Boston College Law Review

Volume 10
Issue 3 *A Symposium Federal Rule 23 - The Class Action*
Article 6

4-1-1969

Prerequisities to a Class Action Under New Rule 23

Charles Donelan

PREREQUISITES TO A CLASS ACTION UNDER NEW RULE 23

CHARLES DONELAN*

The author analyzes the four very specific prerequisites imposed by new Rule 23 upon the would-be class action representative: that the representative first demonstrate that the class members are so numerous as to make their joinder impracticable; that he establish the presence of common questions of law or fact; that he have an interest of sufficient affinity with that of the rest of the class; and, finally, that the representative have the capacity to protect adequately the interests of the entire class. The author concludes that these prerequisites, shaped by considerations of practicability and due process, will more than adequately safeguard the rights of absent class members so long as they are conscientiously administered.

New Rule 23 of the Federal Rules of Civil Procedure sets forth very specific prerequisites to a class action.[1] The four elements contained in subsection (a) of new Rule 23 prescribe the threshold requirements: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class."

The elements in 23(b),[2] which also must be satisfied before a class action may be maintained, apply generally to the effect on others outside the class and provide for the protection of absentees or nonparticipants. In this respect, both 23(a) and (b) reflect proper deference for the traditional procedural requirements of due process. This deference reflects an evolution from prior rules.

The thrust of the prior Equity Rules[3] and former Rule 23 was

* B.A., Yale University, 1953; LL.B., Georgetown University, 1958; LL.M., Georgetown University, 1960; Member, Massachusetts Bar Association, American Bar Association; Member, American Trial Lawyers Association; Partner, Bowditch, Gowetz & Lane, Worcester, Massachusetts.

1 Fed. R. Civ. P. 23.

2 Fed. R. Civ. P. 23(b).

3 The Federal Equity Rules were the prototypes of the present Federal Rules of Civil Procedure. Equity Rule 38 was promulgated by the Supreme Court in 1912. It read: "When the question is 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, one or more may sue or defend for the whole." Equity R. 38, 226 U.S. 659 (1912); see 2 J. Moore, Federal Practice ¶ 1.02[2], at 124; ¶ 2.03, at 315-16 (1967); Lesar, Class Suits and the Federal Rules, 22 Minn. L. Rev. 34 (1937).

an attempt to deal effectively with multi-party litigation without sacrifice of the individual's rights of due process. Multiplicity of parties has been an ancient problem in the courts but modern statutes and business requirements have intensified and dramatized the need for a just and efficient procedure to enable every plaintiff to have his day in court and to allow every defendant to terminate his liability on that same issue for all time. An additional consideration which has come to the fore is an increasing awareness of the rights of all parties not only to due process but to a concrete means of protecting themselves in the courts. Prior to amended Rule 23, there was no ready accommodation in the Federal Rules for the interests of the small claimant or effective means of dealing with many small claimants.

Former Equity Rule 38 dealt with the problem of numerosity.[4] Former Rule 23 expanded this Rule to embrace not only the numerosity feature but to include a reference to adequate representation and common questions of law or fact.[5] Despite this expansion, two major objections to former Rule 23 were that (1) it was too vague and offered insufficient guidance to the courts and parties,[6] and (2) it failed to safeguard adequately the rights of affected parties who were not given notice and who were not represented before the court.[7] This gap in the procedural tapestry has been mended or "amended" by new Rule 23 which provides the claimant of limited financial resources an avenue of relief which exists not only in law but also in fact.

It is noteworthy that in the early Equity Rules the due process argument was not considered paramount and perhaps not even significant. A judgment in a class action under Equity Rule 38 was binding on all members of the class.[8] However, in later years, prior to the revised Rule, judicial attitudes shifted. For example, the "spurious" class action was interpreted as a permissive joinder device under former Rule 23. Courts carefully provided that the rights of class members not present and not subject to the jurisdiction of the court, and not having notice of the action, were completely unaffected by such suit.[9]

New Rule 23 has attacked this problem directly by setting forth guidelines for the conduct of class actions which deal with the due process problem. First, it requires that the rights of absent class members be fully protected through adequate representation by the original parties. Second, it insures that the class is carefully chosen and defined and that notice is given to class members so as to give them the opportunity to be heard or to exclude themselves.

