NOTES

THE MANAGEABILITY CRISIS OF CONSUMER CLASS ACTIONS: THE SEVERE EXAMPLE OF EISEN III*

A three-judge panel of the Court of Appeals for the Second Circuit has recently decided a case which may prove to be the most significant setback in the history of the development of massive consumer class actions under rule 23 of the Federal Rules of Civil Procedure.[1] The case of *Eisen v. Carlisle & Jacquelin*[2] has

---

*The case of *Eisen v. Carlisle & Jacquelin* has been before the Court of Appeals for the Second Circuit three times. These decisions have come to be designated as follows: Eisen I, 370 F.2d 119 (2d Cir. 1966); Eisen II, 391 F.2d 555 (2d Cir. 1968); and Eisen III, 479 F.2d 1005 (2d Cir. 1973).

[1]Rule 23 of the Federal Rules of Civil Procedure controls class action litigation. It provides as follows:

CLASS ACTIONS

(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.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) 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, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(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 con-

finally been dismissed as a class action[3] after seven years of highly

troversy. 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.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as 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.

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

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought, or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom

controversial litigation.[4] In dismissing Eisen's class action, the court of appeals held, *inter alia,* that individual notice must be given to all "identifiable" class members, and the representative plaintiff must bear all of the cost of such strictly required notice. The opinion flatly rejects such innovations as a preliminary hearing on the merits,[5] used to determine how the costs of notice should be allocated, and the "fluid class recovery"[6] method of damage distribution. The court concluded that without such improper and illegal innovations, massive class actions of this type are impossible and must be dismissed as unmanageable.

An examination of the problems facing consumer class actions is best conducted in the context of an analysis of a case such as *Eisen.* Indeed, this case presents a rare opportunity for such a

---

allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

[2]479 F.2d 1005 (2d Cir.), *cert. granted,* 94 S. Ct. 235 (1973).

[3]This case was dismissed as a class action, but "without prejudice" to any individual claim which the plantiff might still care to assert against the defendants. Note, however, that Eisen's individual claim amounted to only about $70. Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 120 (2d Cir. 1966).

[4]To this date, there are seven reported *Eisen* decisions. 41 F.R.D. 147 (S.D.N.Y. 1966); 370 F.2d 119 (2d Cir. 1966), *cert. denied,* 386 U.S. 1035 (1967); 391 F.2d 555 (2d Cir. 1968); 50 F.R.D. 471 (S.D.N.Y. 1970); 52 F.R.D. 253 (S.D.N.Y. 1971); 54 F.R.D. 565 (S.D.N.Y. 1972); 479 F.2d 1005 (2d Cir.) *cert. granted,* 94 S. Ct. 235 (1973). The extraordinary interests in this case is evidenced by the many articles which it has inspired. *See, e.g.,* Note, *Federal Rule 23(c)(2)—Notice in Class Actions*—Mullane *Reconsidered,* 43 TUL. L. REV. 369 (1969); Comment, Eisen v. Carlisle & Jacquelin, *"Frankenstein Monster Posing as a Class Action"?* 33 U. PITT. L. REV. 868 (1972); 18 AM. U.L. REV. 225 (1968); 44 N.Y.U.L. REV. 198 (1969). *See also* N.Y. Times, May 2, 1973, at 1, col. 3.

[5]The "preliminary hearing" referred to here has, perhaps inappropriately, come to be termed a "mini-hearing." 54 F.R.D. at 567. Such hearings, on the merits of a claim or otherwise, have been held to help determine whether the class action procedure is appropriate in a particular case. *See, e.g.,* Herbst v. Able, 45 F.R.D. 451 (S.D.N.Y. 1968) (preliminary hearing held to determine whether common questions predominated over individual issues as required by rule 23(b)(3)).

[6]The concept of "fluid class recovery" involves the establishment of a damage fund out of which expenses of litigation and individual claims are

study because, not only does its litigation span all of the seven years since the amendment of rule 23,[7] but, during its course, all of the major problems which face today's massive class action suits have been raised. *Eisen* is a classic example of the modern large consumer class action, and the story of its litigation is a reflection of the evolution of attitudes in the federal courts toward the application of rule 23 since its 1966 amendment.

I. Background

In 1966, the plaintiff, Eisen, brought this class action on behalf of himself and all other persons who had, during the previous six years, invested in "odd lots"[8] on the New York Stock Exchange. Named as defendants were the two major odd-lot dealers on the New York Stock Exchange[9] and the New York Stock Exchange itself. The plaintiff charged that the odd-lot dealers had conspired to monopolize odd-lot trading and to charge excessive

---

paid. Some courts have used or suggested the use of such a fluid recovery system as an alternative to having individual claims alone form the basis of damage calculation and administration. *See, e.g.*, cases cited notes 55, 61 *infra; cf.* Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 587-90 (10th Cir. 1961).

[7]The old rule 23 suffered from inflexible complexities and was difficult for the courts to apply primarily because of the obscure classification of class actions as "true," "hybrid," or "spurious." *See* Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States, Advisory Note, 39 F.R.D. 69, 98-99 (1966) [hereinafter cited as Advisory Comm. Note]. Most cases fell into the category of spurious class actions, and the judgment in such cases would extend only to the parties to the lawsuit. This was one factor which led to the necessity of an amendment to the old rule, which, in its original form, was not achieving its objective of determining all questions in one suit. *Id. See also* 3B J. Moore, Federal Practice ¶ 23.11 (2d ed. 1969); Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L. Rev. 433 (1960). Amended rule 23 was adopted by the Supreme Court Order of Feb. 28, 1966, 383 U.S. 1031 (1966), and became effective on July 1, 1966. Under the new rule, a class action judgment is generally binding on all members of the class, with the exception that in some cases, members who seasonably request exclusion will not be bound. *See* Fed. R. Civ. P. 23(c)(2), (3).

[8]While normal trading units on stock exchanges are called "round lots" and are traded in multiples of 100 shares, "odd lots" are any units traded that are smaller than the established unit of trading. Certain dealers specialize in the trading of these smaller share parcels. A consumer who purchases odd lots must pay, in addition to the normal brokerage commission, a fee known as an odd-lot differential which is based upon a fraction of a point for each share traded. *See* 391 F.2d at 559.

[9]The defendants Carlisle & Jacquelin and DeCoppet & Doremus are odd-lot traders who collectively control ninety-nine percent of the volume in odd-lot transactions. 391 F.2d at 559-60, *citing* SEC Report of Special Studies of

fees in violation of the Sherman Act.[10] He charged the Exchange with failure to protect the odd-lot investors as required by the Securities and Exchange Act.[11] The class which the plaintiff claimed to represent was first thought to include a maximum of around 3.7 million[12] members, but later was estimated to include as many as six million investors.[13]

Initially, some courts were reluctant to embrace a rule which would bind absent but described class members.[14] The first *Eisen* decision in 1966 reflected this early conservative approach, and, in rejecting the case as a class action, that opinion dwelt heavily upon the observation that the tremendous size and diversity of the class all but precluded its being litigated under rule 23.[15] In granting the defendants' motion to dismiss the suit as a class action, Judge Tyler found that the plaintiff had not established that he could fairly and adequately protect the interests of the class,[16] that proper notice to the class members was practically and financially impossible,[17] and that questions common to the class probably did not predominate over questions affecting individual members.[18] On appeal to the Court of Appeals for the Second Circuit, this initial rejection of the suit as a class action was reversed and remanded to the district court for a further evidentiary hearing.[19] The majority on the court of appeals deferred to the policy reasons set out in a prior appeal, which called for a liberal attitude toward class actions under rule 23, especially in cases such as this, in which, due to the small size of the in-

---

SECURITIES MARKETS, H.R. Doc. No. 95, 88th Cong., 1st Sess., pt. 2, 172-202, 393 (1963).

