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Civil Procedure -- Class Actions -- Notice Obligations of Representative Plaintiff -- Eisen v. Carlisle & Jacquelin

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legislation.[98] The enactment of such an amendment is, therefore, recommended.*

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Civil Procedure—Class Actions—Notice Obligations of Representative Plaintiff—*Eisen v. Carlisle & Jacquelin.*[1]—In 1966, Morton Eisen filed a suit in the United States District Court for the Southern District of New York on behalf of himself and all other persons who had purchased or sold odd-lots[2] on the New York Stock Exchange from May 1, 1962 through June 30, 1966.[3] In the complaint, two of the Exchange's major odd-lot brokerage firms, Carlisle & Jacquelin and DeCoppet & Doremus, were charged with monopolizing odd-lot trading and charging excessive fees.[4] A third defendant, the New York Stock Exchange, was charged with failing to regulate the fees charged by the two firms.[5] Eisen's individual claim included treble damages for the amount of the overcharge and amounted to a total of seventy dollars.[6] The claim for the class as a whole, which

[98] The bills cited in note 97 supra would appear to be unnecessarily broad. The proposed amendments provide that an agency is merely permitted to make disclosure of names and addresses after the necessary certification has been made; it is not required to do so. See bills cited in note 97 supra. Such discretion could possibly result in the refusal of all requests for names and addresses regardless of the purpose for which they were sought—for if there is any lesson to be learned from the history of the FOIA, it is that where disclosure is discretionary, there is likely to be no disclosure at all. See text at notes 16-25 supra. This problem cannot be solved merely by making disclosure mandatory upon certification. Such a provision would require disclosure in all instances, without regard to the resulting invasion of privacy suffered by the individuals concerned. Some type of balancing, therefore, would appear to be required in determining whether non-commercial requests for names and addresses should be granted.

It is also suggested that the provision which requires a certification that the list "will not be used for purposes of commercial or *other* solicitation . . . ." is unduly restrictive. H.R. 6840, 93d Cong., 1st Sess., ¶ (2)(A)(i) (1973) (emphasis added). Courts and agencies might construe such a provision as empowering an agency to refuse disclosure in instances where the requesting party seeks merely to interview or otherwise question persons whose names appear on the disclosed list. Such a restriction would make the execution of a study such as that which was at issue in *Getman* totally dependent upon the whim of agency bureaucrats. See text at notes 57-64 supra. This is the very situation which the FOIA was intented to prevent.

* As this article was going to press, Congress passed certain amendments to the FOIA over President Ford's veto. This legislation is not relevant to the issues presented in *Wine Hobby*.

[1] 417 U.S. 156 (1974).

[2] "Odd-lots" are shares traded in lots of less then a hundred. Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147, 148 (S.D.N.Y. 1966).

[3] Eisen v. Carlisle & Jacquelin, 417 U.S. at 160.

[4] The defendant firms were alleged to have violated §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1970). 417 U.S. at 160.

[5] The Exchange was alleged to have violated §§ 6 and 19 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78f, 78s (1970). 94 U.S. at 160.

[6] 417 U.S. at 161.

included approximately six million shareholders, was estimated to be from twenty-two million to sixty million dollars.[7]

Shortly after the suit was filed, the defendants moved, pursuant to Federal Rule of Civil Procedure 23(c)(1),[8] for dismissal of the action for failure to meet the requirements for maintenance of a class action.[9] The issues raised by this motion proved to be so complex that in six federal court decisions, rendered during the following eight years, the courts were unable to move beyond this question to the merits of Eisen's complaint.[10] The Supreme Court, however, ultimately resolved the issue of maintainability by ordering dismissal of the class action, since Eisen claimed he could not afford to comply with the Court's holding.[11] In this case of first impression, interpreting the notice provision of Rule 23(c)(2), the Court held that the representative plaintiff must provide individual notice to all identifiable class members.[12] The effect of this holding will be to decrease the ability of the small claimant to seek redress.[13]

Initially, the district court construed the notice provision of Rule 23(c)(2)[14] as requiring not only publication, but also individual notice to each identifiable class member.[15] Eisen had argued that he could not afford to provide individual notice to the approximately two million identifiable class members. Despite this argument, the court decided that since Eisen could not provide individual notice, he had not met the prerequisite of establishing that he could "fairly and adequately protect the interests of the class." Consequently, the class action was dismissed as not maintainable.[16]

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[7] Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 265 (S.D.N.Y. 1971).

[8] Fed. R. Civ. P. 23(c)(1) provides in part: "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. . . ."