---

4 Equity R. 38, 226 U.S. 659 (1912).
5 Fed. R. Civ. P. 23, 28 U.S.C. App., at 6101 (1964).
6 See Advisory Committee's Note to Rule 23, 39 F.R.D. 98, 98-99 (1966).
7 Id.
8 Z. Chafee, Some Problems of Equity 228-29 (1950).
9 All American Airways, Inc. v. Elderd, 209 F.2d 247 (2d Cir. 1954).

Present throughout all four of the prerequisites in Rule 23(a) is the preliminary problem of defining the class. As stated in *Dolgow v. Anderson*,[10] "[b]y definition, an essential prerequisite to a class action is the existence of a 'class' whose bounds are precisely drawn."[11]

The class definition does not have to name the exact number of the class nor their identity.[12] All that is necessary is that the class be defined with "some precision."[13]

Initial class definitions are subject to the perils of misinformation, lack of information, lack of time and lack of means for ascertaining the necessary facts prior to filing suit. The draftsmen of Rule 23 recognized this problem by providing for the designation of subclasses as deemed necessary by the court.[14] Even when subclasses may not provide the best solution, the Rule has provided sufficient discretion to the court, such as that exercised in the *Dolgow* case: "The fact that these classes may overlap is not significant at this stage of the litigation. If it should later appear that a scheme to defraud was not carried on during the entire period [plaintiff] was a shareholder, the class can be further narrowed."[15] The definition of the class has become crucial under amended Rule 23 because of the binding effect upon all class members whether represented or not. It may be expected that all judges will scrutinize this element of the Rule with particular care.[16]

The first prerequisite states that the class action is not to be utilized unless joinder under Rules 19 and 20 is impracticable. Federal Rule 19 provides little comfort to the class litigants whose numbers are so large as to make joinder impracticable.[17] The very heading of Rule 19, subsection (a) is, "Persons to be joined if feasible." Rule 19 proceeds within the framework of conventional jurisdiction over all the parties individually through valid service of notice and other regular procedural safeguards of due process. This restriction severely narrows the potential class since the only parties eligible to be joined are those "subject to service of process and whose joinder will not deprive the court of jurisdiction." The purpose of the joinder provision is to implement the principle that everyone should have his day in court. However, these elements presuppose that the proponent will know the other parties similarly situated. Recognizing that it is not

[10] 43 F.R.D. 472 (E.D.N.Y. 1968).

[11] Id. at 491.

[12] Id. at 492-93.

[13] Fischer v. Kletz, 41 F.R.D. 377, 384 (S.D.N.Y. 1966).

[14] Fed. R. Civ. P. 23(c)(4).

[15] 43 F.R.D. at 492.

[16] See Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 45-46 (1968); Frankel, Amended Rule 23 From a Judge's Point of View, 32 Antitrust L.J. 295, 297 (1966).

[17] Fed. R. Civ. P. 19.

a substitute for a bona fide class action, Rule 19 in subsection (d) provides that it "is subject to the provisions of Rule 23."

Rule 20 is permissive in nature and allows an unlimited number of parties, irrespective of their jurisdiction, to join in an action where there is a common question of law or fact arising out of the same transaction.[18] It is optional joinder in that "[a]ll persons may join," and implies that every party is to be represented separately. Rule 20 approaches the multi-party litigation problem by requiring a common question of law or fact but contemplates separate claims which stand on their own legal ground. The purpose of the Rule is the avoidance of multiple trials involving the same facts, but it leaves to each individual claimant the decision whether he wishes to join in a common action or conduct his own. Rule 20 expressly recognizes in subsection (b) that the common interest may dissolve at any time and that each party may be severed from the action to pursue his own destiny at any stage of the proceedings.[19] Thus, Rules 19 and 20 contemplate a viable, independent plaintiff or a defendant knowledgeable and solvent enough to take effective care of himself. These Rules presuppose individual financial ability to prosecute the claims, and eliminate the small claimant whose claim is under $10,000 or who by jurisdictional facts is precluded from joining an existing action or whose numbers are so large as to be impracticable for joinder.

One of the primary considerations in the determination whether joinder is practicable is the number of persons involved. Thus, the first prerequisite is that "the class is so numerous that joinder of all members is impracticable." There has been, however, no accepted definition as to the number of parties that must be involved in one action. In the developing case law the absolute number in the class is not controlling. In the *Dolgow* case, this was made clear by Judge Weinstein: "The fact that plaintiffs cannot state the exact numbers of people in the . . . class or identify them by name is irrelevant."[20]

Despite the realization that mere number is not the sole criterion, it is significant to note that a four-member class was not numerous enough to sustain a class action in *Hyde v. First & Merchants Nat'l Bank*.[21] Other cases have held that a few more than four in a class still did not qualify. These include cases involving 7 members,[22] 8 members,[23] and 16 members.[24] But as few as 18 members were found to be

---

18 Fed. R. Civ. P. 20(a).

19 Fed. R. Civ. P. 20(b).

20 43 F.R.D. at 492.