[10]15 U.S.C. §§ 1-2 (1970). *See* 41 F.R.D. at 148.

[11]15 U.S.C. 78f(b), (d), 78s(a) (1970). *See* 41 F.R.D. at 148.

[12]41 F.R.D. at 151 n.2.

[13]52 F.R.D. at 257.

[14]*See, e.g.*, School Dist. v. Harper & Row Publishers, Inc., 267 F. Supp. 1001 (E.D. Pa. 1967).

[15]Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147 (S.D.N.Y. 1966).

[16]*See* FED. R. CIV. P. 23(a)(4).

[17]*See id.* 23(c)(2). The court noted that in addition to the notice requirements of the rule, due process standards of notice should be strictly enforced since the new rule would make the judgment binding on any class member who did not affirmatively "opt out." 41 F.R.D. at 151. *See* note 7 *supra*.

[18]*See* FED. R. CIV. P. 23(b)(3).

[19]Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968).

dividual claims, the class action device represented the only practical way to adjudicate the class members' potentially meritorious rights.[20]

II. The 1968 Court of Appeals Opinion

This important 1968 opinion was the first court of appeals case interpreting that portion of the amended rule which had not been contained in old rule 23.[21] There the court rejected the district court's reliance upon quantitative factors, such as size of the class and smallness of the representative plaintiff's claim, as deciding factors for a determination of whether a class action could be maintained.[22]

In order for a case to be maintained as a class action, it must first meet four basic requirements.[23] These prerequisities are: that joinder of all members will be impracticable, that questions of law or fact are common to the class, that the plaintiff's claim is typical of the class, and that the plaintiff will serve as an adequate representative of the class. In addition to these, the case must fit within at least one of the provisions of rule 23(b). The court found that at this early stage of the proceedings the plaintiff had adequately demonstrated that the provisions of subdivision (b)(3) had been met.[24] A class action may be maintained under this subdivision when common questions of law or fact predominate over questions affecting only individual members,

---

[20]Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). On this prior appeal, the only question before the court was whether an appeal could be taken from an order of the district court dismissing a class action, but permitting litigation to continue on the plaintiff's individual claims. *See* Fed. R. Civ. P. 23(c)(1). Recognizing that such a dismissal had the practical effect of ending the lawsuit, the court held that an order of such fundamental significance was indeed appealable. Such a dismissal was called the "death knell" of the action. 370 F.2d at 121. *See generally* Note, *Interlocutory Appeal from Orders Striking Class Action Allegations*, 70 Colum. L. Rev. 1292 (1970). In its most recent *Eisen* opinion, the court has indicated that it would use a similar rationale to hold that an order *permitting* the plaintiff to continue a suit as a class action is also appealable. 479 F.2d at 1007 n.1. The Second Circuit emphasized that if such a ruling were not subject to immediate appellate review, irreparable harm would be caused to the complaining party. *Id.*

[21]Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968).

[22]The district court had emphasized that Eisen was the "sole plaintiff" among millions and that his interest was "miniscule" compared to the interests of the class as a whole. 41 F.R.D. at 151.

[23]*See* Fed. R. Civ. P. 23(a).

[24]391 F.2d at 566.

and the class action method of litigation is superior to other forms of adjudication.[25]

The court of appeals found that the district court's determination that the above requirements had not been met was, at this point, unwarranted and concluded that a closer examination would be required. In essence, the court, in 1968, found that when there is inadequate information upon which to base a determination of whether the requirements of rule 23 and due process are present, the district court must conduct evidentiary hearings. Only then could the district court properly decide whether a class action can or cannot be maintained.[26] Accordingly, the court of appeals remanded the case to the district court for such a hearing "on the questions of notice, adequate representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper."[27] In the course of this earlier opinion, the Second Circuit declared that vindication of small claims, which otherwise may be too small to justify individual legal action, is one of the "primary functions" of the rule 23 class action.[28] The court further observed that to facilitate such broad salutary purposes, the new rule should be given a liberal, not restrictive, interpretation.[29]

Although this earlier court of appeals opinion in the *Eisen* case displayed an appropriately positive attitude toward rule 23 by rejecting a simple quantitative approach in favor of the view that it is the *function* of the class action that is paramount, there remain several questionable aspects of that opinion. These particular features of the earlier opinion are important to an analysis of the final outcome of this important case, for they led, at least in part, to the Second Circuit's ultimate rejection of this case as a class action.

First, when considering the potential problems of providing adequate notice to members of the representative plaintiff's class,

---

[25]FED. R. CIV. P. 23(b)(3).

[26]*See, e.g.*, Herbst v. Able, 45 F.R.D. 451 (S.D.N.Y. 1968) (preliminary hearing held to determine whether common questions predominated over individual issues).

[27]391 F.2d at 570. Chief Judge Lumbard dissented arguing that suitable notice was impossible and that cases such as this are unmanagable as class actions. He characterized this suit as a "Frankenstein monster posing as a class action." *Id.* at 572 (Lumbard, C.J., dissenting).

[28]*Id.* at 563, *citing* Escott v. Barchris Constr. Corp., 340 F.2d 731, 733 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

[29]*Id.* at 563.

the court implied that if the district court should find that a considerable number of the class members could be ascertained, then those members would be entitled to *individual notice.*[30] The court added that if financial limitations should prevent the plaintiff from furnishing such individual notice, "there may prove to be no alternative other than the dismissal of the class suit."[31] For reasons which will be considered later,[32] this aspect of the court's holding has been condemned as unnecessarily restrictive.[33]

Another questionable holding of this earlier *Eisen* opinion is the court's conclusion that this case can qualify as a class action *only* under subdivision 23(b)(3).[34] Arguably, the court which recognized that the new rule must be given a "liberal" interpretation, should not have been so quick to declare that this class action could not be maintained under either subdivision (b)(1)(A) or (b)(2). A class action is maintainable under subdivision (b)(1)(A) when there is the risk that separate lawsuits would create varying adjudications as to individual members of the class and

---

[30] *Id.* at 568-70. For this conclusion, the court looked to the requirements of due process and rule 23. Rule 23(c)(2) states that:

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

The court cited Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), for its rule that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 391 F.2d at 568, *citing* Mullane v. Central Hanover Bank & Trust Co., *supra* at 314.

[31] 391 F.2d at 570.

[32] *See* discussion of Second Circuit's most recent *Eisen* opinion *infra.*

[33] *See, e.g.*, 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1786 (1972). The authors of this treatise refer specifically to Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968), and, in their analysis of the court's attitude toward individual notice, go so far as to state that "[t]his decision is unnecessarily restrictive and demands more than is traditionally required to satisfy due process and more than seems necessary in Rule 23(b)(3) actions." *Id.* In its subsequent *Eisen* decision, the Second Circuit reaffirmed and amplified its earlier strict approach to the requirement of individual notice. 479 F.2d at 1009.

