeking to recover the damages caused by the pollution for himself and for all members of the class. It should be noted that in both *Zahn* and *Eisen* neither plaintiff was ever able to litigate the merits of their allegations, despite the fact that each appears to have alleged a cause of action which on the merits had substantial prospects of success.[182]

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[178] D. DOBBS, *supra* note 131, § 4.5 at 264; RESTATEMENT OF RESTITUTION, *supra* note 119, § 1, comment e at 14. Comment (e) to the Restatement presents the situation in which

> a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust. In such cases, the defendant may be under a duty to give to the plaintiff the amount by which he has been enriched.

Id.

[179] *See generally, Developments: Class Actions*, 89 HARV. L. REV. 1318 (1972).

[180] *See, e.g.*, Jacob & Cherkasky, *The Effects of Eisen IV and Proposed Amendments of Federal Rule 23*, 12 SAN DIEGO L. REV. 1 (1975); Dam, *supra* note 3; Note, *supra* note 12.

[181] *Zahn v. International Paper Co.*, 414 U.S. 291, 292 (1973). This injury was allegedly caused by the discharge of pulp and paper making waste, and untreated and inadequately treated domestic or sanitary sewage into Ticonderoga Creek approximately two miles from its entry into Lake Champlain. *Id.*

[182] In fact, after the Supreme Court had dismissed the *Zahn* action for the jurisdictional defect, the State of Vermont brought suit against International and the State of New York, alleging the same facts that the plaintiff Zahn had alleged. A consent decree was entered in which stringent standards of pollution controls were established, to which International ultimately acquiesced. At the time, it was stated that "the controls to be imposed by the EPA

Had Zahn chosen to waive the damage action in tort and instead seek restitution of International's unjust gain realized through the wrongful pollution of the lake, crucial procedural impediments would have been overcome. Representatives of a class have the same choice between restitution and tort as does any individual plaintiff who sues to protect his own interests. Zahn's chances for success in a restitutionary action alleging that International obtained an unjust gain from its wrongful acts would turn upon his ability to prove the extent of that wrongfully obtained gain. In seeking to develop a standard of measurement, Zahn could have sought to disgorge the costs that International saved by not having to install the proper pollution-preventing equipment. He also might have sought to disgorge the amount that International saved by not having to pay to the lakeshore property owners the reasonable value of easements to the land it was wrongfully polluting,[183] or even all of the profits earned by the company from the operations of that particular plant under the theory that without its polluting acts the plant could not have been operating profitably. For the purposes of discussion, regardless of whichever standard of measurement is applied, it will be assumed that Zahn could have claimed and established that International's wrongful polluting acts benefitted the company $1,000,000 per year for five years.[184] Again, it must be noted that the amount in controversy in the pleadings in restitution is the amount of the defendant's unjust gain. The amount of damages that any individual plaintiff suffered

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under the agreement were described as more stringent than those imposed anywhere else in the nation." Bennington Banner, April 25, 1974, at 1, col. 2.

[183] An apparent difficulty in this approach lies in restitution's traditional refusal to disgorge unjust enrichment obtained by trespass to real property. *See* RESTATEMENT OF RESTITUTION, *supra* note 119, § 129. "Because actions based upon such acts frequently involve the question of title thereto, and because the action of assumpsit was inconvenient for the purpose of determining such title, these rules [precluding the application of restitution] have become crystalized." *Id.*, § 129, comment a at 538. It was also believed that the liability for damages in tort would normally be "as great as would exist if an action for restitution were allowed," id., thereby minimizing the harm caused by precluding any restitutionary relief. With the disappearance of the problems inherent in determining title, and with the clear recognition that remedies for damages are not always sufficient, the restriction has been both criticized, *see* 30 MICH. L. REV. 1087 (1932), and overruled, *see* Missouri Pac. Rep. Co. v. Atchison, 43 Kan. 529, 23 P. 610 (1890); Meger v. Davenport Elevator Co., 12 S.D. 172, 80 N.W. 189 (1899); Raven Red Ash Coal Co. v. Ball, 185 Va. 534, 39 S.E.2d 231 (1946). *See also* Edward v. Lee's Adm'r, 265 Ky. 418, 96 S.W.2d 1028 (1936); Jensen v. Probert, 174 Or. 143, 148 P.2d 248 (1944). Such an irrational technical problem is presumably irrelevant to the *Zahn* analysis since the action would have been grounded in nuisance and not trespass.

