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Comment, Damages in Class Actions: Determinations and Allocation

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DAMAGES IN CLASS ACTIONS: DETERMINATION AND ALLOCATION

I. INTRODUCTION

The class suit is a procedural device utilized by the courts in order to effect redress for the plaintiff who has a small stake in a large controversy. The controversy usually involves a large sum of money, immensely complex facts and intricate law. The expense entailed in the litigation of such a controversy is generally much greater than the relief afforded an individual plaintiff. Thus, even if the individual plaintiff could be assured of the outcome of a suit, few would have a claim large enough to make such an effort worthwhile. In the absence of other administrative or judicial procedures the wrong would go unredressed. Consequently, "[t]he employee who is entitled to time and a half for overtime, the stockholder who has been misled by a false statement in a prospectus, the ratepayer who has been charged an excessive rate, . . . the taxpayer who resists an illegal assessment, or small business man who has been the victim of a monopoly in restraint of trade . . ."[1] is placed in an adverse position. Realizing this problem, the courts have often allowed the many small plaintiffs to sue as a class and, as such, to share the expenses and profits resulting from the suit. This arrangement has generated its own peculiar difficulties and solutions to these difficulties. Consequently a nexus of laws and procedures unique to class suits has accumulated. The purpose of this comment is to examine this set of laws and procedures, particularly those relating to damages, and to analyze and evaluate them with respect to the aim of all judicial procedure, that is, "to secure a just, speedy and inexpensive determination of substantive rights."[2]

Most procedural problems arise in actions where the claims, defenses and relief of the class members are not identical and where the plaintiffs have been awarded money damages. This comment will be concerned primarily with the question of damages in those types of actions and, more specifically, with problems raised in federal litigation under Rule 23 of The Federal Rules of Civil Procedure. Rule 23, as originally promulgated in 1938, divided class actions into three categories.[3] The first two categories applied to

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[1] Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684 (1941).

[2] Simeone, Class Suits Under the Codes, 7 W. Res. L. Rev. 6 (1955).

[3] Fed. R. Civ. P. 23(a), 28 U.S.C. App., at 6101 (1964), as promulgated in 1938, provided:

> Representation.
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> If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
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> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
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> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
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> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

those class actions where the rights of the individual class members were identical, the "true" class action; or where there was a common fund or property involved, the "hybrid" class action. The third category, termed the "spurious" class action, involved those suits where the rights of the individual class members were not identical, and where there was no common fund or property, but where there were involved common questions of law and fact affecting the rights of all the class members.[4] The 1966 amendment to Rule 23 rejected both the categories and the labels applied to class actions by the original Rule. Rather than defining and categorizing class suits in terms of the abstract nature of the rights involved, the amended Rule describes in more practical terms the occasions for maintaining class actions.[5] Yet those class actions which were labeled "spurious," and which were categorized under subsection (a)(3) of the 1938 Rule, are essentially preserved under subsection (b)(3) of the amended Rule.[6] Thus, the primary focus of this comment will fall on successful class actions for damages which are maintained under subsection (b)(3) of the amended Rule. Subsection (d)(1) of the Rule allows the court broad discretion to fashion appropriate orders for regulating the conduct of the class action. The circumstances of each case will govern the determination of which procedures the court should follow,

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[4] These labels were applied by Professor Moore. 2 J. Moore, Federal Practice § 23.04 (1938). Kalven & Rosenfield disapproved of these labels:

> It may be salutary and perhaps refreshing to pause for a moment to write an epitaph for Moore's accursed labels; "true," "hybrid," and "spurious." It may be a matter of concern only to the purist that this terminology is ludicrous and that the plaintiff must stubbornly insist that he has a spurious suit against the equally stubborn insistence of the defendant that it is not spurious; it may be a matter of concern only to the West Publishing Company that the phrase "spurious class suit held maintainable" must now appear in head notes; it may be a matter of concern only to the logician that we are given three species of class suits the first of which is really a class suit, the second of which is partly a class suit, and the last of which isn't a class suit at all; but it is a matter of general concern that so perverse a value judgment is expressed by the application of the terms "true" and "spurious" to suits of equivalent social importance and function. Given the penchant of the legal mind for psittacistic repetition of labels—res gestae, res ipsa loquitur, champerty, maintenance, or power coupled with an interest, for example—it is imperative that the class suit of subparagraph (a)(3) be saved from the damnation of the faint, faint praise carried by the word spurious.

Kalven & Rosenfield, supra note 1, at 707 n.73.

[5] Advisory Committee's Note to Rule 23, 39 F.R.D. 98, 99 (1966) [hereinafter cited as Advisory Note].

[6] Fed. R. Civ. P. 23(b)(3) provides that a class action may be maintained if

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

including the selection of a method for determining and allocating damages among the class. Thus, any general conclusion as to the efficiency of a particular procedure is as yet impossible. What follows, then, is a survey of those procedures and devices which seem to have been utilized effectively in the past.

II. The Relationship of Damages Problems to the Maintainability of the Class Suit

Factors central to the determination and allocation of damages in certain cases are also crucial to the question of the maintainability of a suit as a class action. Early in the litigation of the action the court must make a determination whether the action will be allowed to proceed as a class suit.[7] One of the primary considerations in this determination is the factor of economy. The class suit is one method of preventing multiple litigation and of trimming court dockets. Yet this goal will not be achieved unless "the questions common to the class predominate over the questions affecting individual members."[8] Were this not the case, the class action would degenerate into an endless stream of litigation to determine the questions pertaining to the individual class members. One type of situation in which the factor of damages can destroy the maintainability of the suit as a class action is the instance of a mass accident. Mass accident cases which involve widespread bodily injury or property damages have generally been disallowed as class actions. Usually the reason for disallowance is that the individuality of defenses, for example, the contributory negligence of each member of the plaintiff class, can destroy the economy of a class suit. However, in some types of mass accident cases the individuality of defenses is at a minimum, as in the case of an airplane crash where there is little likelihood of any contributory negligence. In such cases it is the damages which are highly individual, since they are based on earning capacity, age and other personal circumstances. The authorities have not distinguished between the different types of mass accident suits, but have instead expressed their opinion that they should not be

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[7] Fed. R. Civ. P. 23(c)(1) provides:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

[8] Advisory Note, 39 F.R.D. at 100. For a class action to be maintained it must be shown that a class action is the best possible device. The Advisory Committee's Note further provides:

> That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions.