[34] 391 F.2d at 565.

thus establish inconsistent judicial demands upon the defendant.[35] The court felt that this subdivision was inapplicable because the expense of litigation and the smallness of any individual claims made the likelihood of separate actions by individuals and the resulting risk of incompatible adjudications extremely remote.[36] This rationale may be consistent with the court's earlier determination that an order ending this suit as a class action would, for all practical purposes, be the "death knell"[37] of the action. However, as a rationale for limiting the basis upon which a class action may be maintained, it is not entirely in keeping with the court's admonition that the new rule should be given a broad definition. Though individual lawsuits may be much less *practical* than class actions in cases such as this, obviously such suits *can* be brought, and, if they are, the risk of inconsistent adjudications seems undeniable.[38] Also, it must not be overlooked that a successful antitrust plaintiff can collect triple damages[39] and, of course, reasonable attorney's fees.[40] Therefore, individual lawsuits are not entirely out of the question, and, given the need for a liberal application of the rule, subdivision (b) (1) (A) should not be summarily ruled out.

Similarly, the court rejected the possibility that this suit could be maintained under subdivision (b) (2) of rule 23.[41] This provision of the rule is meant to apply to cases in which the relief sought is exclusively or predominantly injunctive or declaratory.[42] Obviously, in *Eisen* the plaintiff sought primarily monetary damages, but it was argued early in the litigation that the size of the class and the smallness of individual claims would render a distribution of monetary damages unfeasible. Ultimately, this was one of the reasons for the court's rejection of this class action.[43] Thus, it was foreseeable at the outset that money damages might not be appropriate final relief in this case. With reference to subdi-

---

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

[36]391 F.2d at 564.

[37]370 F.2d at 121. *See* note 19 *supra.*

[38]*See* 44 N.Y.U.L. REV. 198, 201-02 (1969).

[39]15 U.S.C. § 15 (1970).

[40]*See generally* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1803 (1972).

[41]391 F.2d at 564.

[42]FED. R. CIV. P. 23(b)(2). *See also* Advisory Comm. Note, 39 F.R.D. at 102.

[43]479 F.2d at 1017. The court ultimately concluded that:

the amounts payable to individual claimants would be so low as to be

vision (b)(2), the Advisory Committee's Note to the Proposed Rules of Civil Procedure provides that this "subdivision does not extend to cases in which the *appropriate* final relief relates exclusively or predominantly to money damages."[44] Eisen requested equitable relief in his complaint. It was clear from the beginning that he could ultimately be prevented from pursuing his class action because money damages would prove unmanageable.[45] Under these circumstances, nothing in the rule prohibits recourse to subdivision (b)(2).

The reason that subdivisions (b)(1) and (b)(2) are such attractive alternatives is their lesser notice requirements. The notice requirement of 23(c)(2), which calls for "individual notice to all members who can be identified through reasonable effort,"[46] applies only to actions brought under subdivision (b)(3). Due process may require some form of notice in class actions under subdivisions (b)(1) and (b)(2).[47] However, there is no provision in the rule whereby class members may elect to be excluded from actions maintained under these two subdivisions; thus, notice is less vital in class actions which are not brought under subdivision (b)(3). It was the Second Circuit's emphasis upon a notice requirement which led to its eventual rejection of this class action.[48] Dismissal may not have become necessary had the court not rejected all the potentially viable alternatives at such an early stage.[49]

---

negligible [and this] should have been enough of itself to warrant dismissal as a class action.

Id.

[44]Advisory Comm. Note, 30 F.R.D. at 102 (emphasis added).

[45]One of the matters which rule 23 provides must be considered to determine whether a class action can be maintained under 23(b)(3) is "the difficulties likely to be encountered in the management of a class action." FED. R. CIV. P. 23(b)(3)(D).

[46]*Id.* 23(c)(2).

[47]*But see* Hammond v. Powell, 462 F.2d 1053, 1055 (4th Cir. 1972) (notice not required in 23(b)(2) actions).

[48]479 F.2d at 1015.

[49]It must be noted that resort to subdivisions (b)(1)(A) or (b)(2) may only be necessitated if the notice requirements of (b)(3) are interpreted as being so demanding that they effectively preclude large consumer class actions under the latter subdivision. Obviously, it would be better to avoid any necessity of attempting to juggle the classification of actions under rule 23(b). This, after all, was one of the defects which made the old rule so cumbersome. *See* Advisory Comm. Note, 39 F.R.D. at 98. *See also* Comment, *Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by Securities Laws*, 116 U. PA. L. REV. 889, 916-17 (1968). However, it is submitted that such juggling may be preferable to an alternative which would

III. The District Court's Approach

The case was remanded to the district court. Judge Tyler then made an extraordinary about-face from his previous decision. Five years after his firm dismissal of this case as a class action, Judge Tyler allowed the plaintiff to proceed under rule 23, and in so doing, rendered a decision which went as far as any federal court has gone in accommodating massive consumer class litigation.[50] In three reported opinions, Judge Tyler called for a more extensive hearing to gather necessary information,[51] found that the case was manageable as a class action,[52] and, after an additional evidentiary hearing on the merits, determined that the defendants should bear ninety percent of the cost of notice to the class.[53]

On remand, the district court first made findings of fact based upon information which had been submitted by the parties. These findings dealt primarily with the make-up of the plaintiff class and the transactions and charges which were the basis of the harm alleged to have been done to the class members.[54] The court also made certain findings as to how other courts had handled the complexities of similar litigation involving many parties and large recoveries.[55] The district court then turned to the crucial questions to be considered on remand. First, under the guidelines set out by

---

make the class action remedy unavailable for antitrust, consumer, and environmental litigation.

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

[51]Eisen v. Carlisle & Jacquelin, 50 F.R.D. 471 (S.D.N.Y. 1970). Judge Tyler called upon the parties to provide additional information concerning the crucial issues of manageability and notice.

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

[53]Eisen v. Carlisle & Jacquelin, 54 F.R.D. 565 (S.D.N.Y. 1972). This allocation of the cost of notice was based upon the finding at the preliminary hearing that "plaintiff and the class he represents are more than likely to prevail at trial or upon a motion for summary judgment." *Id.* at 573.

[54]52 F.R.D. at 256-59. The court's findings included, *inter alia* that: there were approximately six million class members for the period in question, the typical class member had approximately five odd-lot transactions during that period, approximately 1,967 members had ten or more such transactions during the period, the average odd-lot differential per transaction was about $5.18, two million of the class members were identifiable from computer tapes and other records of brokerage and odd-lot firms, and the remaining four million class members could not be identified with reasonable effort.

[55]52 F.R.D. at 259-60. The court referred to the similarly complex cases of Cherner v. Transitron Electronic Corp., 201 F. Supp. 934 (D. Mass. 1962), and West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971) [hereinafter cited as *Drug Cases*].

the court of appeals, it was not difficult to find that the plaintiff, as representative party, would be an adequate representative of his class.[56] The remainder of Judge Tyler's considered and lengthy opinion dealt with the complex question of manageability of the class action,[57] including the mechanics of administration, the computation and distribution of damages, the form of notice appropriate in this case, and allocation of the cost of notice.