[9] The prerequisites to a class action are prescribed in Fed. R. Civ. P. 23(a) and (b), which provide in pertinent part:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (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 interests of the class.
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> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

[10] 417 U.S. at 159, 161.

[11] Id. at 179.

[12] Id. at 177.

[13] For a definition of "small claimant," see text at note 40 infra.

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

[15] 41 F.R.D. at 151-52.

[16] Id. at 150 (quoting Fed. R. Civ. P. 23(a)(4)), 152.

The United States Court of Appeals for the Second Circuit reversed, and instructed the district court to give the language of Rule 23 a more liberal interpretation.[17] On remand, the district court reexamined the notice provision and decided that the proper notice could be given by a less costly procedure, consisting of notice by publication together with individual notice to only 7,000 of the identifiable class members.[18] The court also decided that the defendants must bear part of the cost of notice if a preliminary hearing on the merits indicated that the plaintiff would probably prevail at trial. Since it appeared that Eisen could meet these less stringent notice requirements, the class action was held to be maintainable.[19] Following discovery procedures, a preliminary hearing on the merits resulted in a finding that the plaintiff class was "more than likely to prevail" at trial.[20] Accordingly, the defendants were ordered to pay 90% of the notice costs.[21]

In its final ruling on the *Eisen* case, the court of appeals again reversed, stating that the district court had construed Rule 23 too liberally.[22] According to the court of appeals, the notice provision should have been construed as requiring individual notice to each identifiable member and the preliminary hearing on the merits should not have been used to distribute costs, since it was unauthorized by Rule 23 and likely to be extremely prejudicial to the losing party.[23]

The Supreme Court granted certiorari[24] in order to resolve these issues over the proper construction of Federal Rule 23.[25] The Court HELD: (1) Rule 23(c)(2) requires individual notice to be sent to each class member who can be identified through reasonable effort;[26] and (2) the representative plaintiff must initially bear the total cost of notice.[27] The decision of the court of appeals was vacated and the case remanded with instructions to dismiss the class action as defined.[28]

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[17] Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968). In its prior order in the *Eisen* case, the court of appeals ruled that the district court's order dismissing the suit as a class action was appealable as an order within the meaning of the word "final" in 28 U.S.C. § 1291 (1970). Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 120-21 (2d Cir. 1966).

[18] 52 F.R.D. at 267-68. This procedure reduced the notice cost from $315,000 to $21,720. 417 U.S. at 167 & n.7.

[19] 52 F.R.D. at 270-72.

[20] Eisen v. Carlisle & Jacquelin, 54 F.R.D. 565, 567 (S.D.N.Y. 1972).

[21] Id.

[22] Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1015 (2d Cir. 1973).

[23] Id. at 1015-16.

[24] Eisen v. Carlisle & Jacquelin, 414 U.S. 908 (1973).

[25] 417 U.S. at 159.

[26] Id. at 177. The Court's opinion was written by Justice Powell.

[27] Id. The Court further ruled that the district court's resolution of the notice problem constituted a "final" and thus appealable decision within the meaning of 28 U.S.C. § 1291 (1970) and thereby upheld the jurisdiction of the court of appeals. 417 U.S. at 172. See note 17 supra.

[28] Id. at 179.

Noting the provision in Rule 23(c)(2), that a judgment in a class suit is binding on each class member who does not request exclusion, the Court premised its holding that individual notice must be sent to each identifiable member on what it considered to be the "unmistakable" import of Rule 23.[29] According to the Court, the "express language and intent" of Rule 23(c)(2)[30] left "no doubt" that such notice was an "unambiguous" requirement of the Rule and not a discretionary consideration.[31] Furthermore, the Court concluded that the preliminary hearing conflicted with the Rule's requirement that a class action be determined to be maintainable before the merits are considered. Finally, the Court stated that a preliminary hearing on the merits was likely to cause substantial prejudice to the defendant.[32] Having found no authority in Rule 23 for a preliminary distribution of costs between the parties, the Court declared that the usual rule that the plaintiff must initially bear the notice expenses should be followed.[33]

In a separate opinion[34] Justice Douglas considered the suggestion by Second Circuit Judge Oakes[35] that Eisen's class be divided into subclasses with a suit by one subclass being treated as a test case.[36] Justice Douglas noted, however, that this proposal raised two issues that needed to be resolved: whether the statute of limitations could be tolled for all class members pending the subclass suit and whether the judgment of the subclass suit could be binding on all class members.[37]

It will be submitted that the Court's holdings in *Eisen*, as Justice Douglas appeared to recognize, will seriously undermine a principal objective of Rule 23(b)(3) by impeding the small claimant's efforts to obtain relief. One of the main purposes of Rule 23(b)(3), as amended in 1966,[38] was to provide a means—the class action—by

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[29] Id. at 173.