Id. at 103. See, e.g., Dalehite v. United States, 346 U.S. 15 (1953) (a test case representing about 300 claims aggregating about $200,000,000, was used rather than a class action).

The Bankruptcy Act, 11 U.S.C. §§ 1-1103 (1964), as amended, (Supp. III, 1967), and Federal Deposit Bank Insurance would also cover situations where a class action might have been brought had these other procedures not been available. See Comment, Recovery of Damages in Class Actions, 32 U. Chi. L. Rev. 768, 784 & n.90 (1965).

allowed as class actions.[9] If they are correct, then, in at least one area, a greater degree than usual of individuality of damages will result in a disallowance of the class action procedure, despite the existence of common questions concerning liability.

It is submitted, however, that the class action may still be an economical method of litigating some mass accident cases. If the defenses against the individual plaintiffs are at a minimum, in spite of the individuality of damages, the class suit may provide the most efficient disposition of such a case. This conclusion draws support from the fact that class actions have been allowed on other tort theories, including suits based on fraud and misrepresentation.[10] In such cases, the defendant is able to raise individual defenses, such as lack of reliance, against each plaintiff. While the assessment of damages may be relatively simple if the fraud practiced caused similar injury to each class member, these cases lack the communion of issues pertaining to liability that is present in many mass accident cases. Thus, a mass accident case may well be better suited to the class action device than some cases which have traditionally been allowed to proceed as class suits. This conclusion is reinforced by the fact that the requirement of "common relief" as stated in the 1938 Rule was deleted in the amended Rule. The requirement that common relief be sought was variously construed to mean that each member must be seeking identical relief,[11] that is, the same amount, or that each member must be seeking a similar type of relief, that is, either money damages or injunctive relief.[12] The 1966 amendment to Rule 23 deleted the term "common relief," and required only that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class. . . ."[13] The amended Rule thus rejected the position that each member must be seeking identical relief, and, therefore, it appears that some mass accident cases may be allowed under the new Rule.

III. Types of Suits Maintainable as Class Actions

Many diverse causes of action can be brought as class suits. This fact has become increasingly apparent as class actions have been employed more and more often in actions pursuant to legislatively conferred rights.[14] Each

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[9] The Advisory Committee Note to the 1966 Amendment of Rule 23(b)(3) provides:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways.

39 F.R.D. at 103.

[10] Kimbrough v. Parker, 344 Ill. App. 483, 101 N.E.2d 617 (1951).

[11] Farmer's Co-Op. Oil Co. v. Socony-Vacuum Oil Co., 133 F.2d 101 (8th Cir. 1942).

[12] Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 915 (9th Cir. 1964); York v. Guaranty Trust Co., 143 F.2d 503 (2d Cir. 1944), rev'd on other grounds, 326 U.S. 99 (1945); Weeks v. Bareco Oil Co., 125 F.2d 84, 88 (7th Cir. 1941).

[13] Fed. R. Civ. P. 23(a)(3).

[14] The facts of the older class-suit cases seem very simple in contrast with the enormous complications of . . . recent litigations where it is often difficult to see just what was decided. All sorts of new problems arise, among which judges are groping. The situation is so tangled and bewildering that I sometimes wonder

action has its own peculiar difficulties, and the court in each must first decide whether a class action should be maintained and second, if so, which procedural devices common to class suits are applicable to the case at bar, including those procedures to be used in the determination and allocation of damages. Consequently, Rule 23 requires the court to make preliminary findings as to the maintainability of the suit as a class action, and allows the court broad powers to make appropriate orders regulating the conduct of these actions. An analysis of the procedures utilized in the determination and allocation of damages compels examination of the types of suits successfully brought as class actions.

A. *Defendant Class Actions*

Although the most common class actions are those with a plaintiff class, Rule 23 does not differentiate between plaintiff and defendant class suits. There are, however, important differences between the two. The defendant class action is widely used by those seeking injunctive relief, especially in the area of civil rights.[15] Defendant class actions for damages are infrequent. There is little advantage in suing such a large group of individuals because each defendant's share of the prospective damages would not be sufficiently large to justify the difficulty of maintaining the action. There have been, however, a few instances of such actions. The problems incident to a suit for damages against a defendant class are quickly apparent. If the class is found liable the court confronts the difficulty of exercising its judgment with respect to individual class members, a difficulty that would not, of course, be alleviated by voluntary participation. The court must also devise stringent procedural safeguards, in order constitutionally to find the individual defendant class members liable. Due process requires that each defendant class member be afforded notice as to the suit, and a procedure whereby each could appear and defend himself. In plaintiff class actions, actual notice is not required where it is not reasonably possible or practicable to give such an adequate warning, so that publication would be sufficient in some instances.[16] It is doubtful, however, whether anything less than actual notice would be sufficient in a defendant class action. In such a suit the court must eventually ascertain the identity of each defendant so that, first, it may bind individual class members and, second, order payment of the damages. On the other hand, in plaintiff class actions the burden of proving a right to participation in the judgment is placed on the individual class members. Additional problems of jurisdiction and venue arise in defendant class actions. Since cases are initiated by the plaintiffs, most venue statutes are written in terms of the location of the defendant. If the defendant class members are located in several different states, it is questionable whether the defendants outside the forum state may be included in the class. If the defendant class or subclass is entirely within

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whether the world would have been any better off if the class-suit device had been left buried in the learned obscurity of Calverts on *Parties to Suits in Equity*. Z. Chaffee, Some Problems of Equity 200 (1950).

[15] See Advisory Note, 39 F.R.D. at 102. See, e.g., Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966).

[16] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317 (1950).

the forum state, yet spread among different federal districts, the action may be brought in any one of the districts.[17] If the defendant class is found liable, however, the plaintiff must enforce the judgment in the district where the defendant is found. In *Southern Ornamental Iron Works v. Morrow*[18] the judgment was enforced against an absent defendant class member. The defendant class, consisting of 4000 subscribers to a bankrupt association, had been found liable for a prorated share of the association's indebtedness. This liability was found in the state district court of Travis County, Texas. In order to enforce the judgment, a suit had to be initiated against one of the absent class members in another county. In large and diverse defendant class actions this procedure would be exceptionally costly and time consuming and, unless the court could establish in rem jurisdiction,[19] it would be necessary to enforce the judgment personally against every class member.