A. Damages

In a massive consumer class action of this type, with its huge class and small individual recoveries, naturally, the problem of handling the damages aspects of a case are considerable.[58] Central to the court's conclusions in this regard was its finding that a fair estimate of the damages in this case was possible without the filing of individual claims by each class member.[59] In regard to the problems of administering any eventual damage recovery, the court looked for guidance to prior experiences in the administration of the *Drug Cases*[60] and found precedent in those and other recent

---

[56]52 F.R.D. at 261. *See* FED. R. CIV. P. 23(a)(4). The court of appeals had indicated the factors to be considered in this determination were: plaintiff's general qualifications and ability to conduct such litigation, the possibility of collusion or of plaintiff's having interests antagonistic to those of the class, plaintiff's general interest to insure his forceful advocacy, and the likelihood that the class would accept the plaintiff as their representative. 391 F.2d at 562-63.

[57]FED. R. CIV. P. 23(b)(3)(D) provides that one of the matters pertinent to the finding that a class action of this type may be maintained is, "the difficulties likely to be encountered in the management of the class action."

[58]*See generally* Dole, *The Settlement of Class Actions for Damages*, 71 COLUM. L. REV. 971 (1971); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941); Note, *Damages in Class Actions: Determination and Allocation*, in *The Class Action—A Symposium*, 10 B.C. IND. & COM. L. REV. 615 (1969); Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338 (1971); Comment, *Recovery of Damages in Class Actions*, 32 U. CHI. L. REV. 768 (1965).

[59]52 F.R.D. at 262. The court said that as sources for its computations, it could look to various records and reports. *Id.* But the significant factor in its determination that the filing of individual claims would not be essential was the fact that the same allegedly excessive charge was made to all class members in all odd-lot transactions. *Id. See* 391 F.2d at 562; *cf.* City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971), in which the court found that the damages problem in such vast class actions could be handled, but not in a case which lacked such factors as price uniformity.

[60]*Drug Cases, supra* note 55. These cases were a series of civil suits filed by various government entities and drug sellers alleging violation of antitrust

cases for a type of "fluid class recovery."[61] Though the court made no final ruling on the nature of the recovery that might eventually be allowed, it found the fluid class concepts to be of sufficient merit to establish a presumption that some adequate method of distribution could be found.[62]

The court found that because each alleged wrong, taken separately, was too small to have any true "litigable significance," any eventual distribution of recovery need not be limited strictly to "personal" recoupment of damages.[63] The court added, however, that individual recovery was not ruled out, in that any such claims could be honored if properly filed.[64] Fluid class recovery contemplates distribution to the class as a whole usually by the creation of a fund made up of unclaimed damages.[65] In this case, it was suggested that the best way of benefiting the original class would be to reduce the odd-lot differential over a period of time until the

---

laws. The suits were consolidated into one class action. Settlement of 100 million dollars was eventually offered by the defendant drug manufacturers. The defendants in *Eisen* argued that the *Drug Cases* were not applicable because there the parties reached an agreed-upon settlement from which a fund was established for damage compensation. In short, the *Drug Cases* were not litigated to the "bitter end." 52 F.R.D. at 262. Judge Tyler, however, in rejecting this distinction, found that if liability was eventually established in this case, the court's task of distribution would be essentially the same as it was in the *Drug Cases*. *Id.*

[61]In addition to the *Drug Cases*, the court relied upon Bebchick v. Public Util. Comm'n, 318 F.2d 187 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963) (court established fund used to decrease fare after transit users had been overcharged through wrongful rate increase), and Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967) (class action involving excessive rates on taxicab meters with settlement out of court and approximately one million dollars returned to the class by reduction of taxicab fares).

Of the cases relied upon by the district court as precedent for fluid class recovery, the *Drug Cases* are thought to be the most applicable because of the court's recognition that the establishment of a total damage figure as recovery for the class as a whole does not infringe upon the defendants' due process rights. *See In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278, 281-82 (S.D.N.Y. 1971) (one of several opinions arising from discovery proceedings which followed the earlier *Drug Cases*). *See generally* Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338 (1971).

[62]52 F.R.D. at 265.

[63]*Id.* at 264.

[64]*Id.*

[65]*Id. See generally* Malina, *Fluid Class Recovery as a Consumer Remedy in Antitrust Cases*, 47 N.Y.U.L. REV. 477 (1972).

fund was depleted.[66] It was recognized that without a significant recovery the expense of administering such a damage procedure might make any eventual distribution insignificant and perhaps unjustified. However, the court's estimation of potential damages at around twenty-two million dollars indicated that a sufficient recovery would be available for distribution.[67]

B. Notice

Undoubtedly, the notice requirements of rule 23 and due process present the major manageability problem of large consumer class actions.[68] Indeed, the problems associated with notice requirements raise the specter that such actions may be deemed impossible. Judge Tyler examined the notice requirements of rule 23 and due process and found that in this particular case they could be met "without imposing what in effect amounts to an insufferable tariff on the prosecution of the case."[69] The cases of *Mullane v. Central Hanover Bank & Trust Co.*[70] and *Hansberry v. Lee*[71] indicated to the court that the goal of constitutionally required notice is to provide for fair and adequate protection of all parties' interests in the action.[72] The court also noted that rule 23(c)(2) specifically

---

[66]52 F.R.D. at 265. It was suggested that the Securities and Exchange Commission [hereinafter referred to as SEC] could either approve or supervise such rate regulation. *Id.*

[67]*Id.*

[68]*See generally* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1786 (1972); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure* (I), 81 HARV. L. REV. 356, 396 (1967); Note, *Class Actions under Federal Rule 23(b)(3)—The Notice Requirement*, 29 MD. L. REV. 139 (1969); Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338 (1971); Note, Federal Rule 23(c)(2)—*Notice in Class Actions*—Mullane *Reconsidered*, 43 TUL. L. REV. 369 (1969).

[69]52 F.R.D. at 266-67.

[70]339 U.S. 306 (1950).

[71]311 U.S. 32 (1940).

[72]*Mullane* provided that due process requires "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314. The district court in *Eisen* properly saw the *Mullane* standard as one of flexible practicality which must be applied on a case-by-case basis. "[I]f with due regard for the *practicalities and peculiarities of the case* these conditions are reasonably met, the constitutional requirements are satisfied." *Id.* at 314-15 (emphasis added). "This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where

calls for the "best notice *practicable under the circumstances,* including individual notice to all members who can be identified with *reasonable* effort."[73] Since the rule was intended to reflect the requirements of due process,[74] the court felt that the notice requirements of the rule should be interpreted in light of the actual need for a notice procedure designed to enable class members to protect their rights in the litigation.

The question of adequate notice must be approached on a case-by-case basis,[75] and in this case the following factors combined to enable the court to conclude that overemphasis upon strictly required notice to individual class members was particularly unjustified. First, because individual claims were so small, the likelihood that any class members would wish to exclude themselves from the action was extremely remote.[76] Second, the statute of limitations had run so that any res judicata consequences, should the plaintiff lose his case, were thought to be of little significance to other class members. And finally, the court recognized the need to balance between the demand for expensive and stringent notice requirements and the reality that overemphasis of such notice could nullify the class action device.[77]

In light of all these considerations, the district court then outlined a notice procedure which it deemed a realistic and fair accommodation of the interests of all the parties. The notice which

---

it is *not reasonably possible or practicable* to give more adequate warning." *Id.* at 317 (emphasis added).

The *Hansberry* case emphasized the importance of protecting the interests of absent class members by insuring that the representative plaintiff had substantially similar and unconflicting interests. *See* 311 U.S. at 45.