21 41 F.R.D. 527 (W.D. Va. 1967).

22 Brooks v. Briley, 274 F. Supp. 538 (M.D. Tenn. 1967).

23 Rippey v. Denver United States Nat'l Bank, 260 F. Supp. 704 (D. Colo. 1966).

24 DeMarco v. Edens, 390 F.2d 836 (2d Cir. 1968).

so numerous as to make joinder impracticable in *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*,[25] and other cases with more than 18 members have supported a claim for a class action.[26] The opinion in *DeMarco v. Edens* seems to sponsor the most rational approach. Judge Waterman stated: "[C]ourts should not be so rigid as to depend upon mere numbers as a guideline on the practicability of joinder; a determination of practicability should depend upon all the circumstances surrounding a case."[27]

It seems clear that no court will seize upon numerosity alone as a ground for deciding the question whether a class action can be maintained, but will examine the case in the context of all the pertinent facts. Thus, the court's determination of the practicability of joinder will require consideration of several other factors.[28] One such factor is whether the parties are within the jurisdiction of the court. If they are not, and if a situation arises where all parties must be joined for the fair and efficient adjudication of the controversy, Rule 19 would not apply. In such situations, permissive joinder under Rule 20 would not be a satisfactory alternative, since the parties either join or sue separately at their discretion. Thus, joinder would seem to be impractical.

Another typical factor concerns the ability of individual claimants to institute suits in their own behalf.[29] Inability to litigate could arise from one's financial position or from a lack of knowledge that a cause of action exists. If the persons are unable to sue, then joinder may be deemed impractical because permissive joinder presupposes "a group of economically powerful parties who are obviously able and willing to take care of their own interests. . . ."[30] Only the people who are aware of their cause of action and who are able financially to join the suit can make use of the permissive joinder device. Since a major purpose of the class action is to protect small claimants and to provide an adequate means of redressing their grievances, permissive joinder should be deemed an impractical alternative in these cases. The class action may then be utilized if the remaining prerequisites of Rule 23 are met.[31]

---

[25] 375 F.2d 648 (4th Cir. 1967).

[26] Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 (S.D. Ind. 1967) (160 members); Clemens v. Central R.R., 264 F. Supp. 551 (E.D. Pa. 1967) (200 members).

[27] 390 F.2d at 845.

[28] See Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 459 (1960).

[29] Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968); Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968).

[30] Frankel, Amended Rule 23 From a Judge's Point of View, 32 Antitrust L.J. 295, 298 (1966). See also Proceedings of the Twenty-eighth Annual Judicial Conference—Third Judicial Circuit of the United States, 39 F.R.D. 375, 517 (1965) (remarks of Prof. Kaplan).

[31] It is important to note that the burden of making the record of facts rests upon the proponent of the class. Judge Waterman has stated: "[I]t is fundamental that those seeking to maintain an action as a class action must make a positive showing that it

The second prerequisite of 23(a), that there be questions of law or fact common to the class, is important in the preliminary attempt to define the class. The advantage of the resolution of large numbers of separate claims through the use of a class action would quickly be defeated if each class member sought to rely on different law or different facts. The case would quickly become a procedural Tower of Babel.

In the securities field, certain problems of interpreting subsection (a)(2) have arisen, especially in regard to misrepresentation or failure to disclose information in a written prospectus. When a corporation releases to the public a single written prospectus which falsely states or omits a material fact, the common questions are clear. The questions whether the prospectus was, in fact, incorrect and whether the incorrect statement created a cause of action in those injured parties who relied thereon, are common to the class. The common questions are not clear, however, when the misrepresentations are not made to the public generally, and are not made in one written statement. If the misrepresentations are made orally to separate persons, the questions of law or fact would vary according to the particular circumstances surrounding each communication. Similarly, if several different written statements were issued to the public at large, the questions of law or fact as to the persons injured by reliance on one prospectus may differ from the common questions of persons relying on another.[32]

However, if a series of misrepresentations can be shown to be interrelated, the various injured parties may be able to sue in one class action in accordance with the "common course of conduct" concept.[33] In order to be included within this concept, a party must show that the misrepresentations were all part of a common scheme to defraud. Once this fact is established, the questions of law or fact, though intrinsically based on different circumstances, obtain a common nucleus and thus are amenable to class action treatment. In *Fischer v. Kletz*,[34] a case which illustrates the "common course of conduct" concept, the alleged class members purchased stock from the defendant corporation over a two-year period, each relying on one of seven financial statements which overstated the company's earnings. The corporation alleged that since there was a variety of statements, none of which were seen or relied upon by each of the investors, there were no common questions

---

would be impracticable to deny the prayer." DeMarco v. Edens, 390 F.2d 836, 845 (2d Cir. 1968).