[30] For the language of Fed. R. Civ. P. 23(c)(2), see note 14 supra.

[31] 417 U.S. at 175-76.

[32] Id. at 177-78.

[33] Id. at 178.

[34] Justice Douglas' opinion which dissented in part (with Justices Brennan and Marshall concurring), agreed with the majority's holdings but went on to explore issues with which the majority opinion had not dealt but which were felt to be important to the disposition of the case on remand. Id. (dissenting opinion).

[35] Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1021 (2d Cir. 1973) (dissenting from denial of rehearing en banc).

[36] 417 U.S. at 180 (dissenting opinion). The creation of subclasses is authorized by Fed. R. Civ. P. 23(c)(4)(B).

[37] 417 U.S. at 181-82 (dissenting opinion).

[38] For a discussion of problems which arose under Rule 23 as originally enacted, see Advisory Committee's Note to Fed. R. Civ. P. 23, 39 F.R.D. 69, 98-99 (1966) [hereinafter cited as Adv. Comm. Note].

Amended Rule 23 provides that a class action may be maintained under three sets of circumstances: Rule 23(b)(1) permits class actions where separate actions would create a risk of inconsistent adjudications to the party opposing the class or to the class members; Rule 23(b)(2) permits them where injunctive or declaratory relief on behalf of the class is appropri-

which the small claimant could seek redress.[39] A small claimant is a person who has sustained actual injury but whose claim is too insignificant to justify the expense of individual litigation.[40] Rule 23(c)(2) contains the provision for notice to class members which will govern Rule 23(b)(3) class actions. Thus, the *Eisen* Court's decision interpreting Rule 23(c)(2) must be analyzed in light of the objective of affording relief to small claimants, the fulfillment of which may be prevented if the small claimant must meet burdensome notice requirements in his pursuit of relief.

In holding that the representative plaintiff must send individual notice to each identifiable class member, the Court appeared to place great emphasis on the language in Rule 23(c)(2), which states: "[T]he court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[41] It has been argued, however, that an interpretation of Rule 23(c)(2) as requiring individual notice to all identifiable class members reduces the "best notice practicable" and "reasonable effort" provisions of that Rule to "mere verbiage."[42] Courts and commentators have construed Rule 23(c)(2) as providing that the form of notice required in each case should be left to the district court's discretion and that the suit should not be dismissed summarily whenever the representative plaintiff cannot afford to give individual notice to all identifiable class members.[43]

In support of its decision[44] the Court cited the statement in the Advisory Committee's Note to Federal Rule of Civil Procedure 23,[45] that "under subdivision (c) (2), notice . . . is not merely discretionary."[46] This statement, however, could be interpreted as indicating merely that some form of notice is required rather than

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ate; and Rule 23(b)(3) permits class actions where common questions of law or fact would warrant them. 3B J. Moore, Federal Practice ¶ 23.02-1, at 23-124 (2d ed. 1974).

[39] Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 560 (2d Cir. 1968); Katz v. Carte Blanche Corp., 53 F.R.D. 539, 545 (W.D. Pa. 1971); Dolgow v. Anderson, 43 F.R.D. 472, 484-85 (E.D.N.Y. 1968); Kaplan, A Prefatory Note to "The Class Action—A Symposium," 10 B.C. Ind. & Com. L. Rev. 497 (1969); Ford, Federal Rule 23: A Device for Aiding the Small Claimant, 10 B.C. Ind. & Com. L. Rev. 501, 504 (1969); Ward & Elliott, The Contents and Mechanics of Rule 23 Notice, 10 B.C. Ind. & Com. L. Rev. 557 (1969).

[40] Handler, The Shift from Substantive to Procedural Innovations in Antitrust Suits —The Twenty-Third Annual Antitrust Review, 71 Colum. L. Rev. 1, 9 (1971). Plaintiff Eisen was a small claimant since, as the Court noted, "[n]o competent attorney would undertake his complex antitrust action to recover so inconsequential an amount" as his claim of seventy dollars. 417 U.S. at 161.

[41] Fed. R. Civ. P. 23(c)(2).

[42] Ward & Elliott, supra note 39, at 559.

[43] E.g., Berland v. Mack, 48 F.R.D. 121, 129 (S.D.N.Y. 1969); Booth v. General Dynamics Corp., 264 F. Supp. 465, 472 (N.D. Ill. 1967); Miller, Problems of Giving Notice in Class Actions, 58 F.R.D. 313, 319-20 (1973); Ford, supra note 39, at 512.

[44] 417 U.S. at 173.