[73]FED. R. CIV. P. 23(c)(2) (emphasis added).

[74]*See* Advisory Comm. Note, 39 F.R.D. at 107.

[75]*See* note 69 *supra.* The Advisory Committee states that "[n]otice to members of the class, *whenever* employed under amended rule 23, should be accommodated to the *particular purpose* but need not comply with the formalities for service of process." Advisory Comm. Note, 39 F.R.D. at 107 (emphasis added).

[76]*See* FED. R. CIV. P. 23(c)(2), (3), which provides that class members who do not wish to be bound by the judgment may request exclusion. *See also* Berland v. Mack, 48 F.R.D. 121, 129 n.3 (S.D.N.Y. 1969).

[77]52 F.R.D. at 266. *See also* Herbst v. Able, 47 F.R.D. 11, 21 (S.D.N.Y. 1969); Dolgow v. Anderson, 43 F.R.D. 472, 497 (E.D.N.Y. 1968).

At this point, the district court emphasized public policy considerations and the importance of the class action device—especially in such areas as private antitrust, consumer, and environmental litigation. 52 F.R.D. at 266.

the court proposed included the following: individual notice to all member firms of the New York Stock Exchange and all commercial banks with large trust departments,[78] individual notice by mail to approximately 7,000 class members, 2,000 of whom consisted of the group who were found to have had ten or more odd-lot transactions during the relevant period, and 5,000 others selected at random from those remaining "identifiable" class members,[79] and lastly, notice by publication to the remander of the class.[80]

C. Cost of Notice

Having treated the issues of damages and appropriate notice, the only remaining problem for the district court was the question of who must pay for the notice that would be required. The court of appeals had indicated that the plaintiff must bear this burden,[81] but the district court viewed the more recent Second Circuit case of *Green v. Wolf Corp.*[82] as an indication that the question remained

---

[78]52 F.R.D. at 267.

[79]*Id.*

[80]The court-proposed notice by publication consisted of one-quarter page notice once each month for two consecutive months in the following publications: 1) the national edition of the *Wall Street Journal*, 2) the financial section of the *New York Times*, 3) the financial sections of the *San Francisco Chronicle* and *San Francisco Examiner*, and 4) the financial section of the *Los Angeles Times*. *Id.* at 268.

To these provisions for notice, the district court made the following qualification:

> Assuming that a significant number of class members should exclude themselves, this might be viewed as an indication that the interests of the class are not being adequately represented. In such event, to properly consider the question of whether defendants should be shielded from the expense and effort of defending a suit which a large number of class members may not favor, further individual notice might then be required. On the other hand, a lack of response to the notice would not shed any light on adequacy of representation and would probably mean that the notice was sufficient for this case.

Id. This indication of a willingness to require further individual notice if needed is further evidence of the district court's view of its own flexible adaptability in what it considers an area in which due process and rule 23 allow practical-minded discretion.

[81]391 F.2d at 568.

[82]406 F.2d 291 (2d Cir. 1968). In *Green* the court of appeals observed that district courts had gone both ways on the question of whether the cost of notice could be allocated between the parties. No preference was expressed for either view. *Id.* at 301-02 n.15. *Compare* Dolgow v. Anderson, 43 F.R.D. 472, 497-98 (E.D.N.Y. 1968), *with* Mersay v. First Republic Corp. of America, 43 F.R.D. 465, 469 (S.D.N.Y. 1968).

open. Eisen had acknowledged from the outset that he could not afford to pay for the notice, even in the less stringent form which the district court ultimately required. Thus, an imposition of the inflexible requirement that the plaintiff must always pay the expense of the notice would result in an abrupt termination of this case.[83] It is clear that this same result would occur in many similar large class actions. Thus, if the plaintiff must always bear the expense of notice, most consumer class actions would end without reaching the merits.

Judge Tyler felt that the power to allocate the cost of notice was within the broad discretion of the trial court,[84] especially when strict adherence to the usual rule[85] would mean the dismissal of a possibly meritorious suit supported by strong public policy considerations. However, recognizing that arbitrarily placing the burden of costs upon the defendant might result in an unfair imposition based upon a frivolous claim and could encourage use of the class action device as a harassment technique, the court set out a series of factors which are important considerations for justifying shifting some of this burden to the defendant. Foremost of these considerations was the fact that private class actions provide one of the few viable methods of enforcing antitrust laws, and they

---

[83] 52 F.R.D. at 269.

[84]

> Rule 23 grants to the court broad discretionary powers to enable the court successfully to solve the novel administrative problems posed in a class action by the unusually large number of members of the class, each of whom may have small monetary claims.

MANUAL FOR COMPLEX LITIGATION 29 (West Pub. 1973).

[85] The court conceded that ordinarily the plaintiff would be required to pay the costs of notice. 52 F.R.D. at 269, *citing* Weiss v. Tenney Corp., 47 F.R.D. 283, 294 (S.D.N.Y. 1969); Richland v. Cheatham, 272 F. Supp. 148, 156 (S.D.N.Y. 1967); Frankel, *Amended Rule 23 from a Judge's Point of View* in *Symposium, "Amended Federal Rule 23: Antitrust Class Actions?* 32 A.B.A. ANTITRUST L.J. 295, 300 (1966); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendment of the Federal Rules of Civil Procedure (I)* 81 HARV. L. REV. 356, 398 n.157 (1967); Ward & Elliott, *The Contents and Mechanics of Rule 23 Notice,* in *The Class Action—A Symposium,* 10 B.C. IND. & COM. L. REV. 557, 566-67 (1969). However, certain other cases and commentators were cited for recognizing the "propriety of apportioning the burdens in certain cases." 52 F.R.D. at 269, *citing* Bragalini v. Biblowitz, CCH FED. SEC. LAW RPTR. ¶ 92,537 (S.D.N.Y. 1969); Herbst v. Able, 47 F.R.D. 11 (S.D.N.Y. 1969); Minnesota v. United States Steel Corp., 44 F.R.D. 559, 577 (D. Minn. 1968); Dolgow v. Anderson, 43 F.R.D. 472, 498-500 (E.D.N.Y. 1968); *Developments in the Law—Multiparty Litigation in the Federal Courts,* 71 HARV. L. REV. 874, 938 (1958); Note, *Class Actions under Federal Rule 23(b)(3)—The Notice Requirement,* 29 MD. L. REV. 139, 156 (1969).

are the *only* method of insuring that violators do not keep their illegal profits and that the damaged class is compensated as much as possible.[86] Here, since the statute of limitations had run, it could be argued that Eisen's class action was the only way to litigate these particular antitrust claims. It is frequently observed that rule 23 requires a liberal interpretation, and the court felt that such a construction is particularly applicable when, as here, there was strong reason to believe that the plaintiff's suit was not frivolous.[87] From these considerations, the court concluded that it would be unfair to put the full burden of notice costs upon the plaintiff before ascertaining more about the merits of his claim.