[32] See Jacobs v. Paul Hardeman, Inc., 42 F.R.D. 595 (S.D.N.Y. 1967); Richland v. Cheatham, 272 F. Supp. 148 (S.D.N.Y. 1967); Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42 (S.D.N.Y. 1966).

[33] See Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 914 (9th Cir. 1964); Fischer v. Kletz, 41 F.R.D. 377, 381 (S.D.N.Y. 1966); Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42, 45 (S.D.N.Y. 1966).

[34] 41 F.R.D. 377 (S.D.N.Y. 1966).

of law or fact. The court held that the false statements were so "interrelated, interdependent, and cumulative" that a "close relationship" existed and that the common-question prerequisite was satisfied.[35] Where the class representatives can allege and prove that statements are consistently false—that a consistent course of misconduct is involved—the "common course of conduct" approach should be used.

Similar problems of interpretation and application of the common-question requirement have arisen in the field of antitrust law. Generally, where a conspiracy to fix prices is coupled with an actual fixing of prices, the common-question prerequisite is satisfied for all those who purchase products at the inflated prices.[36] The common questions may not be clear, however, when the fixed prices vary according to the purchaser, and to the products involved. In *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*[37] the class representative sued the defendant corporation alleging a conspiracy to fix prices in violation of the antitrust laws. Each member of the alleged class had purchased products from the defendant at prices which, as a result of the price fixing, were inflated. The defendant, Anaconda American Brass Company, asserted that even if prices were adjusted in restraint of trade, the parties could not sue as a class since there were no common questions of law or fact. Anaconda pointed out that the alleged class members purchased varying products which were separately priced and had separate uses. The defendant also noted that during the period of the alleged conspiracy there were many price changes in each product line and that these changes varied with the individual purchaser. The district court held that, although these varying circumstances existed, the overriding fact of the restraint on trade remained constant. The court noted that if, during the course of the suit, the differences among class members appeared significant, resort might be had to subclasses. It is also considered immaterial that once the common questions are litigated the individual class members will have varying proofs regarding damages.

The prerequisite of common questions of law or fact must also be read with the first clause of subsection (b)(3) which provides that the questions not only must be common but also must predominate over questions affecting only individual class members.[38] This requirement was not present under former Rule 23.[39] Obviously, the assessment of predominance is a more difficult judgment than the mere finding of the

[35] Id. at 381.

[36] Nagler v. Admiral Corp., 248 F.2d 319 (2d Cir. 1957); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968); Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967); Illinois v. Brunswick Corp., 32 F.R.D. 453 (N.D. Ill. 1963); Austin Theatre, Inc. v. Warner Bros. Pictures, Inc., 19 F.R.D. 93 (S.D.N.Y. 1956).

[37] 43 F.R.D. 452 (E.D. Pa. 1968).

[38] Fed. R. Civ. P. 23(b)(3).

[39] See 3A J. Moore, Federal Practice ¶ 23.10[5], at 3453 (1968).

common questions. Judge Weinstein in *Dolgow* recognized as much: "The common issues need not be dispositive of the entire litigation. The fact that questions peculiar to each individual member of the class may remain after the common questions have been resolved does not dictate the conclusion that a class action is not permissible."[40] Furthermore, it was stated in *Kronenberg v. Hotel Governor Clinton, Inc.*,[41] "While there may be different kinds of misrepresentations alleged with respect to different plaintiffs, including some oral misrepresentations, and while such factors might have led to a dismissal of a class action under the old rule . . . the new Rule 23 provides the flexibility to permit this action to proceed."[42]

Prerequisite (a)(3) that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class," is new and has yet received only meager interpretation by the courts. It appears to be a further effort to insure that the representative of the class will act for the best interests of absent class members who will be bound by the result. Prior sections of the new Rule reveal some indication of this concern but the draftsmen, perhaps in answer to the implied criticism of vagueness in the old Rule, felt it necessary to describe specifically the identity of interest which the representative of the class must share with the absent members.[43] It should be remembered that this requirement of the class representative is in addition to the common-question prerequisite of (a)(2) which applies to the class as a whole and which requires only a finding that there are issues of law or fact applicable to each member. Thus, the interests of the class representative under (a)(3) must have such affinity with the interests of the rest of the class as to preclude any actions inimical thereto.