[45] 39 F.R.D. 69, 98 et seq. (1966).

[46] Id. at 106.

that a particular form of notice, individual notice to each identifiable member, is necessary. The interpretation that notice, in some form, is all that is required would seem to be reinforced by analysis of the Committee's statement in the context in which it was made. The Committee was comparing the notice provision in Rule 23(c)(2), which governs the Rule 23(b)(3) class action utilized prior to *Eisen* by many small claimants, with the notice provision in Rule 23(d)(2),[47] which leaves to the court's discretion the question of whether any notice in class actions other than those brought under Rule 23(b)(3) should be required.[48]

The Advisory Committee further stated that the Rule 23(c)(2) notice provision was designed to fulfill the requirements of due process.[49] Noting this statement by the Advisory Committee, the Court in *Eisen* cited *Mullane v. Central Hanover Bank & Trust Co.*[50] and *Schroeder v. City of New York*[51] as authority for the principle that due process requires individual notice to each identifiable class member in Rule 23(b)(3) class actions.[52] The aforementioned cases did hold that individual notice to each identifiable party in the action was required by due process[53] but neither of the cases involved a Rule 23 class action.[54] Furthermore, in past interpretations of *Mullane,* the Supreme Court[55] and other courts[56] have stated that due process requires that the appropriate

[47] Fed. R. Civ. P. 23(d) provides in pertinent part: "In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring . . . that notice be given in such manner as the court may direct to some or all of the members . . . ."

[48] Adv. Comm. Note, supra note 38, at 106-07. See notes 38, 47 supra.

[49] 39 F.R.D. at 107.

[50] 339 U.S. 306 (1950).

[51] 371 U.S. 208 (1962).

[52] 417 U.S. at 174-75.

[53] In *Mullane,* the Court ruled that notice by publication to beneficiaries of a common trust fund as part of a judicial settlement of accounts did not satisfy due process requirements where the names and addresses of the beneficiaries were known. 339 U.S. at 318-20. In *Schroeder* it was held "that the newspaper publications and posted notices in the circumstances of this case, did not measure up to the quality of notice which the Due Process Clause . . . requires." 371 U.S. at 211.

[54] The issue raised in *Mullane* was the constitutional sufficiency of notice by the trustee of a common trust fund to beneficiaries of the judicial settlement of accounts. 339 U.S. at 307. The attorneys who served as guardians ad litem for the beneficiaries in *Mullane* acted without the advice or assistance of any client. Their fees were court-established and not predicated on success. Comment, Constitutional and Statutory Requirements of Notice Under Rule 23(c)(2), 10 B.C. Ind. & Com. L. Rev. 571, 572 (1969). Furthermore, the trust company had mailed notice to each known beneficiary in the past and the Court recognized in its opinion that postal notification would not seriously burden the trust company. 339 U.S. at 310, 319.

Schroeder involved the condemnation of real property owned by a single individual. 371 U.S. at 208-09.

[55] See Schroeder v. City of New York, 371 U.S. 208 (1962), where the Court stated: "In the *Mullane* case . . . the Court thoroughly canvassed . . . the practical considerations which make it impossible to draw a standard set of specifications as to what is constitutionally adequate notice, to be mechanically applied in every situation." Id. at 212.

[56] Dolgow v. Anderson, 43 F.R.D. 472, 500 (E.D.N.Y. 1968); Comment, supra note 54, at 575.

form of notice be determined on a case-by-case basis, not by a rule "to be mechanically applied in every situation."[57] Moreover, the Court in *Schroeder* expressly limited its holding to the facts of that case.[58]

These various interpretations of the language of Rule 23, the Advisory Committee's Note, and the *Mullane* and *Schroeder* cases suggest that the Court's construction of Rule 23(c)(2)[59] is not the only reasonable interpretation. Another reasonable interpretation of this provision is that the appropriate form of notice in each case should be left to the district court's discretion.[60] This interpretation of subdivision Rule 23(c)(2) may be more desirable than the Court's construction when considered in terms of the possible impact upon small claimant suits. If the form of notice were a discretionary matter, the small claimant would not be precluded from utilizing the class action device as a means by which to seek redress whenever the class contained a large number of identifiable members. Furthermore, construing Rule 23(c)(2) as providing that the form of notice be discretionary would not result in any unfairness to the defendants, since under either interpretation of Rule 23(c)(2), all class members who do not expressly request exclusion would be bound by the judgment.[61]

Finally, it does not appear that class members in small claimant class suits would be more adversely affected by the "discretionary" interpretation of Rule 23(c)(2) than by the Court's nondiscretionary interpretation. If a class suit on behalf of small claimants is foreclosed because the representative plaintiff cannot afford to provide individual notice to each identifiable member, the class member would probably have no other avenue of recourse due to the financial infeasibility of commencing an individual suit. On the other hand, while his chances of receiving actual notice are decreased if individual notice of a class action's pendency is not required, the likelihood of obtaining redress is enhanced by the mere fact that the merits of the suit will be heard. Furthermore, class members are at least partially protected, regardless of whether they receive notice, by the requirement that the representative plaintiff show that he is a capable representative of, and has an identity of interest with, the class.[62]

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[57] Schroeder v. City of New York, 371 U.S. at 212. See note 55 supra.