In the *Southern Ornamental* case the damages were prorated among the defendants according to the annual premiums earned by each defendant.[20] By contract, the defendants could not be liable in excess of the annual earned premiums of the insurance policies which were issued to the defendant. The total unpaid liability of the association was over 625,000 dollars, while the aggregate of the premiums earned by all the subscribers to the association was over 1,895,000 dollars. Thus, it was determined that each defendant subscriber owed 33 percent of their annual premiums. The defendant in this case earned 4,330 dollars in premiums and therefore was assessed 1,429 dollars as his share of the damages. A separate action had to be taken in order to enforce this liability, for, although the assessment of damages is similar to the allocation of damages in a plaintiff class action, the collection of these damages is much more difficult because of the obvious constitutional problems in the attempt to enforce the judgment against a class member who was not a party to the case.[21]

The problem is compounded where there is a special statute fixing the venue of particular actions, such as suits for treble damages under the antitrust laws[22] or cases under the Federal Employers' Liability Act.[23] An example is *Kaeppler v. James H. Matthews & Co.*,[24] which held that in antitrust

17 28 U.S.C. § 1392(a) (1964) provides: "Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts."

18 101 S.W.2d 336 (Tex. Civ. App. 1937).

19 Although it is possible for a class action based on in rem jurisdiction to be brought under subsection (b)(3) of Rule 23, most actions of this type would be brought under subsection (b)(1)(B).

20 This is analogous to the plaintiff class suit. This procedure was used in Porter v. Healy, 244 Pa. 427, 91 A. 428 (1914), a plaintiff class suit where the amount of the judgment was divided by the total number of shares and distributed per share.

21 If a fund or specific property is involved, the court's jurisdictional problem may be solved if it can establish in rem jurisdiction over this property. Generally a receiver would be appointed to administer this fund. See Pennsylvania Co. for Insurances on Lives & Granting Annuities v. Deckert, 123 F.2d 979 (3d Cir. 1941); see also Fed. R. Civ. P. 66.

22 Clayton Antitrust Act § 4, 15 U.S.C. § 15 (1964).

23 45 U.S.C. § 56 (1964).

24 180 F. Supp. 691 (E.D. Pa. 1960).

actions only the defendants residing in the court's district could be included in the suit.

The defendant class action has been suggested as a device for avoiding the necessity of service upon every defendant in order to enforce statutory liability of shareholders.[25] In some states statutes make shareholders liable if they receive a dividend which impairs the corporation's capital to the injury of its creditors.[26] In New York the shareholders of every stock corporation are personally liable for debts, wages and fringe benefits due any of its employees.[27] In cases brought under such statutes the problems of due process appurtenant to defendant class actions are more easily solved, since the shareholders are usually easily ascertained and since the shareholders subject themselves to the statute by purchasing shares.

B. *Plaintiff Class Actions*

1. *Antitrust Suits.*—The largest and most common plaintiff class actions are those involving stockholders of a corporation and victims of antitrust violations. Suits involving antitrust violations can be particularly large,[28] as is demonstrated by the recent series of electric cases arising in 35 federal district courts and involving 1912 actions, some with as many as 40 plaintiffs, totaling 25,632 claims.[29] By rough calculation these cases involved from six to seven billion dollars in sales.[30] The suits were initiated separately and were coordinated under a National Committee. However, since they all involved the same conspiracy by the same set of manufacturers of the same products,[31] these suits could possibly have been disposed of more efficiently had they been consolidated into several class actions with party plaintiffs representing the absent plaintiffs.[32] Another recent case illustrative of the problems in allocation of damages in such large controversies involved alleged price fixing by five drug companies.[33] More than eighty suits, on behalf of nearly all the states, ten cities and numerous private parties, were initiated against the five

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[25] 3A J. Moore, Federal Practice § 23.11[2] (2d ed. 1968).

[26] Cal. Corp. Code § 1510 (West 1955); Ohio Rev. Code Ann. § 1701.95D (Baldwin 1964). Cf. McDonald v. Williams, 174 U.S. 397 (1899). Suits have also been brought on common law theories, but when the shareholder himself is innocent such suits are unsuccessful. See Bartlett v. Smith, 162 Md. 478, 160 A. 440 (1932).

[27] N.Y. Stock Corp. Law § 71 (McKinney 1951).

[28] The complexity of antitrust suits is compounded by the fact that violations can involve treble damages under § 4 of the Clayton Antitrust Act, 15 U.S.C. § 15 (1964).

[29] Proceedings of the Twenty-eighth Annual Judicial Conference—Third Judicial Circuit of the United States, 39 F.R.D. 375, 497 (1965) (remarks of Clary, C.J.).

[30] Bane, Pretrial Discovery in Multiple Litigation From the Plaintiffs' Standpoint, 32 Antitrust L.J. 117 (1966).

[31] These suits were founded on price fixing of major electrical components used in the transmission and production of electricity. They involved nearly every component of this type which was sold in the United States during the period covered by the suits. Id. at 117-18.

[32] Professor Kaplan, one of the drafters of the amended Rule 23, suggested that class actions may have been useful for the efficient adjudication of these cases. Proceedings of the Twenty-eighth Annual Judicial Conference—Third Judicial Circuit of the United States, 39 F.R.D. 375, 517-18 (1965) (remarks of Prof. Kaplan).