[184] This figure of $5,000,000 could be established by studying the corporate books and records of International to determine the amount of their unjust gain.

should be irrelevant, even if the plaintiffs' individual damages were less than the $10,000 jurisdictional amount.[185]

The shift of the subject of judgment from damages of the individual plaintiffs to the amount of the defendant's unjust gain is only one result of the shift in the pleadings from tort to restitution. Another result is that a class action pled in this manner should shift from a Rule 23(b)(3) to a Rule 23(b)(1) class action. Rule 23(b)(1) class actions involve joint and common interests in a unitary sum.[186] Accordingly, aggregation becomes irrelevant and unnecessary. Separate and distinct class actions are brought pursuant to Rule 23(b)(3), for which aggregation is relevant but unavailable. Furthermore, since Rule 23(b)(3) class actions require compliance with the onerous notice provisions of *Eisen*, the shift in pleadings to a Rule 23(b)(1) class action, depending upon the constitutional basis of the notice procedure, confers an additional benefit upon the representative plaintiff. The most burdensome notice requirements apply primarily to Rule 23(b)(3) class actions, which usually involve the most diverse circumstances among the various members of the class. The more easily complied with notice requirements of Rule 23(b)(1) and (b)(2) class actions apply when the absent members of the class and the representative members have the most homogeneous interests.[187] If notice for binding litigation is not required by constitutional due process but only by the federal rules, then changing the theory of the

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[185] Restitution is a single bag full of money. Everyone at whose expense it has been accumulated has an inchoate right to share in the whole. In comparison, according to traditional damage theory, each wronged party has an empty bag which he individually seeks to have filled with the wrongdoer's money. While this conceptual distinction is highly technical, so is the distinction upon which the theory of aggregation is based. If the technical difficulties were to be abolished, the problems caused by aggregation would be abolished as well.

[186] FED. R. CIV. P. 23(b)(1).

[187] Representation of unknown class members, although always troublesome, is less objectionable when the interests of the representatives closely parallel the interests of the absent members. It has been stated that Rule 23 "does not command the giving of any notice to members of (b)(1) and (b)(2) types of class actions, while it mandates notice in a (b)(3) type of class . . . ." 3B MOORE'S FEDERAL PRACTICE, *supra* note 83, at ¶ 23.55. In Rule (b)(1) actions "there will be situations where the class is cohesive or where the legal relationship of the members enable one or more to stand judgment for all, and where the representatives are truly representative and faithful . . . although some notice to the members may be desirable . . . a judgment should be res judicata as to all class members, even in the absence of notice." *Id.* "On the other hand, in a (b)(3) type of class suit, where notice is mandatory, there is no jural relationship between the members. They are merely fellow travelers related only by some common question of law or fact and with the right to opt out of the class. The mandatory notice under (c)(2) informs them of that right." *Id.* *See* Note, *Class Actions Under Rule 23(b)(2): A Type of Class Action Which Does Not Require Eisen Notice*, 24 CLEV. ST. L. REV. 504, 514 (1975).

pleading may preclude the need for notice.[188] Without the jurisdictional problems or the burdensome notice requirements, the representative of the class would be faced only with the more routine problems inherent in the litigation of any class action, and would be able to try to prove his case.[189]

Restitution and the Mass Wrongdoer

Even if the federal rules do not require strict notice for class actions seeking restitution, the Supreme Court may ultimately determine that due process requires that each member of the class must receive such notice. In that case, proceeding in a class action may, in certain circumstances, become impractical. Therefore, in order to avoid the strict requirements of the class action, there may exist a plausible alternative: suing mass wrongdoers in restitution in an individual action.