[58] 371 U.S. at 211. See note 53 supra.

[59] For the language of Fed. R. Civ. P. 23(c)(2), see note 14 supra.

[60] See text at notes 42-43 supra and authorities cited in notes 42-43 supra.

[61] Fed. R. Civ. P. 23(c)(2)(B); Adv. Comm. Note, supra note 38, at 105.

[62] See note 9 supra. As one commentator has noted, class actions constitute an exception to two important principles of procedural law:

> [E]ach person is free to determine whether, when, and how to enforce his substantive rights; [and] each person is entitled to his day in court before his rights are affected by a judgment. Powerful as they are, the abstract objections to being bound by the actions of others yielded long ago . . . to the practicalities of life and the law,

The second holding in *Eisen* that the representative plaintiff must bear the cost of notice appears to be a just resolution of the problem. A preliminary hearing on the merits was held in the district court to allocate the costs of notice on the basis of the plaintiff's likelihood of success. The Supreme Court objected to the preliminary hearing because: (1) it was unauthorized by Rule 23; (2) it conflicted with Rule 23(c)(1); and (3) it could result in substantial prejudice to the defendant. Accordingly, the Court applied the usual rule that the plaintiff should bear the cost of notice.[63] The *Eisen* opinion, however, would be more persuasive if the Court had more fully explored this issue and further developed the reasons for its holding.

As the Court noted, a preliminary hearing on the merits to allocate initially the notice costs between the parties is not authorized by Rule 23.[64] This rationale, however, is not fully persuasive since Rule 23 does not address itself to the issue of if or how notice costs should be allocated. Secondly, it appears that the Court may have erred in stating that the preliminary hearing contravened Rule 23(c)(1)[65] by permitting the merits to be considered before the maintainability of the class action was established.[66] The district court in *Eisen* found that the suit met the prerequisites for a class action,[67] and thus held it to be maintainable prior to holding the preliminary hearing on the merits.[68]

In addition, the Court reasoned that the preliminary hearing could be prejudicial to the defendant "since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials."[69] The Court, though, did not proceed to explain why "of necessity" such a hearing could not be accompanied by rules protecting the defendant's rights.[70] Moreover, the Court did not elaborate on its comment that the tentative findings of the hearing could place an "unfair burden" on the defendant.[71]

Finally, the Court did not sufficiently develop the reasoning

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to the need to afford an effective remedy for the protection of rights and to the reduction of repetitive litigation.

Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buff. L. Rev. 433, 433-34 (1960).

[63] 417 U.S. at 177-78.

[64] Id. at 177.

[65] For the language of Fed. R. Civ. P. 23(c)(1), see note 8 supra.

[66] 417 U.S. at 177-78.

[67] See note 9 supra.

[68] Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 272 (S.D.N.Y. 1971).

[69] 417 U.S. at 178.

[70] It has been suggested that the same rules and procedures that accompany the granting of temporary restraining orders and preliminary injunctions on the basis of preliminary hearings on the merits could be used for protecting the defendant when such a hearing is used to distribute costs. Recent Developments, Eisen III: Fluid Recovery, Constructive Notice and Payment of Notice Costs by Defendants In Class Action Rejected, 73 Colum. L. Rev. 1641, 1654-55 (1973).

[71] 417 U.S. at 178.

behind its conclusion, that as there is no support for initially distributing the costs under Rule 23, the plaintiff should bear them since that is the "usual rule" in an adversarial proceeding.[72]

It would seem that the Court could have used the following reasons to support its holding. To order a defendant to bear the cost of notice prior to his "day in court," would seem to raise constitutional questions.[73] Moreover, such a procedure could substantially harm a defendant financially and possibly force him to settle merely because he could not afford to pay this expense and then take the risk of being found liable.[74] Furthermore, a representative plaintiff in suits brought on behalf of small claimants may not be able to reimburse a defendant if the judgment is for the latter.[75] The Court, however, did not discuss these considerations in its opinion.