[33] See Chicago Tribune, Feb. 7, 1969, at 1, col. 3; N.Y. Times, Feb. 7, 1969 at 1, col. 4; Wall St. Journal, Feb. 7, 1969, at 24, col. 1.

companies. The suits were consolidated, whereupon the defendant companies offered to settle for 120 million dollars, 37 million of which would go to consumers who could provide documentation of their use of the drug. The 120 million dollars was allocated among the individual company defendants, partly on the basis of the dollar sales of the antibiotic products of each company, and partly on the basis of the fact that two of the companies were the manufacturers of the product. The burden of submitting a plan of allocation of damages was placed on the representative plaintiffs. A complex formula based on the number of hospital beds in each state was suggested as a means for calculating each state's share of the 120 million dollars. Under the proposed settlement, it would remain to the states to distribute the damages to the individual consumers. Illinois, for example, proposed depositing one million dollars in the state treasury to be distributed to consumers who could prove their purchase of the drug during the thirteen years when it was sold. Since the money would be transferred to and administered by the state and since most states were also claimants, the funds unclaimed after a fixed period would probably be claimed by the states.

Treble damage actions for antitrust violations can be brought for price fixing or for monopolizing in restraint of trade. Most treble damage class actions under the old Rule 23 were designated as spurious, indicating a greater degree of individuality in the relief sought than is found in other class suits.[34] The computation of damages, both total and individual, can be particularly troublesome in antitrust actions. "[D]amages to a business injured by an antitrust violation may be figured on loss of profits on business actually done, on loss of anticipated profits, and upon loss of goodwill value and capital investment."[35] The difficulty stems from the determination of the condition of plaintiff's business "but for" the violation, "[t]he amount . . . calculated by contrasting what actually happened to the plaintiff's business or property with what would have happened to it 'but for' the defendant's law violation."[36] In spite of the fact that plaintiffs in an antitrust class action would be seeking different damages, the courts have allowed these suits to be maintained as class actions.[37] The problem of allocation is simplified in price-fixing cases by the presence of a specific commodity which should have been sold at a reasonable price. The court must first determine the fair market value of the commodity. Then the individual plaintiffs must prove the amount of the commodity which they purchased. In the recent drug company cases, it was alleged that the drug cost 6 cents per dose to manufacture but was sold for

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34 Comegys, The Advantages and Disadvantages of a Class Suit Under New Rule 23 as Seen by the Treble Damage Defendant, 32 Antitrust L.J. 271, 272 n.8 (1966). It has been suggested that this individuality will result in the disallowance of antitrust actions as class actions under the new Rule. Fales, Significance to the Antitrust Bar of Amended Rule 23, 32 Antitrust L. J. 282, 286-87 (1966). The social importance of antitrust enforcement, however, makes such a development unlikely. Cf. Minnesota v. United States Steel Corp., 44 F.R.D. 559, 563-78 (D. Minn. 1968); Donelan, Prerequisites to a Class Action Under New Rule 23, 10 B.C. Ind. & Com. L. Rev. 527, 534 (1969).

35 Rowley, Proof of Damages in Antitrust Cases, 32 Antitrust L.J. 75, 84 (1966).

36 Id. at 85.

37 See, e.g., Nagler v. Admiral Corp., 248 F.2d 319 (2d Cir. 1957); Kainz v. Anheuser-Busch, Inc., 194 F.2d 737 (7th Cir. 1952).

40 cents per dose.[38] In *Union Carbide & Carbon Corp. v. Nisley*,[39] the plaintiffs alleged price fixing concerning the cost of ores. Thirty-six plaintiffs, representing 4000 absent mine owners, were allowed to bring a class action for treble damages against two large mining companies. The fair market value of the ore was ascertained by a jury and this value was to be used to compute the damages of the individual plaintiff class members.[40] Using this procedure the court can determine the liability of the defendant and, if possible, any common issue of damages. The damages of each class member can be determined by later proceedings.[41] This procedure effects the economy sought in such a class action by the disposition of as many issues as possible in the original action.

2. *Securities and Shareholder's Suits.*—Corporate shareholder actions, especially those based on federal statutes,[42] are increasingly brought as class actions. Suits of this type can be brought either derivatively on behalf of the corporation, whereby the damages would go only to the corporation, or on behalf of the individual shareholders themselves who will collect the damages. Since in derivative actions the proceeds are not allocated among the plaintiff class members,[43] the court is not faced with the difficulty of determination and distribution of the damages to the individual members.[44] However, suits have been allowed on different theories in which the plaintiff class members can collect individual damages, especially when those plaintiffs can prove that allocating the damages directly to the corporation will not provide satisfactory redress.[45] Many of these suits arise under Section 10(b) of the Securities and Exchange Commission Act[46] and Rule 10b-5 of the Securities and Exchange Commission.[47] These regulations make it unlawful to engage in any fraud or deceit in the purchase or sale of a security. The class action is an efficient means of effecting a resolution of cases involving fraud or misrepresentation which induced large numbers of class members either to buy or sell stock.[48] In cases involving fraud or misrepresentation, equitable relief is widely granted, but plaintiff class members have often been awarded money damages. One instance of major litigation for money damages under Rule 10b-5 is the case of *Speed*

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38 N.Y. Times, Feb. 7, 1969, at 1, col. 4.

39 300 F.2d 561 (10th Cir. 1961), petition for cert. dismissed, 371 U.S. 801 (1962).

40 An additional facet of the injury to the plaintiffs, one not discussed by the court in *Nisley*, was the calculation of lost profits, which involves many complex factors.

41 Cf. State Wholesale Grocers v. Great Atl. & Pac. Tea Co., 258 F.2d 831 (7th Cir. 1958).

42 E.g., the Securities Exchange Act of 1934, §§ 10(b), 16(b), 15 U.S.C. §§ 78j(b), 78 p(b) (1964).

43 Smith v. Bramwell, 146 Ore. 611, 31 P.2d 647 (1934); but cf. Watson v. Button, 235 F.2d 235 (9th Cir. 1956); see 40 Calif. L. Rev. 127 (1952).

44 Class actions based on § 16(b) are usually brought on behalf of the corporation. E.g., Smolowe v. Delendo Corp., 136 F.2d 231, 239 (2d Cir. 1943).

45 See Annot., 167 A.L.R. 279, 285 (1945), and cases cited.

46 15 U.S.C. § 78j(b) (1964).

47 17 C.F.R. § 240.10b-5 (1968).