Although restitution occupies a central and unique place in our structure of rights and remedies, the familiar problem of notice may impose great difficulties upon one who chooses to waive the tort and sue in restitution. In order to disgorge the unjust gain, the plaintiff in an individual action may be compelled to notify all of the other victims of the mass wrongdoer. To date, the impact of strict notice requirements has been shown to limit the ability to use the class action device.[190] An individual's right to plead an important cause of action may also be limited by the strict notice requirements, thereby

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[188] The Supreme Court has not yet decided whether constitutional due process mandates notice by an *Eisen*-type representative to members of the class. Until the Court decides the issue, it will remain unclear. The Advisory Committee's Note to the Federal Rules indicates that the notice is "designed to fulfill requirements of due process to which class action procedure is of course subject." 39 F.R.D. 69, 107 (1966). This formulation was based upon the Supreme Court's decision in Mullane v. Central Hanover Bank, 339 U.S. 306 (1950), in which a balancing test was employed to weigh the expense against the nature of the proceedings and the interests involved. The *Eisen* Court relied on *Mullane* but failed to utilize its balancing test. *See* Note, *supra* note 12, at 294. *Mullane* indicates that while "due process may require individual notice in smaller class actions, it need not do so in cases like *Eisen* where the class is very large and the average recovery so small." *Recent Developments, Eisen III: Fluid Recovery, Constructive Notice and Payment of Notice Costs by Defendant in Class Action Rejected*, 73 COLUM. L. REV. 1641, 1652 (1973). The result in *Eisen* may have been to make stricter notice requirements than due process demands. *See* Dam, *supra* note 3, at 110.

[189] Such problems as allocating the money award and notifying unknown members of their rights established by the class action remain, of course, whether the action is brought in tort or in restitution, for it is a problem of practicality as well as a problem of remedy principles. *See* Comment, *Recovery of Damages in Class Actions*, 32 U. CHI. L. REV. 768 (1965).

[190] *See* notes 50–52 *supra* and accompanying text.

immunizing the mass wrongdoer from both class actions and individual suits seeking to disgorge the unjust gain. If an individual cannot seek restitution from a mass wrongdoer without notice to the other victims, it is because of the unitary nature inherent in the unjust gain.[191] If restitution is one entire pie, how can it be divided in order to facilitate individual recoveries? If this pie is indivisible, how can any one victim maintain an individual action in restitution? If he cannot, then wrongdoers are immune from a suit in restitution except through a class action—certainly an ironic result in light of the Supreme Court's apparent attitude toward class actions.[192]

The only remaining choice is that an otherwise indivisible object somehow must become divisible. If that happens, then an individual may be able to waive the tort and sue in restitution, as an individual plaintiff seeking damages. A representative plaintiff such as Zahn would claim a right to recover for himself without the burden of notifying anyone. It is readily apparent that if Zahn had sought to disgorge the entire unjust gain of International, then the problems relating to minimum amount in controversy and the strict notice requirement of Rule 23 could have been eradicated. The crux of such an argument would be that the representative plaintiff is an indispensable victim of an indivisible wrong through which International realized substantial gains. The dynamics of pollution are such that the pollution of a lake inevitably wrongs every owner of lakeshore property. Whatever gains the polluter obtained from this wrongful conduct could not have been obtained without specifically injuring each individual property owner. Thus, under the facts of *Zahn*, the basis for a restitutionary recovery is established. Zahn would seek to compel International to disgorge those gains that were made possible only through injuring Zahn and his property. The fact that the gains could not have occurred without equally wronging others does not detract from Zahn's own indispensability.

In light of this approach to the situation, International's standing to oppose Zahn's suit for the entire unjust gain on the basis that he would thereby receive a windfall would be most delicate.[193] As pre-

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[191] The subject of such a suit, the wrongdoer's unjust gain, is a unitary sum of money. It is the same unitary nature of the unjust gain which permits aggregation in order to overcome the amount in controversy requirement. *See* notes 185–87 *supra* and accompanying text.

[192] *See* Note, *supra* note 12, at 287, 292–96, for a discussion of the Supreme Court's current disposition towards the modern class action.

[193] International's argument that the Court would be giving Zahn money which actually belongs to others has failed in similar contexts. The Restatement of Restitution clearly states that

viously indicated, one of the traditional considerations in electing to seek restitution rather than compensation for the damages suffered is that a money award in restitution may be greater than the amount recoverable as compensation for injuries arising from the same conduct.[194] Any claim by International that Zahn should be denied the full recovery would be especially suspect in that the inevitable consequence of that argument would be to allow the wrongdoer to retain a substantial portion of his unjust gain.