The most significant consequence of the Court's holdings in *Eisen* may prove to be that the Rule 23(b)(3) class action device will cease to be an effective means by which the small claimant may seek redress.[76] It is unlikely that the amount of damages that the small claimant is individually seeking would ever justify the substantial expense he would have to bear, at least initially, in order to provide individual notice to each identifiable class member,[77] as mandated by the Court in *Eisen*.[78] This result, however, may not be totally undesirable due to its curative effect upon certain inequities faced by class action defendants.

Before *Eisen*, the defendants in large class suits maintained by small claimants were frequently forced to settle out of court regardless of the case's merits because their financial exposure exceeded their net worth.[79] Furthermore, the economic threat arising from the very pendency of the action impeded any financial planning by the

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[72] Id.

[73] The questions would be likely to arise under the Due Process Clause. U.S. Const. amend. V. "[N]o one shall be personally bound until he has had his day in court . . . ." Galpin v. Page, 85 U.S. (18 Wall.) 350, 368-69 (1873). "The due process clause requires at a minimum that deprivation of life, liberty, or property by adjudication be preceded by . . . opportunity for hearing appropriate to [the] nature of the case." Boddie v. Connecticut, 401 U.S. 371, 378 (1971).

[74] Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1019 (2d Cir. 1973); Simon, Class Actions—Useful Tool or Engine of Destruction, 55 F.R.D. 375, 388-89 (1973); Handler, supra note 40, at 9.

[75] Cf. Simon, supra note 74 at 392.

[76] Eisen v. Carlisle & Jacquelin, 479 F.2d at 1025 (Oakes, J., dissenting from denial of rehearing en banc); Ward and Elliott, supra note 39, at 564-65; Comment, supra note 54, at 574-75.

[77] Comment, supra note 54, at 574-75.

[78] In *Eisen* the petitioner contended that the requirement of individual notice to each identifiable member should be dispensed with because "the prohibitively high cost" of providing such notice "would end this suit as a class action . . . ." The Court recognized that this result would ensue from its holding but stated: "There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." 417 U.S. at 175-76.

[79] Simon, supra note 74, at 389.

defendant, particularly if it was a corporate entity. The mere existence of the suit affected its credit status.[80]

Secondly, the management of large Rule 23(b)(3) class actions placed a heavy burden on the federal court system. These suits conflicted with one of the principal goals of class actions—the achievement of economies in court time, effort, and expense.[81] Instead of replacing many suits with one, Rule 23(b)(3) class actions, when brought on behalf of small claimants, often created suits where none would have otherwise existed, since small claimants could not have met the cost of individual suits. At the same time, however, Rule 23 class actions did provide for judicial review of wrongs which might not otherwise have been redressed because of the expense of litigation. Nonetheless, at a time when one of the major concerns of the federal judiciary is the backlog of cases,[82] Rule 23(b)(3) class suits invariably tended to be very time consuming.[83] Thus, while *Eisen* will have undesirable consequences, the decision will rectify these inequities and inefficiencies inherent in the Rule.

Some commentators have even questioned whether class actions usually aided the small claimant.[84] These commentators claim that after the costs of attorney's fees, notice, filing of claims, and discovery response are paid or subtracted from the recovery, little remains for the small claimant.[85] If these commentators are correct, it would appear that *Eisen* will not have a particularly detrimental impact upon small claimants.

Alternative means by which the small claimant can seek redress, however, do not appear to be very promising at this time. The suggestion of using a subclass suit as a test case, discussed by Justice Douglas,[86] appears to be accompanied by problems which may render it unworkable. When a subclass is organized to prosecute the action, the original suit need not be dismissed. Thus, the full class complaint can be preserved.[87] The statute of limitations, therefore,

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[80] Weithers, Amended Rule 23: A Defendant's Point of View, 10 B.C. Ind. & Com. L. Rev. 515, 522 (1969).

[81] American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974); Weithers, supra note 80, at 520-21; Adv. Comm. Note, supra note 38, at 102.

[82] See Burger, Report on the Federal Judicial Branch—1973, 59 A.B.A.J. 1125, 1126, 1129 (1973).

[83] See Weithers, supra note 80, at 522-24. Chief Judge Lumbard of the Southern District of New York felt that *Eisen* was so unmanageable and time consuming that he referred to the case as a "Frankenstein monster posing as a class action." Eisen v. Carlisle & Jacquelin, 391 F.2d at 572 (dissenting opinion).

[84] Simon, supra note 74, at 378; American College of Trial Lawyers, Report and Recommendations of the Special Comm. on Rule 23 of the Federal Rules of Civil Procedure 22-25 (1972) [hereinafter cited as Trial Lawyers Special Comm.]; Handler, supra note 40, at 9-10.