48 The burden of proof and criteria for determination of the basis and extent of recovery may differ, depending upon whether the plaintiffs are buyers or sellers. See generally Comment, Remedies for Private Parties Under Rule 10b-5, 10 B.C. Ind. & Com. L. Rev. 337, 340-51 (1969).

v. Transamerica Corp.[49] In that case the defendant corporation had offered to purchase the shares of certain stockholders of the Axton-Fisher Tobacco Company, a company which the defendant corporation controlled. The defendant, in its offer, withheld certain information which would have shown the value of the stock to be more than four times the price offered. The court allowed the suit to proceed as a class action, and the shareholders recovered on the basis of a reconstructed liquidation of the Axton-Fisher assets, with the stockholders participating in the proceeds of the liquidation.[50]

Several major difficulties in the measurement of damages are the determination of the fair market value of the stock at the time in question and the calculation of the precise time over which this value will be computed.[51] The fact that the misrepresentation often clouds the issue of fair market value compounds the difficulty. Once these factors are determined damages can be allocated by simple multiplication of the number of shares by the damage per share. The court must then address the problem of fashioning a procedure to distribute individual damages to class members.

3. *Tax and Rate Cases.*—The problem of distribution is especially acute in those class actions involving rates charged by public utility corporations and state or local tax boards. These suits generally involve a large number of class members who allege that they have been charged at an unreasonable rate. The difficulty in such cases is the delineation of the class and the establishment of a means of determining and allocating the individual damages. Usually the individual damages are so small that without the device of a class suit the plaintiff would not be afforded any relief.[52] The rates charged by public utilities are typically fixed by federal and state utilities commissions. The suit usually includes a request for injunctive relief against future overcharges, plus the posting of a bond or the placing of the excess in a fund, over which a trustee or receiver is appointed. If the court allows a class action to be maintained and the defendant is found liable, the fund is distributed either directly by the defendant under the supervision of the court, or by the court itself, on a proper showing by the plaintiff class members of proof entitling them to participate in the recovery.

IV. Procedures Used to Distribute Damages

A. *The Master*

In successful class actions the courts face the necessity of establishing an efficient procedure for the allocation and distribution of the damages to

[49] 99 F. Supp. 808 (D. Del. 1951), opinion on form of final decree, 135 F. Supp. 176 (D. Del. 1955), modified and aff'd, 235 F.2d 369 (3d Cir. 1956).

[50] 135 F. Supp. 176, 182 (D. Del. 1955).

[51] Cf. id. at 182. See also Smolowe v. Delenda Corp., 136 F.2d 231 (2d Cir. 1943), for a discussion of the difficulties in determining, in actions under § 16(b) of the 1934 Act, 15 U.S.C. § 78 p(b) (1964), at which time the value of the stock should be fixed in order to compute damages.

[52] In Illinois Bell Tel. Co. v. Slattery, 102 F.2d 58 (7th Cir. 1939), it was estimated that 85% of the claims were under $25. The total number of claimants was over 1 million, and the total amount of the claims exceeded 17 million dollars. These figures are provided in Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684, 686 n.5 (1941).

each individual class member.[53] While procedures vary with the circumstances of the particular case before the court, some procedures by their nature have had wide application in class actions. The use of a master is such a procedure. A master may be appointed to hold meetings of the parties, examine witnesses, review evidence and compile and submit a report. Federal Rule 53 defines "master" as "includ[ing] a referee, an auditor, an examiner, a commissioner, and an assessor."[54] A master may be appointed before the trial in order to aid the judge in resolution of factual issues, or after the trial to aid in distribution of the damages. Under Rule 53 the master may require the production of evidence upon all matters embraced in the master's reference. He has the authority to rule upon the admissibility of this evidence and to put the parties and witnesses under oath. The master appointed is usually a person specially qualified in the subject with which he is required to deal. The subject usually requiring a master is that of accounting or auditing. Rule 53 gives the master special powers to prescribe the form and

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[53] The plaintiff representatives are usually required to propose the procedure for allocation of damages. For example, in Reality Equities Corp. v. Gerosa, 30 Misc. 2d 481, 483-84, 209 N.Y.S.2d 446, 450-51 (Sup. Ct. 1960), the plaintiffs applied to the court for an order including the following provisions:

> (1) That the aforesaid judgment shall constitute a determination of the rights of all persons similarly situated as the plaintiffs, to wit all persons who paid the Real Property Transfer Tax under protest to the City Treasurer of the City of New York on real estate transactions closed outside the territorial limits of the City of New York;
>
> (2) That the City Treasurer of the City of New York holds all of the money so received by him in trust for all persons who have made payments to him as aforesaid;
>
> (3) Directing the City Treasurer of the City of New York to account to this Court for all moneys so paid to him as aforesaid;
>
> (4) Declaring that all of the aforesaid moneys so held by the City Treasurer of the City of New York constitute a fund for a class of persons similarly situated as plaintiffs, which fund has been created and made available to such class by reason of the commencement and succesful prosecution of this action;
>
> (5) Adjudging and decreeing that the plaintiffs and their counsel, David Stein, Esq., having created said fund for a class, are entitled to a lien on said fund for reimbursement of all expenses incurred by the plaintiffs, including an allowance for the fair and reasonable value of the legal services of their counsel, David Stein, Esq.;
>
> (6) Fixing a time and place for the filing and serving of the application of allowance for reimbursement of expenses, including reasonable legal fees of plaintiffs' counsel, David Stein, Esq.; and directing the payment of such expenses, including counsel fees out of the aforesaid fund.
>
> (7) Enjoining and restraining the defendants from paying out any moneys out of said fund until after the final determination of plaintiffs' application for allowances, including legal fees as aforesaid . . . .

In Daar v. Yellow Cab Co., 67 Cal. 2d 695, 715 n.15, 433 P.2d 732, 746 n.15, 63 Cal. Rptr. 724, 738 n.15 (1967), the State of California, as amicus curiae, argued

> that the total amount of the overcharge recovered in the class suit should be deposited with the superior court or its named trustee or receiver, subject to an order that class members presenting adequate proof of identity may obtain a refund of overcharges attributable to them. "At the end of seven years, the uncollected portion of the deposited moneys would be presumed abandoned under the provisions of section 1507 of the Code of Civil Procedure."