Requiring the defendants to bear this expense was recognized as a significant imposition, but the court drew support from an analogy to the preliminary injunction remedy.[88] The preliminary injunction was seen as a similarly burdensome imposition which is sometimes placed upon defendants when necessitated by "the need to create or preserve a state of affairs which will enable the court to render a meaningful decision."[89] As with the preliminary injunction, however, the court emphasized that this pretrial burden of notice costs should not be placed upon the defendant unless the plaintiff can make a strong showing that he is likely to succeed at trial. In other words, for the court to be swayed in this discretionary posture, much depends upon the merits of the plaintiff's claim. And so, for the purpose of determining how to allocate the costs of notice, Judge Tyler ordered a preliminary hearing on the merits of Eisen's case.[90]

The subsequent preliminary hearing revealed enough of the merits of the plaintiff's claims for the court to determine that the plaintiff and his class were "more than likely" to prevail.[91] The court stressed, however, that this finding would not be binding in

---

[86]52 F.R.D. at 270. *See also* Dolgow v. Anderson, 43 F.R.D. 472, 482-83 (E.D.N.Y. 1968).

[87]52 F.R.D. at 270. The court cited studies by the SEC and the New York Stock Exchange and the subsequent reduction of the odd-lot differential by approximately five million dollars per year.

[88]*Id.* at 270-71. *See also* Dolgow v. Anderson, 43 F.R.D. 472, 502 (E.D.N.Y. 1968).

[89]52 F.R.D. at 270.

[90]It was noted that several courts had rejected such a hearing, but the court claimed that "the facts and circumstances of those cases were markedly different from those at hand. . . ." *Id.* at 271.

[91]54 F.R.D. at 573.

the ultimate trial on the merits and that the purpose of the hearing was strictly limited to a determination of whether, and if so, how, the costs of notice to the class were to be allocated among the parties. Judge Tyler's ultimate conclusion was that the defendants should bear ninety percent of these notice costs. Though its approach to class actions was short-lived as legal precedent, the district court's holdings in the *Eisen* case met with a generally positive reaction.[92]

IV. Reversal by the Court of Appeals

In a three-judge panel opinion written by Judge Medina, the Court of Appeals for the Second Circuit resolutely reversed the district court's rulings.[93] On each of the dominant issues in this case—damages, appropriate notice, allocation of costs, and the preliminary hearing on the merits—the court of appeals opinion expressed complete disagreement with Judge Tyler's conclusions.[94] The findings and conclusions based upon the district court's preliminary hearing on the merits were vacated and set aside. The various rulings of the district court which had sustained the *Eisen* case as a class action were reversed, and, as a class action, the case was dismissed.[95]

---

[92]*See* 7A C. Wright & A. Miller, Federal Practice and Procedure § 1786 (1972); Comment, Eisen v. Carlisle & Jacquelin, *"Frankenstein Monster Posing as a Class Action"?*, 33 U. Pitt. L. Rev. 868 (1972).

[93]Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir.), *cert. granted*, 94 S. Ct. 235 (1973).

[94]As will be seen in the discussion that follows, this opinion by Judge Medina was indeed "resolute" in its total rejection of the lower court's various rulings. It is doubtful, however, that such an adamant position is prevailing. In this decision, Judge Lumbard concurred, but Judge Hays concurred only in the result. Judge Hays stated that he could not accept the district court's allocation of the costs of notice, thus indicating that he would probably not totally reject the district court's other holdings. 479 F.2d at 1020 (Hays, J., concurring). In the opinion denying an en banc rehearing of the case, in which four judges concurred, Judge Kaufman wrote that the primary reason for denying further consideration of the case was to avoid delay in its reaching the Supreme Court. *Id.* at 1020-21. Judge Mansfield concurred in Judge Kaufman's opinion, and expressed the same presumption that the Supreme Court would grant certiorari. *Id.* at 1021 (Mansfield, J., concurring). Judge Hays dissented from the court's denial of en banc rehearing. *Id.* (Hays, J., dissenting). Finally, Judge Oakes, with whom Judge Timbers concurred, wrote a forceful dissent expressing grave concern about the panel's "very doubtful" result and arguing in favor of the court's hearing this matter en banc. *Id.* at 1021-26 (Oakes, J., dissenting).

[95]The court of appeals did not reach the merits of Eisen's claims against the defendants. *See* 479 F.2d at 1013.

A. *Fluid Class Recovery*

The court of appeals opinion saw the fluid class recovery method of handling damages as an illegal innovation resorted to in desperation to pull the case out of its "morass" of "hopeless" unmanageability.[96] This rejection of fluid class recovery was based upon three critical observations. First, the court could not see how the damages could be distributed to the class.[97] Second, the fluid class recovery is not supported by the "respectable precedent" upon which the district court had relied.[98] Lastly, this recovery method would award damages to persons who had not been injured, since all members of the "fluid class" would not have been investors in the odd-lot market during the pertinent time period.[99] The court of appeals concluded that the fluid class recovery techniques are not authorized by rule 23.[100]

The district court had found that the damage fund might be depleted by reducing the odd-lot differential by a reasonable amount over a period of time.[101] The court of appeals saw this method of distribution as precluded by the fact that only the SEC has the

---

[96]*Id.* at 1010.

[97]*Id.* at 1011. *See* City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971). This court, while recognizing that Judge Tyler's method of *establishing* damages may have been acceptable in the context of the *Eisen* case, found that to attempt an eventual distribution would be unrealistic for the group there under consideration. *Id.* at 71-73. *But see* 44 N.Y.U.L. REV. 198, 204 (1969).

[98]479 F.2d at 1012.

[99]*Id.* at 1010, 1014, 1018.

[100]The court also concluded that even if rule 23 does permit fluid class recovery, such a procedure would have to be rejected "as an unconstitutional violation of the requirement of due process of law." *Id.* at 1018. However, the court offered no further explanation of how the recovery procedures proposed by the district court actually violated due process. *See In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278, 281-82 (S.D.N.Y. 1971) (no violation of due process found in fluid recovery procedure).

[101]52 F.R.D. at 265; *cf.* Bebchick v. Public Util. Comm'n, 318 F.2d 187 (D.C. Cir), *cert. denied*, 373 U.S. 913 (1963); Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967). Such a damage distribution has been compared with the doctrine of *cy pres*, which aims at substantial justice when perfect justice cannot be done. *See* Pomerantz, *New Developments in Class Action—Has Their Death Knell Been Sounded?*, 25 BUS. LAW. 1259, 1260-65 (1970). *See also* Miller, *Problems in Administering Judicial Relief in Class Actions under Federal Rule 23(b)(3)*, 54 F.R.D. 501, 510 (1972).

power to fix rates or establish a rate's effective time period.[102] However, the district court had noted the SEC's probable exclusive jurisdiction but felt that any reduction in differential could be carried out with SEC approval or supervision.[103] The district court's proposed method of distribution of unclaimed damages was not final or inflexible and could have been made contingent upon the voluntary cooperation of the SEC.[104]

In extremely large class actions, the requirement of individual claims to establish the defendant's liability creates a tremendous task which often would be impossible or impractical.[105] As mentioned earlier, fluid class recovery seeks to avoid this problem by treating the "class as a whole" as the recipient of a precalculated damage award. Obviously, such a system of providing recovery is not precise; any award which is aimed at such a large group is bound to lack the rigid accuracy which is demanded in normal adversary proceedings involving a single plaintiff and single defendant. Here, for example, a distribution of the damage fund through the reduction of the odd-lot differential is bound to benefit some individuals who were not odd-lot investors during the period of the alleged antitrust violations. Such persons, presumably, were not injured as the plaintiff and his class claim to have been. For fluid recovery to be appropriate in these situations, there should be a sufficiently high level of repetitive activity to enable the court to predict that the persons benefited by the damage award are, by and large, the same group that was injured.[106] It should be

---

[102] 479 F.2d at 1011, *citing* 15 U.S.C. §§ 78k(b), 78s(b) (1970).