[85] Simon, supra note 74, at 378; Handler, supra note 40, at 9-10.

[86] 417 U.S. at 179-85 (dissenting opinion).

[87] Id. at 183-85 (dissenting opinion).

probably could be tolled for all class members during the subclass trial on the basis of the Supreme Court's holding in *American Pipe & Construction Co. v. Utah*.[88] That holding was that the timely initiation of a class action prior to the running of the statute would protect all the members of the class.[89] In his partial dissent Justice Douglas noted that there are unresolved issues as to what effect the judgment in the subclass suit would have upon the original class.[90] If the results of the subclass suit bind all class members, the subclass suit would, in effect, be a class action on behalf of the whole class. In that case, the Court's holding in *Eisen* would appear to require that individual notice be given to all identifiable class members, not just those in the subclass. Consequently, the representative plaintiff in the subclass suit would face the same high cost of notice imposed upon the plaintiff in the original class action. On the other hand, if the results of the subclass suit bind only the subclass members, which appears more likely,[91] the suit is separate and distinct from the original class action. Accordingly, it would appear that the damages sought in the subclass suit should be based solely on the sum of the claims of the subclass members. In this case, if the subclass is small enough that the representative plaintiff can afford notice, the damages sought may be too inconsequential to attract an attorney. In certain instances, however, probono legal assistance, or publicly or charitably funded legal assistance, may be available. Nonetheless, it seems unlikely that all small claimants would be able to obtain such services. Therefore, whether or not the judgment in the subclass suit is binding on all class members, the suggestion of using the subclass suit as a test case does not appear to provide a satisfactory alternative means by which the small claimant may seek redress.

If a Rule 23(b)(3) class suit is held not to be maintainable or is foreclosed because of notice costs, it has been suggested that the representative plaintiff could bring a Rule 23(b)(2) class action suit,[92] which is designed primarily for injunctive relief.[93] These suits have been extolled as procedurally simple and inexpensive as well as suited for the implementation of social and economic reforms.[94] Injunctive suits, however, are only cognizable when there is ongoing illegality.[95] Furthermore, Rule 23(b)(2) does not

[88] 414 U.S. 538 (1974). For a discussion of this case, see Note, 15 B.C. Ind. & Com. L. Rev. 1010 (1974).

[89] 414 U.S. at 552-53.

[90] 417 U.S. at 181-82.

[91] Id. at 182 n.3.

[92] Fed. R. Civ. P. 23(b) provides in pertinent part: "An action may be maintained as a class action if . . . (2) . . . final injunctive relief" is appropriate.

[93] Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1019-20 (2d Cir. 1973), quoting Trial Lawyers Special Comm., supra note 84, at 29.

[94] 479 F.2d at 1020.

[95] 11 C. Wright & A. Miller, Federal Practice & Procedure § 2942 at 371 (1973). An injunction would not have helped the plaintiff class in *Eisen* since the alleged overpricing by

extend to cases in which "the appropriate final relief relates exclusively or predominantly to money damages."[96] Thus, the injunctive suit by small claimants is not an entirely satisfactory substitute for the Rule 23(b)(3) class action damage suits, particularly in cases involving alleged antitrust, securities, and consumer violations.[97]

Other judicial procedures available for handling many claims at one time are joinder, consolidation, intervention, stare decisis, and res judicata.[98] It would appear that none of these procedures are suitable alternatives for small claimants, since these devices are not practicable for handling the number of people that would have to be involved to enable the representative plaintiff to engage a competent attorney. The Court recognized this consideration in *Eisen*.[99] Administrative agencies, such as the Securities and Exchange Commission and the Federal Trade Commission, also do not provide satisfactory alternatives for the small claimant, since most "simply do not have the tools available to remedy the many claims of persons injured."[100]

Although the Supreme Court's holdings in *Eisen v. Carlisle &*

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the defendants was stopped by the New York Stock Exchange before the suit was filed. See 417 U.S. at 160 n.2.

[96] Advisory Committee's Note to Fed. R. Civ. P. 23, 39 F.R.D. 69, 102 (1966).

[97] Class actions for damages (i.e., Rule 23(b)(3) class actions) have been used in increasing frequency during the last few years by such groups as shareholders, overcharged victims of antitrust violations, environmentalists, and consumers. McCall, Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Class Action Issues, 25 Hastings L.J. 1351, 1355-56 (1974). Since federal agencies entrusted with the enforcement of antitrust and securities laws do not have the funds or manpower to take action on every case of a possible violation, nor the authority to compel repayments to wronged consumers, class actions for damages have been used extensively to prosecute alleged antitrust and securities violations. See Katz v. Carte Blanche Corp., 53 F.R.D. 539, 543 (W.D. Pa. 1971); Berland v. Mack, 48 F.R.D. 121, 125 (S.D.N.Y. 1969); Dolgow v. Anderson, 43 F.R.D. 472, 482-83 (E.D.N.Y. 1968), citing Brief for S.E.C. as Amicus Curiae.