The full meaning of this prerequisite is put into relief when read in tandem with subsection (a)(4) requiring that "[t]he representative parties will fairly and adequately protect the interest of the class." Subsections (a)(3) and (4) are both subjective in nature and impose a dual requirement on the would-be class representative. The draftsmen have emphasized the necessity of an adequate inquiry into the

---

[40] 43 F.R.D. at 490.

[41] 41 F.R.D. 42 (S.D.N.Y. 1966).

[42] Id. at 45. It is interesting to note that the lack of direct comment in the cases on the predominance issue seems to indicate that it has always been considered to be, by implication, part of the common-question prerequisite.

[43] See Minnesota v. United States Steel Corp., 44 F.R.D. 559, 566-67 (D. Minn. 1968); Iowa v. Union Asphalt & Roadoils, Inc., 5 Trade Reg. Rep. ¶ 72,473, at 85,543 (S.D. Iowa 1968). "Clause (3) of subdivision (a) emphasizes that the representative ought to be squarely aligned in interest with the represented group." Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure, 81 Harv. L. Rev. 356, 387 n.120 (1967).

suitability of the representative to protect the interests of the class. The obvious need for this exercise of proper scrutiny stems from the fact that under the revised Rule every class member is bound by the judgment in the class action,[44] regardless of the nature of his rights.

Of course, the judge is to consider the realities of each case and has available the discretion conventionally thought to be inherent in the judicial power. Thus, the decisions often reflect the same general approach of the cases on common question and predominance which rely on the major wrong as a strong determining factor, and the singular relationship of a particular plaintiff to the wrong as secondary. In *Mersay v. First Republic Corp. of America*,[45] an action charging fraud in the sale of securities, the court found the basic issue to be such that the class proponent's interests were typical even though he, as an "insider," might be precluded from recovering. In *Siegel v. Chicken Delight, Inc.*, Judge Harris held that "Rule 23(a)(3) does not require that all the members of the class be identically situated, if there are substantial questions of law or fact common to all. . . ."[46]

Whereas subsection (a)(3) emphasizes the necessity of common and consistent interests of the representative, (a)(4) treats the actual ability of the representative to protect and enhance the interests of the rest of the class. This fourth and last prerequisite requires that "[t]he representative parties will fairly and adequately protect the interest of the class." The use of the word "protect" is significant in that it indicates the concern so evident throughout amended Rule 23 for the rights of parties not before the court. The binding effect of a judgment under amended Rule 23 on these absentees imposes a far reaching responsibility on the court and the class representative. As Judge Weinstein states in *Dolgow*, "[the absent class members] may find themselves bound even though they were not actually aware of the proceeding. In such circumstances, the contention that adequate representation is lacking becomes weighty and 'the interests of the affected persons must be carefully scrutinized to assure due process of law for the absent members.' "[47]

The court in *Eisen v. Carlisle & Jacquelin*[48] held: "[A]n essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation."[49] It follows, therefore, that the attorney for the class representative has a better chance for success in his quest for recognition of

---

[44] Fed. R. Civ. P. 23(c)(2),(3).

[45] 11 Fed. Rules Serv. 2d 23a.52, Case 4 (S.D.N.Y. 1968).

[46] 271 F. Supp. at 726-27.

[47] 43 F.R.D. at 493.

[48] 391 F.2d 555 (2d Cir. 1968).

[49] Id. at 562.

his client as a class representative if he is well known and, even better, favorably known to the judge.

The quality of counsel is one of the factors discussed in the *Dolgow* case. The court's consideration of this factor resulted in a ringing endorsement of counsel which was obviously not what defense counsel sought when they challenged his qualifications.[50] The *Dolgow* opinion flatly puts the burden on the assailant to sustain any attack on the adequacy of counsel. "Until the contrary is demonstrated, courts will assume that members of the bar are skilled in their profession."[51]

It would appear that an attack upon a party's lawyer, under 23(a)(4), on a general basis of qualifications is strategically disastrous unless the incompetence charged is specific, supported by solid evidence, and so apparent as to be obvious. Even where incompetence seems patent, this contention will inevitably involve the speculatory difficulties of definition and proof of professional inability. Therefore, it is wise to assume that a judge might not agree with an allegation of incompetence about a fellow attorney. The *Eisen* case does mention one area where a challenge to the qualifications of counsel might be sustained. Judge Medina states: "[I]t is [also] necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder of the class."[52] These last elements relate more to personal honesty than to professional competence and the "antagonistic claim" aspect would seem to have been considered earlier under 23(a)(2) (common question) or certainly 23(a)(3) (typical of the class).