[103] 52 F.R.D. at 265; *see* note 66 *supra.*

[104] *See* Thill Sec. Corp. v. New York Stock Exch., 433 F.2d 264 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971) (SEC participation as party or amicus curiae suggested). The district court conceded that the argument against "judicial rate-fixing" had certain merit. 52 F.R.D. at 265. It is submitted, however, that the SEC's power to regulate rates should not necessarily prevent the courts from exercising their power to redress antitrust violations in the regulated industries. *See* Silver v. New York Stock Exch., 373 U.S. 341 (1963). In fact, it has been suggested that the presence of supervisory agencies such as the Public Utilities Commissions or the SEC actually facilitates the use of fluid class recovery. *See* Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338, 370 (1971).

[105] *See* City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971).

[106] *See* Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338, 370-72 (1971). The district court made findings concerning the stability of the class in this case, 52 F.R.D. at 257, and ultimately determined that a method of recovery of unclaimed dam-

remembered that the aim of fluid class recovery is substantial justice, and its probable alternative is no justice at all.[107]

The court of appeals was particularly offended by this lack of precision. It pointed out that section 4 of the Clayton Act authorizes triple action damage suits only to persons who have been "injured in [their] person or property by reason of anything forbidden in the antitrust laws. . . ."[108] The right of recovery under the antitrust laws is a substantive right which cannot be enlarged by any of the Federal Rules of Civil Procedure.[109] Thus, it was argued that the plaintiff cannot sue for the benefit of parties who have not been injured as he or his class are alleged to have been. The court of appeals viewed the fluid class recovery, with its inevitable benefit to some uninjured parties, as a clear infraction of the statutory limitation.[110] However, the court did not mention the various propositions which would avoid that conclusion. One could argue that damages are not, in fact, being awarded to uninjured parties. Any uninjured parties who are ultimately benefited by the fluid recovery method may be said to have been benefited in an "indirect" manner under an assignment theory. This assignment could be implemented through a notice program which informs the class that any unclaimed damages which have been sustained by the class as a whole will be deemed to have been assigned for the benefit of future odd-lot customers.[111] While the statute may limit who may

---

ages could be employed to *substantially* benefit the whole class. *Id.* at 264-65. The court of appeals apparently felt that the district court's estimate of class stability was neither "reliable" nor "rational," but offered no statistics to counter the district court's conclusions. 479 F.2d at 1010. It must be noted, however, that time works in favor of Judge Medina's argument, and as more individuals engage in odd-lot transactions, a higher percentage of those benefited by the eventual award will not be individuals who were originally damaged.

[107]The expense of requiring and administering individual claims is prohibitive in actions with millions of small claimants, and, of course, if actions by massive consumer groups are frustrated in this way, antitrust and other offenders will continue to reap the benefits of their illegal activities.

[108]15 U.S.C. § 15 (1970). The court also cited Hawaii v. Standard Oil Co., 405 U.S. 251 (1972), for the proposition that only persons actually injured in their business or property can claim damages under the Clayton Act. 479 F.2d at 1014.

[109]470 F.2d at 1014, *citing* 28 U.S.C. § 2072 (1970) (the Enabling Act which authorizes the Supreme Court to promulgate its procedural rules).

[110]479 F.2d at 1014.

[111]This "assignment technique" was accomplished in the *Drug Cases* by use of a notice program under which those members of the injured class who

bring an action, it does not limit what such persons can do with their recovery once liability to them has been established.

The court of appeals distinguished the three cases which the district court referred to as "respectable precedent" for its fluid class recovery.[112] These cases were "distinguished" as follows: the *Drug Cases* involved a settlement, *Bebchick v. Public Utilities Commission*[113] was not a class action under rule 23 and those who had been damaged could not be identified, and finally, *Daar v. Yellow Cab Co.*[114] did not involve rule 23 (though it was a class action), and there the court had indicated that proof of individual claims may have ultimately been required.[115] Certainly, there are many factors which distinguish these cases from *Eisen;* however, the methods of handling damages which were either suggested or actually used are clearly analogous. This is particularly true of the *Drug Cases.*[116] Although in the *Drug Cases* the fluid class recovery arose in the context of a settlement, that settlement was expressly approved by the court.[117] The settlement, otherwise like a distribution of damages, was implemented by a classic example of the fluid class recovery method. A necessary predicate to approval of the settlement was the court's finding that the case, with its dependence upon fluid class recovery, was maintainable as a class action.

---

did not assert individual claims were deemed to assign their rights to the attorneys general of the states involved in the action. West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1091 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971). *See also* 7A C. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1784 (1972).

[112]*See* 52 F.R.D. at 264. The district court relied upon the *Drug Cases*— West Virginia v. Chas. Pfizer & Co., 314 F.Supp 710 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971), Bebchick v. Public Util. Comm'n 318 F.2d 187 (D.C. Cir.), *cert denied,* 373 U.S. 913 (1963), and Daar v. Yellow Cab Co., 57 Cal.2d 695, 433 P.2d 732, 63 Calfl Rptr. 724 (1967). *See* notes 60, 61, *supra.*

[113]318 F.2d 187 (D.C. Cir.) *cert. denied,* 373 U.S. 913 (1963).

[114]67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967). The *Daar* case was brought under a state class action statute.

[115]479 F.2d at 1014, *citing* Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

[116]Judge Tyler had recognized that the *Drug Cases* involved a settlement, but rejected the distinction. 52 F.R.D. at 262; *see* note 60 *supra.*

[117]West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971). *See also In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278, 281 (S.D.N.Y. 1971).

As precedent weighing against treating claims collectively, the court of appeals relied upon *Snyder v. Harris*,[118] in which the Supreme Court refused to allow aggregation of the claims of class members to meet the federal court's jurisdictional amount. The court of appeals concluded that this proscribes any consideration of a single damage figure for "the class as a whole."[119] The court's penchant for distinguishing cases would have been better applied to *Snyder*. The *Snyder* case involved an attempt to expand federal diversity jurisdiction. Policies which limit that jurisdiction would seem to have little or no applicability in cases brought under federal statutes pursuant to which federal jurisdiction exists without regard to the amount in controversy. In *Snyder*, the Court emphasized the purposes of the congressionally enacted grant of limited jurisdiction, and these purposes concern restricting access to the federal courts.[120] The reasons for rejecting an attempt to gain access to the federal courts by aggregating claims are entirely inapplicable to the reasons for making a single award to the class after a federal court has acknowledged jurisdiction, tried the case, and determined the defendant's liability to the plaintiff class.

B. Notice

With the exception of the 7,000 class members designated by the district court to receive individual notice, the court of appeals completely rejected the notice provisions which Judge Tyler felt would be adequate in this case. After calling the proposed notice "a totally inadequate compliance with the notice requirements of amended Rule 23,"[121] the court added that, in cases with classes this large, "notices by publication . . . are a farce."[122] As a basis for its rejection of the district court's detailed notice plan, the court of appeals adopted a strict, literal interpretation of the rule 23 notice requirement for 23(b)(3) actions.[123] The court of appeals felt that the rule required individual notice to each "identifiable" member of the class. However, there are compelling considerations which mitigate against such an interpretation, and, unless the words of the rule absolutely require this strict construction, it should be avoided.