The sound reasons permitting the disgorgement of the entire unjust gain, when the plaintiff would receive a windfall, are only reluctantly accepted. Any windfall going to one victim out of many, perhaps only because that victim won a race to judgment, would be considered especially suspect. There are no general policy arguments which support the race to judgment as a winner-take-all contest. The focus of the inquiry, however, should not be upon the extent to which the windfall is at the defendant's expense, for he would in any event be required to disgorge the entire unjust gain in a successful restitutionary action brought by a proper plaintiff. The crucial issue is to what extent, if any, the windfall is at the expense of those victims who might be entitled to be treated as interested parties.[195]

"[a] person entitled to possession as against the tortfeasor, although not as to other persons, is entitled to restitution. Thus the action is not defeated by evidence that the plaintiff is himself a converter and is not entitled to retain the proceeds as against a third person." RESTATEMENT OF RESTITUTION, *supra* note 119, § 128, comment j at 534–35. Therefore, the existence of other potential plaintiffs is not available to International as a defense.

[194] *See id.*

[195] The question of interested parties is covered by Rule 19 of the Federal Rules of Civil Procedure. Rule 19 provides:

> (a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.
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> (b) *Determination by Court Whenever Joinder Not Feasible.* If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded

Zahn could first try to deny that the other victims must be included as interested parties. Although this would appear to present an unacceptably nearsighted view of the case, plaintiffs in other cases have succeeded in excluding comparable victims. In *Jersey City v. Hague*,[196] Jersey City sought the restitution of money allegedly wrongfully obtained from City employees. The allegation was that the defendants, elected public officials of Jersey City, had received kickbacks amounting to three percent of the annual salary of each public employee.[197] The major question presented was whether Jersey City was the proper party plaintiff to recover the money that the defendants had unjustly obtained. Although the defendants had acquired the money through the "voluntary" contribution of the employees after the money was lawfully paid to each employee from the city treasury,[198] the city of Jersey City succeeded in recovering all of the unjust gain. This recovery was obtained despite the absence of the other victims whose money had been the actual source of the unjust gain.

Another case which exemplified a court's willingness to overlook the rights of potentially interested victims in allowing a restitutionary recovery was *Monsanto Chemical Co. v. Perfect Fit Products Manufacturing Co.*[199] In that case, Perfect Fit Products had knowingly and falsely represented their product as being composed of

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as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) *Pleading Reasons for Nonjoinder.* A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) *Exception of Class Actions.* This rule is subject to the provisions of Rule 23.

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196 18 N.J. 584, 115 A.2d 8 (1955).

197 *Id.* at 588, 115 A.2d at 10.

198 The payments were "voluntary" only in the respect that the defendants extorted the funds after the employees received their paycheck rather than taking an automatic deduction from the scheduled payment of city funds. In fact, the employees contributed under the fear of losing their jobs if they refused. The indictment alleged that:

> the defendants by force of their official positions systematically extorted from the employees of the plaintiff municipality 3% of their official income from 1917 to 1949 as a condition of their employment and continued employment and retained these funds for their own use.

Id. at 589, 115 A.2d at 11.

199 349 F.2d 389 (2d Cir. 1965).

Monsanto fibers.[200] Monsanto was thusly wronged through the trademark infringement and Perfect Fit's customers were deluded into purchasing inferior products. The court granted Monsanto an accounting for profits,[201] a form of restitution. The court failed, however, to consider compensating the purchasers who were damaged by the defendant and from whom all of the profits had been obtained.[202]

Even if the existence of these other victims as potential interested parties can be ignored, their rights would be diminished far less than might be expected. It cannot be denied that if the first among equals is permitted to seek a judgment for the entire sum of restitution, the other victims have lost the opportunity to follow the same course. A judgment granting a restitutionary recovery to Zahn, however, would not in any way limit International's liability with regard to subsequent suits seeking compensation for the damage caused by the pollution of Lake Champlain.[203] International cannot claim that it has been immunized from any further liability on the basis of the initial suit whereby it was forced to disgorge its unjust gain. The company would simply have lost whatever benefits it had obtained from its wrongful conduct. Tortious wrongdoers do not have the right to have an unjust gain as a fund from which their liability can be drawn.[204]