Another consideration as to adequacy of counsel is whether one lawyer is enough to represent a large class. This issue received the attention of Judge Weinstein in *Dolgow*. "The lawyer's task with respect to common questions of law and fact is not more difficult whether he is representing one person or a class of a million. In either case he will have to prove the same allegations if he is to prevail."[53]

Once the attorney has been found adequate, the court must consider whether the proponent of the class action is himself capable of "adequately and fairly protecting the interest of the class." As found previously, mere numbers are not determinative, whether the quantum be the extent of the representative's proportionate financial interest or the number of representatives in relation to the size of the class. In *Eisen*, the court spoke directly to the quantitative approach. "[W]e believe that reliance on quantitative elements to determine adequacy of representation . . . is unwarranted. . . . [O]ne of the primary functions

50 43 F.R.D. at 496.

51 Id.

52 391 F.2d at 562.

53 43 F.R.D. at 497.

of the class suit is to provide 'a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group.' "[54] This view accords with that of Judge Weinstein in *Dolgow* where he also voiced a positive philosophy of class actions:

> To assert that the minute interests of the parties before the court is a factor which militates against allowing a class action is to ignore the spirit of Rule 23. Since, as we have seen, if the plaintiff's claim is very large a class action is rendered unnecessary, the main purpose of the class action is to provide a means of vindicating small claims. It would be anomalous to hold that only major financial interests can make use of it.[55]

The amounts sought as individual damages in the *Dolgow* case were 160 dollars for 3 class representatives and 14,760 dollars for the fourth.[56] In *Eisen*, damages were estimated by the lower court at only 70 dollars.[57] This case appears even more extraordinary in view of the fact that Eisen alone was suing on behalf of approximately 3,750,000 members.

The number of proponents of the class action is also regarded as not controlling. Again, in *Dolgow* Judge Weinstein emphasizes that "[t]here is, of course, no 'magic in numbers' . . . . The quality of representation is more important than numbers.' "[58] The court in *Eisen* expressly states that it is "not persuaded that it is essential that any other members of the class seek to intervene."[59] Nor will the class proponent be required to obtain the endorsement of his class members: "[T]he representative party cannot be said to have an affirmative duty to demonstrate that the whole or a majority of the class considers his representation adequate."[60] This approach is harmonious with the tenor of the amendment which presupposes a class that is either unaware of or reluctant to litigate their claims. With such a class, it is natural that a relatively small number of representative parties will appear before the court. Furthermore, the fact that only a small number of parties come forward to represent the class may be due to the class' reliance on the "binding effect" of all judgments under the amended Rule. Satisfied with a small number of representatives, and aware that their claims will be awarded, class members may simply decide not to intervene.

---

54 391 F.2d at 563.
55 43 F.R.D. at 495.
56 Id. at 479.
57 391 F.2d at 566 n.16.
58 43 F.R.D. at 495.
59 391 F.2d at 563.
60 Id.

In *Eisen* and in *Dolgow* the liberal policy of opening the way to the proponent of the class action is tempered by an awareness of Rule 23's other procedural safeguards. Judge Weinstein in *Dolgow* refers to this safety valve. "[U]nder subdivision (d)(3) the court may impose 'conditions on the representative parties.' It has a broad range of discretion to assure adequacy of representation according to the individual circumstances of every case."[61]

Only time will tell whether new Rule 23 is the remedy which will be a deterrent to the predatory or strategically situated wrongdoer. The increasing complexity of legal relationships will produce numerous instances in which multi-party litigation will arise and in which the class action will supply the only satisfactory method of coping with such proceedings. Two imponderably human factors will largely determine the successful use of new Rule 23. One is whether attorneys will be allowed reasonable fees for attempting the arduous task of bringing a class action. The other is whether the judiciary will meet the challenge of new Rule 23, which by its very nature presupposes a responsive and industrious judge who will administer a class action with a firm and impartial hand.

---

[61] 43 F.R.D. at 496.