Most civil rights class actions are for injunctions, and consequently brought under Rule 23(b)(2). Brief for N.A.A.C.P. Legal Defense & Educ. Fund, Inc. as Amicus Curiae at 2, Eisen v. Carlisle & Jacquelin, 417 U.S. at 156 (1974). Therefore, since the Supreme Court's holdings in *Eisen* are limited to Rule 23(b)(3) class actions, the majority of civil rights class actions will not be affected by *Eisen*.

Even if a class action is brought under Rule 23(b)(3), it will not be adversely affected by *Eisen* if most of the class members are not identifiable through reasonable effort, since individual notice will not be required to be sent to these members. For example, in the typical case of environmental injury, there is no transaction, such as there generally is in a shareholders case, between class members and the defendants. Consequently, there is no basis for individual identification of class members. Comment, The Federal Class Action in Environmental Litigation: Problems and Possibilities, 51 N.C.L. Rev. 1385, 1444 (1973). A well-known exception to the "typical" environmental class action is Zahn v. International Paper Co., 414 U.S. 291 (1973). In *Zahn* the plaintiff class members were owners and lessees of property fronting on Lake Champlain in Orwell, Vermont. Id. at 291-92. Hence, the class members were readily identifiable.

[98] Weinstein, supra note 62, at 438-54.

[99] 417 U.S. at 161.

[100] Ford, Federal Rule 23: A Device for Aiding the Small Claimant, 10 B.C. Ind. & Com. L. Rev. 501, 508 (1969); See also Dolgow v. Anderson, 43 F.R.D. 472, 483-85 (E.D.N.Y. 1968). For example, the SEC is not empowered to award damages. Id.

Jacquelin may be likely to protect the defendant in Rule 23(b)(3) class actions from being forced to settle for financial reasons, this desirable result may well be at the cost of foreclosing the use of the class action as a means by which the small claimant can seek redress. If the Court had construed the notice provision in Rule 23(c)(2) as stating that the form of notice should be a discretionary consideration rather than that individual notice to each identifiable member is always required, the desirable result with respect to the defendant might have been achieved in a manner that was less damaging to the small claimant's position.

LUCY WEST BEHYMER

Constitutional Law—The Anti-Injunction Act—Due Process Considerations Where IRS Actions Threaten First Amendment Liberties: *Bob Jones University v. Simon;*[1] *Alexander v. "Americans United" Inc.*[2]—Petitioner Bob Jones University, a religious institution, sought to enjoin the Internal Revenue Service (IRS) from revoking petitioner's status as a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code of 1954[3] (the Code) because of its segregationist admissions policy.[4] Respondent in *Alexander v. "Americans United" Inc.*[5] sought declaratory and injunctive relief to restore its section 501(c)(3) tax-exempt status, which the IRS had revoked because of the organization's substantial lobbying activities.[6] Restoration not only would shield respondent from federal taxation but also would insure that future contributors be permitted to deduct contributions under section 170 of the Code.[7]

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[1] 416 U.S. 725 (1974).

[2] 416 U.S. 752 (1974). The full name of the organization is "Protestants and Other Americans United for Separation of Church and State," Id. at 754.

[3] Int. Rev. Code of 1954, § 501(c)(3). This section of the Code exempts from federal income taxation, *inter alia*, corporations and organizations "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals . . . ." Id. However, the tax exemption is provided only where profits do not inure to private gain and "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . ." Id.

[4] Bob Jones Univ. v. Simon, 416 U.S. 725, 735 (1974).

[5] 416 U.S. 752 (1974).

[6] Id. at 754-55. The organization's lobbying activities were evidently consonant with its purpose, described by the Court as the defense and maintenance of "religious liberty in the United States by the dissemination of knowledge concerning the constitutional principle of the separation of church and State." Id. at 754. See note 25 infra.

[7] Int. Rev. Code of 1954, § 170. Section 170 of the Code provides for the deductibility of charitable contributions. Generally, an organization qualifying under § 501(c)(3) will qualify as a charitable organization under § 170(c)(2). Loss of § 501(c)(3) status, therefore, almost automatically removes contributions which had been deductible under § 170 from qualification for deduction on contributors' federal income tax returns. Thus, "[t]he differences be-