The defects that may arise in the attempt of Zahn to recover the entire unjust gain for himself stem from the potential rights of the other victims to share in the restitutionary recovery. It is not at all clear, however, that restitution, given its unitary nature, is capable of rational apportionment. The problem lies in the fact that a money judgment in restitution reflects only the defendant's unjust gain, without a computation of the specific damages caused to the particular plaintiffs. Certainly, if Zahn had been the owner of all the lakeshore property, and International had derived a benefit of five million dollars from wrongfully polluting the property, no one would challenge Zahn's right to seek tort damages or to recover the entire

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[200] *Id.* at 390.

[201] *Id.* at 395–97.

[202] *Id.* at 396.

[203] It must be noted, however, that subsequent suits must necessarily proceed in tort and would therefore encounter the problems of notice and jurisdictional amount if brought in federal court. This may be an important factor in the determination of which persons must be included as interested parties. *See* note 195 *supra*.

[204] If such a set-off was permissible, a wrongdoer engaged in injurious conduct from which he failed to obtain any gain or perhaps even sustained a loss, would then be able to claim his lack of success as a defense to a tort action or as a limitation upon damages.

unjust gain. The fact remains that the polluter has no right to be unjustly enriched. It would be an unacceptable result that as the number of victims increases the way to disgorgement becomes more arduous.

If the first party to reach judgment for restitution may not receive the other victims' "share," and if mass wrongdoers are to be liable to disgorge their unjust gains in individual actions, then some method to divide the indivisible must be found. A division into smaller parts can occur only after the size of the whole has been determined. If one person sues for his portion of the unjust gain, he will first seek to establish the total amount of the benefit and then ascertain his share. At this point it is not difficult to foresee the defendant's concerns. The defendant does not wish to be caught in a squeeze in which different courts disagree upon the size of the pie and apply different formulas for dividing it, thereby causing different standards for recovery. When the plaintiff was seeking the entire pie, the concern was to protect the other victims. When the plaintiff seeks merely his own share, however, it is apparent that it may well be the defendant who seeks protection. There is no compelling reason to relieve the defendant of the burden of protecting itself. In order to avoid the harsh and possibly conflicting results of multiple suits in various courts, the defendant may protect itself through the use of interpleader or, ironically, a defensive class action under Rule 23. Therefore, the defendant would be free to protect itself from any difficulties the existence of the other victims may cause, but it cannot shift the responsibility for its own protection to the plaintiff.

When the analysis is applied to various fact patterns it becomes apparent for purposes of restitution that there are differences in the relationship between mass wrongdoers and their victims which significantly affect the outcome. Zahn's class action was dismissed because not every victim "in the class had suffered pollution damages in excess of $10,000."[205] By suing for restitution rather than damages, the dismissal might have been prevented. It is apparent that each and every victim was equally essential for any gain to have been realized by the polluting company.[206] The gain, obtained at the expense of the victims, was very likely greater, perhaps far greater, than the victim's aggregate damages. Zahn, had he brought a class action for

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[205] *Zahn*, 414 U.S. at 292.

[206] *See id.*

restitution, could have argued that if the unjust gain exceeded the aggregated damages, each victim's share of the unjust gain, being larger than his damages, would have been more likely to satisfy the amount in controversy.

In *Eisen* the unjust gain of the stock brokers was obtained by a course of conduct significantly different from that which polluted Lake Champlain. A series of individual acts combined to create a total gain. Other than the fact that the wrongs from which the gain was accumulated were part of a common scheme, the wrongs appear to be separate and divisible. It follows that Eisen was not indispensable to the stock brokers' total gain. Furthermore, there seems to be little evidence that the individual wrongs produced any greater unjust gains than they did damages.[207]

Only if Eisen had been able to establish that each victim had been indispensable to the total gain,[208] would use of the analysis have benefitted the class. Because the individual wrongs did not produce any greater unjust gains than they did damages, each victim's share of the unjust gain was equivalent to his damages. Therefore, use of the analysis would not have helped to overcome the amount in controversy deficiencies within the class.[209]