[54] Fed. R. Civ. P. 53(a).

manner in which the accounts are to be submitted and the power to call certified public accountants as witnesses. In the complex litigation of a class action, the need for expert accounting advice is obvious. The need for a disinterested accountant was stressed in *Feick v. Hill Bread Co.*[55] There the defendant company insisted that any inspection of its books be done by a company accountant. The court stated that such an arrangement would defeat the purpose of an investigation, that is, "to obtain information of the affairs of the company through an independent source, by a disinterested expert accountant."[56] A court appointed master, versed in accounting, is ideally suited for the fulfillment of this purpose.

If the court finds that a class action is to be maintained, a master is useful for assisting the court in the determination of both damages and liability. If the defendant is found liable, the master, as an impartial expert in accounting, can be especially helpful in establishing a rate or formula for the determination of damages. His service therefore promotes the simplification of any later litigation. *Kardon v. National Gypsum Co.*[57] exemplifies this possible use of a master. Although this case was not a class action, the court's utilization of the master can easily be applied to class suits. The cause of action rested on Section 10(b) of the Securities Exchange Act of 1934.[58] The defendant bought the plaintiffs' stock without disclosing information which may have increased the value of the shares. The court found a violation of section 10(b), even though the plaintiffs had not yet proved that the defendants had profited from the transaction. It held simply that there was a violation and that the remedy was an accounting to ascertain and restore to the plaintiffs their share, if any, of the profits. A master was appointed to conduct this accounting.

If stock or property is involved in the suit, and the actual value of the property is a basis for the determination of the damages, the master is useful in determining its actual value. In *Gladstone v. Murray Co.*[59] the majority stockholder and director of a corporation purchased the shares of the deceased shareholder at 50 dollars per share. A master served to set the value of these shares at 100 dollars per share. While the court did not find the director liable for breach of any duty of disclosure, a contrary finding would have caused the master's findings to become a basis for damage measurement. Similarly, the master is especially useful in the distribution of the damages to the individual plaintiffs. If the damages are delivered to the court and a receiver is appointed, the master, by an examination of the defendant's records, can ascertain the damages of each plaintiff class member.[60] The

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[55] 91 N.J.L. 486, 103 A. 813 (Sup. Ct. 1918).

[56] Id. at 490, 103 A. at 815.

[57] 73 F. Supp. 798 (E.D. Pa. 1947).

[58] 15 U.S.C. § 78j(b) (1964).

[59] 314 Mass. 584, 50 N.E.2d 958 (1943).

[60] The use of defendant's records in order to prove the plaintiffs' damages does not violate any constitutional rights of the defendant. Heine v. Degan, 362 Ill. 357, 199 N.E. 832 (1936); cf. Spiller v. Atchinson, T. & S.F. Ry., 253 U.S. 117 (1920).

court will usually retain jurisdiction over the case for a specific time in order to effect the allocation of the damages.[61]

One of the most efficient methods of distribution is to require the defendant, under the supervision of a master, to reimburse the plaintiffs directly. The money need not pass through the court. This arrangement is particularly effective if the plaintiff class members will be having continual dealings with the defendant, for example in public utility cases or in shareholders' suits where the plaintiffs still own shares in the corporation. In addition, this procedure allows the defendant, as in utility cases, to deduct from the damages the amount which each plaintiff may owe on his bill. The court in *Illinois Bell Tel. Co. v. Slattery*[62] employed this device. The defendant telephone company was sued for charging an excessive rate. The defendant was found liable, and it was agreed that payments should be made directly to the plaintiffs under the supervision of a special master. The master made periodic reports on the progress of the distribution, and at the end of the period set by the court 18 million dollars had been distributed to a great many small plaintiffs. The defendant was allowed to deduct from the refund any money owed by each plaintiff. At the expiration of the period set by the court for distribution, a final decree was entered which precluded any additional recovery by the plaintiffs.

The propriety of the use of the master and the specific manner in which he is used depend upon the facts of each class action. As noted, the master is usually most helpful in situations involving complex accounting, such as antitrust price-fixing cases or shareholders' suits. He can also provide valuable assistance in the actual distribution of damages in rate cases involving public utilities and tax boards.

B. *The Pretrial Conference*

The pretrial conference is available to aid the court in a class action either in conjunction with or as a substitute for a master. Again, its propriety depends upon the facts of the particular case. Under Rule 16 the court, at its own discretion, may direct the parties to appear before it for a conference to consider any action which would aid the court in disposing of the case. The primary goals of the pretrial conference in class actions are the establishment of questions of law and fact common to the members of the class, and the encouragement of stipulations on as many of these facts as possible.[63] The parties could stipulate to any facts which would allow the courts to distribute damages more economically in the event that the defendant is found liable. For example, the pretrial conference could be used to establish the fair market value for property involved in the litigation, periods

[61] At the end of this period there may be uncollected funds. The disposition of these funds could be settled even before the trial by a pretrial order. See pp. 631-32 infra.

[62] 102 F.2d 58 (7th Cir. 1939).

[63] As a result of a commendable cooperation in which the district judge and counsel for all parties joined, all the evidence, documentary and otherwise, was stipulated, reserving to each party the right to argue the materiality or relevancy thereof.

State Wholesale Grocers v. Great Atl. & Pac. Tea Co., 258 F.2d 831, 833 (7th Cir. 1958).

of time which may be subject to dispute, or fair rates of interest for the sums of money involved.[64]

C. *Complications Arising From the Right to Trial by Jury*

If one of the parties in a class action requests a jury trial, the issues and procedures become more complicated. The seventh amendment guarantees the right to a trial by jury, and Federal Rule 38 establishes the procedure for the exercise of that right.[65] Rule 38 provides that a party may demand a trial by jury on any single issue held to be triable by jury. The presence of a jury alters the procedures which may be utilized and may affect the court's determination of the appropriate procedure. For example, Rule 53 distinguishes between the use of a master in jury and nonjury actions.[66] Masters are used primarily in nonjury trials. Rule 53 provides that "[i]n an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous,"[67] further that parties to the litigation may object to the findings by a motion, and that after a hearing on the motion the court may adopt, modify or reject in whole or in part the report of the master. The Rule contains no provision concerning the effect to be given the master's conclusions of law. But it is agreed that while such conclusions have no presumptive effect they are entitled to careful consideration.[68]

In jury trials the master does not report the evidence. However, his findings are admissible as evidence of the facts found, and may be read to the jury.[69] The master is utilized in this respect as an expert witness who is to hear evidence on an issue and report his findings as an opinion.[70] His report is subject to the rulings of the court upon any objection in point of law made at the trial. Since the jury may accept or reject the master's findings, this procedure does not infringe upon the parties' right to a jury trial. The consequence, however, is that the master's ability to expedite the proceedings is diminished.

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[64] Class actions can become exceptionally complex, so that omission of the smallest detail can result in a new trial. Speed v. Transamerica Corp., 135 F. Supp. 176 (D. Del. 1955), modified and aff'd, 235 F.2d 369 (3d Cir. 1956), a much litigated class action, was retried on the issue of interest rates, an issue that perhaps could have been decided at a pretrial conference.

[65] Probably the most efficient resolution of those controversies tried as class actions could come through administrative agencies. These agencies presently exist, in the form of the federal and state public utilities commissions and the Securities and Exchange Commission. Although they have limited powers to fine, they cannot award damages. This action would be considered confiscatory and a deprivation of the defendant's right to a trial by jury. Class actions could be facilitated if these agencies were given broader power to make findings of fact and present those findings before the court trying a class action. See Kalven & Rosenfield, The Contemporary Function of the Class Suit, supra note 52, at 686-87. See also Comment, Recovery of Damages in Class Actions, 32 U. Chi. L. Rev. 768, 784 (1965).

[66] Fed. R. Civ. P. 53. See 5 J. Moore, Federal Practice §§ 53.02[2], 53.05[2] (2d ed. 1968).

[67] Fed. R. Civ. P. 53(e)(2).

[68] 5 J. Moore, Federal Practice § 53.12[1] (2d ed. 1968).

[69] Fed. R. Civ. P. 53(e)(3).

[70] 5 J. Moore, Federal Practice § 53.14[2] (2d ed. 1968).

An additional problem is the difficulty of preserving the individual class member's right to a trial by jury while avoiding the necessity of multiple jury trials of the same issue.[71] No apparent constitutional difficulty arises from settlement of a case by more than one jury, that is, the resolution of different issues by different juries. Therefore, the courts usually submit to one jury the questions of fact common to the entire class, such as the defendant's liability, and later empanel special juries to decide facts pertinent to the individual plaintiffs, such as damages.[72] The jury may preclude the cumbersome process of multiple juries without violation of the right to trial by jury if, by its finding on common questions of fact, it is able to determine a rate or formula applicable to the individual class members by a master.[73] In a class action where the representatives did not request a jury trial, if the absent class members were adequately represented and afforded due process, they will be deemed to have waived their rights to a jury trial. If due process has been afforded and the class members are adequately represented, all the individual class members will be bound by the judgment and thus precluded from retrying these issues either with or without a jury. This due process requirement is therefore relevant to both the effectiveness of the waiver by the representative of the absent member's right to a jury trial and to the subsequent binding effect of the judgment. In order to afford due process, especially in class suits in which the class members are numerous and dispersed and in which there is no common fund or property involved, the courts have developed the concept of adequate notice. If there was notice reasonably calculated to reach those who are to be bound by the judgment, then due process is satisfied.[74]

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[71] If different juries try the same issue, inconsistent findings could result. Rule 23(b)(1)(A) recognized this difficulty and provided as an additional prerequisite for a class action that "the prosecution of separate actions by or against individual members of the class would create a risk of . . . inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class . . . ." See also Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 498-99 (1931).

[72] See Akely v. Kinnicutt, 238 N.Y. 466, 144 N.E. 682 (1924). Fed. R. Civ. P. 42(b) provides for the use of separate juries. In Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961), petition for cert. dismissed, 371 U.S. 801 (1962), the defendant was found liable and the jury also specially found a fair market price for the items in question. The trial court then allowed six months for claims to be filed with a master for purposes of sharing in a final judgment. The court held that the right to jury trial was not violated since the jury determined liability and a formula, and since any additional facts could be referred to a jury specially empanelled.

[73] Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 589 (10th Cir. 1961), petition for cert. dismissed, 371 U.S. 801 (1962).

[74] The question reduces to who can be bound, constitutionally, by a judgment in a class action. For if a member plaintiff is bound, then he will be precluded from retrying the same question, whether the issue was originally tried by a jury or not. Rule 23(c)(2) provides for reasonable notice to be given the class members, including notice that, without a request for exclusion, they will be bound by the judgment. This provision is a development of the dictum of Hansberry v. Lee, 311 U.S. 32, 43 (1940), in which the Court said that no constitutional barrier arose to binding the class members if a procedure were developed which would insure that the party plaintiffs were sufficiently representative of the class, and that full and fair consideration were given to the common issues. Mullane

One method used to protect the absent class member's right to a jury trial is to hold the judgment open until the damages of all the class members have been determined. The jury can then render a verdict and the court can enter a final judgment incorporating by reference all the class members.[75] This procedure is often used in cases tried before a judge. In jury-tried cases the jury can be empanelled early in the case to determine any common question of fact still in dispute. Any later proceedings can then be based on the jury's findings.

V. Considerations of Time and Expense

The procedure employed by the court in the determination of issues and in the allocation and distribution of damages results primarily from considerations of time and cost. Class actions by their very nature involve complex facts and numerous parties, and thus exact great quantities of time and expense.[76] One determinant of appropriate procedure is its capacity to expedite litigation for the original parties. Rule 24(b), governing intervention, provides that "in exercising its discretion the court will consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties."[77] With respect to damages, the courts have established a procedure whereby the original plaintiffs can recover their losses and the questions common to the class can be adjudicated in the same suit. This procedure leaves the individual questions relating to the absent class members to be decided after the first judgment. This result is accomplished by means of a special verdict separating findings common to the class from those particular to the original plaintiffs.[78] The common findings control subsequent litigation involving absent class members, and the particular findings result in a recovery for those members before the court. The court retains jurisdiction as to absent class members and sets a time limit during which they must file claims.[79] At the end of this time the court renders a final judgment which would preclude any subsequent claims by absent class members. This procedure condenses the time during which the litigation is pending for the representatives. The court has broad powers under Rule 23(d)(1) to make appropriate orders regulating the conduct of the class

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v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), held that reasonable notice satisfied the due process requirement.