Zahn's situation differed from Eisen's not only because of the possibility of establishing a greater amount of restitution than damages, but also because Zahn's damages, unlike Eisen's, could not be precisely determined. Although both Zahn and Eisen could have opted to waive the damages and the class action to seek their shares of the unjust enrichment, only Zahn was in a position to succeed. Zahn could have avoided problems concerning the amount in controversy by looking to the wrongdoer's unjust gain rather than to the individual damages. To do so would have been to rely on the unitary nature of the unjust gains. While such reliance has an advantage in that it is a means to satisfy the amount in controversy requirement, there is a corresponding disadvantage. Such reliance increases the

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[207] *See Eisen*, 417 U.S. at 160–61.

[208] Only if an across-the-board scheme in violation of the Antitrust Act may be treated as unitary and indivisible could such an argument be made. One could reason that the violation of the Act underlying *Eisen* was not that the brokers selectively violated free competition and pricing, but that it was their consistent policy to do so. Once Eisen chose to buy in the odd-lot market, he could no more avoid being a victim of the scheme than the scheme could make an exception for him, each and every purchaser became an indispensable victim as long as the anti-competitive system was in operation. *See id.*

[209] Specifically, Eisen stood to recover $70, whether he sued for his share of the unjust gain or for damages. *Id.* at 161.

risk of involving the rights of other victims, thereby increasing the obligation to give notice.

Whenever no one victim's share of the unjust gain meets the amount in controversy, the unjust gain cannot be disgorged except by a Rule 23(b)(1) class action. If this action is deemed to be subject to due process notice requirements, then those requirements may be so demanding as to stifle the use of the action. The drafters of the Federal Rules of Civil Procedure believed that notice was not required for Rule 23(b)(1) class actions. If the unjust gains of mass wrongdoers are not to be immunized, the Supreme Court will have to accept the distinction within Rule 23 that the drafters created; namely, that Rule 23(b)(3) actions require strict notice; Rule 23(b)(1) actions do not. If the Court does not accept the distinction, then the only alternative is to have individuals bring actions for restitution against mass wrongdoers.

The Common Fund Doctrine

One of the forces which encourage class actions has been the ability to recover attorney's fees. In a somewhat more modest fashion the same inducement may exist when an individual brings an action in restitution against a mass wrongdoer. Reasonable attorney's fees are awarded in class actions provided the action is successful.[210] "Such awards represent . . . [a departure] from the traditional American rule that no attorney's fees will be awarded in a civil suit."[211] Under the "common fund" theory, a plaintiff whose suit for his share of the unjust gain results "in the establishment of a fund for the benefit of others besides himself may recover his counsel fees from the common fund, thus preventing the unjust enrichment of the other beneficiaries at the plaintiff's expense."[212] In *Sprague v. Ticonic National Bank*,[213] the plaintiff had deposited money in a trust fund at the Ticonic National Bank of Waterville, Maine, just prior to the great banking collapse.[214] Under the trust agreement part of her

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[210] *See* Comment, *Computing Attorney's Fees in Class Actions: Recent Judicial Guidelines*, 16 B.C. INDUS. & COM. L. REV. 630 (1975); Comment, *The Allocation of Attorney's Fees After Mills v. Electric Auto Lite Co.*, 38 U. CHI. L. REV. 316 (1971).

[211] Comment, *supra* note 210, 16 B.C. INDUS. & COM. L. REV. at 630.

[212] *Id.* at 630 & n.7.

[213] 307 U.S. 161 (1939).