One problem of notice is its possible use by the champertous lawyer and the strike suiter. See Comment, Recovery of Damages in Class Actions, 32 U. Chi. L. Rev. 768, 780-81 (1965).

[75] See Daar v. Yellow Cab Co., 67 Cal. 2d 695, 706, 433 P.2d 732, 740, 63 Cal. Rptr. 724, 732 (1967).

[76] See Illinois Bell Tel. Co. v. Slattery, 102 F.2d 58, 62 (1939), where the defendant's expenses for distributing the damages were $2,700,000.

[77] Fed. R. Civ. P. 24(b). This provision from the rule on intervention was applied in the class suit of Shipley v. Pittsbugh & L.E.R.R., 70 F. Supp. 870, 876 (W.D. Pa. 1947) (an employee class action for compensation).

[78] Fed. R. Civ. P. 49.

[79] In Illinois Bell Tel. Co. v. Slattery, 102 F.2d 58 (7th Cir. 1939), the court set a time limit of three years. In Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 587-88 (10th Cir. 1961), petition for cert. dismissed, 371 U.S. 801 (1962), the court set a time limit of six months.

action and to impose these orders on representative parties and intervenors.[80] The courts, in exercising these powers, are left to reconcile speed and fairness in adjudication of the class action.

Appropriate orders regulating the conduct of a class action must also reflect considerations of cost. An order must recognize the fact that the class action may be unsuccessful and that, therefore, no fund will exist from which the court can allocate attorneys' and masters' fees or the cost of notice.[81] Even if the action is successful, a large portion of the proceeds in a complex action may go to costs and attorneys' fees.[82] In order better to absorb the costs the plaintiffs usually desire to increase the size of the class, but attainment of this end may be limited by the court to accord with the requirements of Rule 23 and the necessity of a well defined class. The costs of the procedures themselves should influence the court's selection. If the expense of certain procedures is excessive the class action is rendered impracticable, either because of the possibility that plaintiffs will bear the costs in the event of an unsuccessful suit or because, even in the instance of a potentially successful suit, the initial costs of notice could be prohibitive. Thus it falls upon the court, where it deems the action appropriate, to preserve the action from costly and time-consuming procedures capable of eroding the very purpose and efficiency of the class device.

VI. Uncollected Damages

In determining how best to direct the progress of the class action, the court must take into consideration the possibility that some of the damages assessed will go unclaimed. In a large class action with numerous plaintiffs, some class members may not come forward for their share of the damages, so that, after costs are paid, the court will be required either to allocate the remaining sum of money among the known plaintiffs, return it to the defendants or award it to the state. In *Illinois Bell Tel. Co. v. Slattery*,[83] after the expiration of the period set aside for distribution, and at which time the final judgment was entered, 1.6 million dollars remained. The state of Illinois claimed this money under the doctrine of *bona vacantia*. The court disallowed this claim and concluded that the doctrine of *bona vacantia* applies only to personal property without an owner. It regarded the property in the case as having an owner, even though the owner was unascertained. One of the few types of cases where unclaimed damages in a class action would "escheat" to the state is that in which the damages would go to a plaintiff's estate having no beneficiaries. An example of this situation would be a wrongful death action brought by the decedent's administrator, where the damages recovered

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[80] See generally Fed. R. Civ. P. 23(d) for orders pertinent to the conduct of a class action.

[81] See Kalven & Rosenfield, supra note 52, at 714-21. See also Z. Chaffee, Some Problems of Equity 278 (1950).

[82] A substantial portion, up to 45%, of the damages can go to the attorneys' fees. This fact, coupled with the high court cost of class actions, may make a class action impracticable. See Hornstein, The Counsel Fee in Stockholder's Derivative Suits, 39 Colum. L. Rev. 784, 814 (1939).

[83] 102 F.2d 58, 62 (7th Cir. 1939).

go to the estate of the deceased. If no heirs of the estate can be found, the property passes to the state.

The existence of an abandoned property statute may also provide a basis for the state's claim to the uncollected damages. It is doubtful whether the court would be bound by such a statute, however, since the statutes are usually designed for lost personal property or unclaimed corporate assets or dividends. There are other general policies which may be applicable, such as the principle against unjust enrichment, that against providing a windfall for the plaintiff, or the general policy of awarding missing property to the state. The court must examine the facts of the case and decide which policy is most applicable. The court in *Illinois Bell Tel. Co. v. Slattery*[84] turned over the unclaimed damages to the defendant telephone company. After the company had been found liable they expended over two million dollars to distribute the damages. Thus, the element of unjust enrichment was lacking in that case. Since the state's claim was held to be baseless, there was no obstacle to returning the unclaimed funds to the defendant. No single binding law or policy would require the court to award the uncollected damages to the state or to one of the parties. The courts will be free to consider a variety of policies and to apply them to the facts of each case.

VII. Conclusion

Rule 23 gives the court broad discretion over class actions. Subsection (d) of the Rule allows the court authority to prescribe appropriate regulations for the conduct of the action, so that, rather than requiring a particular procedure, it permits and even encourages the courts to establish appropriate procedures tailored to the facts of a particular case. Along with these broad powers, the new Rule instructs the court to make strict findings as to the existence and limits of a class. This regulation may now preclude actions formerly maintainable as class actions under the old Rule.[85]

Rule 23 allows the court to regulate the manner in which damages are ascertained and distributed. Thus, the Rule is effective and fair only with respect to the manner in which it is administered by the courts. While this conclusion is applicable to all the Federal Rules of Civil Procedure, it has special force here. It is submitted that this flexibility is desirable, because any attempt to prescribe class action procedures would circumscribe the peculiar efficiencies by which the courts might adjudicate class actions. If the primary purposes of the Rule are to be realized in the form of just, speedy and inexpensive determination of substantive rights, they will have to result from the ingenuity and efficiency of the courts entrusted with its administration.

Lawrence J. Ball

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[84] Id.

[85] Fales, Significance to the Antitrust Bar of Amended Rule 23, 32 Antitrust L.J. 282, 286-87 (1966).

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