[214] *Id.* at 162.

fund was placed in the bank's savings department while the remainder was placed in the bank's commercial checking department.[215] Other individuals had established trust funds in the same manner.[216] The funds in the checking department were "secured by an appropriate amount of bonds set aside in its trust department as required by Section 11(k) of the amended Federal Reserve Act . . . ."[217] After Ticonic was taken over by another bank and both banks went into the hands of a receiver, Sprague filed an action in the district court against the banks and their receiver to impress upon the proceeds of the bonds a lien for the trust deposit.[218] The court sustained the claim and entered a decree for the discharge of the lien.[219]

Having successfully imposed a lien on the bonds to the extent of her trust fund, Sprague moved to have her counsel fees reimbursed from the remainder of the bonds. She claimed that "by vindicating her claim to a lien on the proceeds of the earmaked bonds to the amount of her trust funds, she had established as a matter of law the right to recovery in relation to fourteen trusts in situations like her own; that she had prosecuted the litigation at her own expense . . . ."[220] Her claim for attorney's fees was based solely upon the theory that her successful lawsuit had in effect established a "common fund," conferring a direct benefit upon those fourteen other trusts for whom the same bonds stood as security.[221] Even though the cases were separate and distinct, a benefit was conferred because the impact of stare decisis was such that by virtue of her judgment all the other trusts became entitled to the same judgment.[222] Unless

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[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.* at 163.

[219] *Id.*

[220] *Id.* Sprague was not seeking the counsel fees from the defendant bank, but from a common fund; nor did she seek damages. *Id.* At no time did she profess to represent any interests but her own. *Id.*

[221] *See* Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds*, 87 HARV. L. REV. 1597, 1601–12 (1974). The "common fund" originated in the landmark cases of Trustees v. Greenough, 105 U.S. 527 (1881) and Central Railroad & Banking Co. v. Petlus, 113 U.S. 116 (1885). In *Greenough*, the successful claim for reimbursement of attorneys' fees from the fund was presented by the client. In *Petlus*, the successful claim for reimbursement of attorneys' fee from the fund was asserted by the attorneys. Professor Dawson believes that the "common fund" escape route from the otherwise restrictive American policy prohibiting recovery of counsel fees should be limited to the plaintiff-client, and that the doctrine should not be a means to provide the successful attorney with an added award beyond the fees that had been negotiated in advance with his client. Dawson, *supra*, at 1601–06.

[222] 307 U.S. at 166. Because Sprague did not bring a class action, the fund in which others could participate was not automatically established by the decree in her favor. *Id.* "But in view

Sprague was granted attorney's fees from the fund, the fourteen passive fund owners would be unjustly enriched by her efforts.[223] Justice Frankfurter, writing for the Court, granted the attorney's fees, to be paid from the fund which her efforts had created.[224]

It follows from *Sprague* that if Zahn, proceeding on his own behalf, had obtained a judgment against International either for his appropriate share of the unjust gain or the full unjust gain, he would have been additionally entitled to obtain reasonable counsel fees to be paid out of the fund his precedent had established. Had Eisen brought a successful suit for restitution he also would have been entitled to counsel fees.[225] Traditional American jurisprudence rejects the idea of imposing the burden of the winning litigant's counsel fees upon the loser.[226] This policy is based on the rationale "that more

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of the consequences of stare decisis, the petitioner by establishing her claim necessarily established the claims of fourteen other trusts pertaining to the same bonds." *Id.* The Court noted that:

> Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through stare decisis rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.

Id. at 167.

[223] It has been stated that "it is repugnant to fundamental principles of equity . . . that they should reap where they have not sown." *Petition of Crum*, 196 S.C. 528, 533, 14 S.E.2d 21, 24 (1941). " '[E]very ground of justice' [calls] for payment by those who 'accepted the fruits' of the labors of others." Dawson, *supra* note 221, at 1603.

[224] *Id.* Justice Frankfurter's opinion explained that:

> Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts. The suits "in equity" of which these courts were given "cognizance" ever since the First Judiciary Act, constituted that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery, subject, of course, to modifications by Congress . . . . To be sure, the usual case is one where through the complainants efforts a fund is recovered in which others share. Sometimes the complainant avowedly sues for the common interest while in others his litigation results in a fund for a group *though he did not profess to be their representative.* The present case presents a variant of the latter situation. In her main suit the *petitioner neither avowed herself to be the representative of a class nor did she automatically establish a fund in which others* could participate. But in view of the consequences of *stare decisis* the petitioner by establishing her claim necessarily established the claims of fourteen other trusts pertaining to the same bonds.

307 U.S. at 164–66 (emphasis added). The net result is "to compel contribution to the litigation costs of the client." Dawson, *supra* note 221, at 1605.

[225] *See* Dawson, *supra* note 221, at 1606 n.25.

[226] *See* Comment, *supra* note 210, 16 B.C. INDUS. & COM. L. REV. at 630. There are, however, both judicial and legislative exceptions to this general principle, including the vexa-

litigants will be deterred by doubling the costs in lawyers' fees if they lose than will be encouraged by the prospect that the lawsuit will cost them nothing if they win."[227] None of the reasons opposing the recovery of counsel fees by the winning party are applicable when the fees are sought not from the losing party, but from a common fund established for non-party beneficiaries.

Fleischmann Brewing Corp. v. Maier Brewing Co.[228] sharpens the distinction between the losing party and the non-party beneficiary. Underlying the case was a deliberate infringement of a valid trademark arising under the Lanham Act.[229] Section 35 of the Act[230] enumerates the available compensatory remedies, but includes no provision for counsel fees. While the Court did not award the fees, it observed that a limited exception was that of the common fund.[231] The distinction between counsel fees obtained from the losing party, forbidden in American jurisprudence, and fees obtained from a non-party beneficiary, has been clearly accepted.[232]

Had Zahn and Eisen been permitted to litigate on the merits, and done so successfully, their precedents would have established a fund out of which they could have asserted a claim for attorneys' fees. Thus, Zahn and Eisen, whether suing in restitution in a representative capacity, or on their own behalf, had the potential to recover their shares of the defendants' unjust gains as well as their attorneys' fees.

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tious conduct rule, which is simply a punitive measure, the common fund doctrine, and the private attorney general theory. *Id.*

[227] Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849, 849 n.1 (1975).

[228] 386 U.S. 714 (1967).

[229] 15 U.S.C. §§ 1051 to 1127 (1963).

[230] 15 U.S.C. § 1117 (1963).

[231] 386 U.S. at 718–19. Chief Justice Warren noted that the:

> exception had previously been applied in cases where a plaintiff traced or created a common fund for the benefit of others as well as himself . . . . In that situation to have allowed the others to obtain full benefit from the plaintiff's efforts without requiring contribution or charging the common fund for attorney's fees would have been to enrich the others unjustly at the expense of the plaintiff.

Id. at 719.

[232] Professor Dawson stated that "[i]t is agreed everywhere that if a *Greenough*-type fund can be found, the client can assert in his own name a claim for contribution to his costs against the fund that his litigation has 'created, increased, or protected.' " Dawson, *supra* note 221, at 1606. Dawson then cited what he claimed to be an almost complete list of cases in which claims for contribution from funds were successful. *Id.* at 1606 n.25.

Conclusion

Zahn's claim, brought under Rule 23(b)(3), which does not permit aggregation of the class members' claims, was dismissed because not every individual within the class satisfied the amount in controversy. The aggregation problem which stymied Zahn might be prevented by bringing an action in restitution for the disgorgement of the unjust enrichment under Rule 23(b)(1) which permits aggregation of the class members' claims. Eisen's claim, brought under Rule 23(b)(3), which requires the representatives of the class to give strict notice to all members, was dismissed because it was not economically feasible for Eisen to pursue the claim given the prohibitive costs of complying with the notice requirements. Such dismissals may be prevented by bringing a Rule 23(b)(1) action in restitution. Strict notice is not required, if, rather than a class action, an individual action in restitution is brought for an appropriate share of the defendant's unjust enrichment. If it is found, however, that constitutional due process requires notice regardless of the Federal Rules of Civil Procedure, the representative must bear the cost and burden of complying with the requirements to prevent a dismissal of the action. To the extent that the defendant wants the protection that notice to the victims would provide, he must serve them himself.

The value of waiving the class action in tort for an individual action in restitution depends upon one's capacity to establish his share of the unjust enrichment as being greater than his damages. Once established, it is more likely that the jurisdictional amount will be exceeded. The class action is meant to be an efficient procedural device to redress mass *de minimus* wrongs. The efficiency of the device has been severely reduced by decisions resulting in onerous notice procedures and undue restrictions on the aggregation of claims. Had Rule 23 been interpreted in light of its purpose—to prevent unjust enrichment resulting from mass *de minimus* wrongs—there would be no need for a novel theory to effect its purpose.