---

[118] 394 U.S. 332 (1969).

[119] 479 F.2d at 1014.

[120] *See* 394 U.S. at 339-40.

[121] 479 F.2d at 1009.

[122] *Id.* at 1017.

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

Little was said in this opinion about the due process requirements upon which the notice provisions of rule 23 are based.[124] The district court pointed out, and many commentators agree, that it is quite unlikely that due process would require individual notice to every known party who may have an interest in the litigation.[125] The *Mullane* case, which dealt with a much smaller group of interested parties, was couched in terms of practicability, with emphasis upon such considerations as a large banking facility's ability to give individual notice, the relatively small expense involved in giving notice, and the reasonableness of the required good faith effort to reach most interested parties.[126] Several courts have recognized that this emphasis upon practicability is especially appropriate in

---

[124]The Advisory Committee states that the (c)(2) notice is designed to fufill the requirements of due process. *See* Advisory Comm. Note, 39 F.R.D. at 106-07.

[125]52 F.R.D. at 265-68. *See also* Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 646 (1971); Comment, *Constitutional and Statutory Requirements of Notice Under Rule 23(c)(2)*, in *The Class Action—A Symposium*, 10 B.C. IND. & COM. L. REV. 571 (1969); Note, *Class Actions under Federal Rule 23(b)(3)—The Notice Requirement*, 29 MD. L. REV. 139, 153-54 (1969); Note, *Federal Rule 23(c)(2)—Notice in Class Actions*—Mullane *Reconsidered*, 43 TUL. L. REV. 369 (1969).

[126]Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); *see* note 72 *supra*. In *Mullane* the notice being tested was that provided by statute to inform trust fund beneficiaries of a trustee's management of fund assets. In rejecting the statutory notice as inadequate, the Supreme Court explained:

> The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could *easily* be informed by other means at hand. However it may have been in former times, the mails today are recognized as an efficient and *inexpensive* means of communication. Moreover, the fact that the trust company has been able to give mailed notice to known beneficiaries at the time the common trust fund was established is persuasive that postal notification at the time of accounting *would not seriously burden the plan.*

339 U.S. at 319 (emphasis added). The *Mullane* Court was careful to point out that "a construction of the Due Process Clause which would place impossible or impractical obstacles in the way would not be justified." *Id.* at 313-14. It is true that under the circumstances of that case, the Court required individual written notice to beneficiaries because the existence of their names and addresses on trust company records made such notice practicable. *Id.* at 318-20. It is submitted, however, that the mere existence of lists containing the names and addresses of two million class members does not render individual notice to them "practicable." *See also* Harris v. Jones, 41 F.R.D. 70, 74 (D. Utah 1966) (requiring individual notice under 23(c)(2) only so far as practical).

large class actions. These courts have looked to the circumstances of various cases facing them and have concluded that overemphasis of an individual notice requirement would, in certain situations, defeat the purpose of class actions.[127] Demands for individual notice in large class actions should not be allowed to present a barrier of prohibitive expense when there is some constitutionally adequate alternative method of giving notice which would enable class members to protect their rights in the litigation.[128]

The narrow construction given the rule by the court of appeals decision is neither supported by the reasoning which makes some notice mandatory nor is it necessarily required by the actual words of the rule. The purpose of a notice requirement in (b) (3) class actions is to inform absent class members of the proceedings so that they can either participate or "opt out" to avoid any res judicata effects of an adverse judgment.[129] However, in large class actions such as this, in which there are so many small claims, financial considerations usually will prevent either prosecution of separate actions or active participation in the present action. Obviously, there would seldom, if ever, be any reason to seek exclusion from the class.[130] This practical consideration, which minimizes the need for notice in these cases, simply cannot be ignored.

---

[127] *See, e.g.*, Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968).

[128] As the district court stated in Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969):

> Rule 23(c)(2) requires the best notice "practicable," not perfect notice. The word "practicable" implies flexibility, with the type of notice depending upon the particular circumstances of each case. Where members of the class are readily identifiable and personal notice would not be so prohibitively expensive as to prevent the class action from being prosecuted, individual notices by first class mail would in most cases be the "best notice practicable." But where members are difficult to locate or identify, the benefits of a class action should not be denied altogether, in the absence of evidence that there is no method of giving a notice that is reasonably calculated to apprise the class members of their opportunity to object. Rule 23 contemplates cooperative ingenuity on the part of counsel and the court in determining the most suitable notice in each case.

Id. at 129.

[129] *See* Advisory Comm. Note, 39 F.R.D. at 104-05, 107.

[130] *See* Berland v. Mack, 48 F.R.D. 121, 129 (S.D.N.Y. 1969); Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 637 (1971). *See also* note 76 *supra* & accompanying text.

Again, the words of the rule require the court to direct "the best notice *practicable under the circumstances*, including individual notice to all members who can be identified *through reasonable effort.*"[131] Certainly, notice in 23(c)(2) is mandatory, but these words do vest the courts with some discretion. The special qualities of class actions of this type demand special consideration. Rule 23 requires a liberal interpretation,[132] and the amended rule was intended to broaden the usefulness of the class action.[133] Notice is designed to serve the needs of the class members; it would be a bitter irony if the notice requirement serves instead to deprive them of the only real opportunity to litigate their claims.

These considerations call for an enlightened interpretation—how then should the words of this rule be applied to a case such as *Eisen*? The mere existence of a list of names and addresses of two million individuals (produced, of course, through the efforts of the defendants) does make those class members "identifiable" in the strict sense of the word, but does not necessarily render those individuals ascertainable for notification purposes "through reasonable effort" as the phrase is used in the rule. If it did, any defendant wishing to escape liability could simply do whatever is necessary to "identify" more class members than his opponent could reasonably afford to notify individually. This cannot have been the intent of the drafters of the rule. Surely the rule cannot be interpreted to provide such an expeditious route to impunity for those who can afford the necessary identification process.

Even more difficult to accept is the pronouncement by the court of appeals that "[w]here there are millions of dispersed and unidentifiable members of the class notices by publication . . . are a farce."[134] The class in *Eisen* is a relatively sophisticated group, and it is not unreasonable to assume that publication in appropriate financial journals and newspaper sections would reach a significant

---

[131] FED. R. CIV. P. 23(c)(2) (emphasis added).

[132] *See, e.g.*, Korn v. Franchard Corp., 456 F.2d 1206, 1209 (2d Cir. 1972); Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969).

[133] *See, e.g.*, Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1214 (1966).

[134] 479 F.2d at 1017.

portion of the class.[135] Moreover, the fact that many class members, whose financial interest in the case is minimal, may not respond to such notice does not render publication either unacceptable or farcical. The Supreme Court has recognized that notice by publication is acceptable even though it may arguably be ineffective.[136] The court of appeals itself had, in an earlier appeal, indicated that notice by publication may be appropriate here,[137] and in another extremely large class action, the Second Circuit expressly approved notice by publication.[138] There would appear to be little doubt that the court's intractable rejection of notice by publication is unwarranted.

C. Cost of Notice

As to the allocation of costs of notice, the court of appeals declared that the district court does not have the discretionary power which it had claimed. Rejecting the district court's conclusion that it would not be fair to effectively terminate the plaintiff's potentially meritorious case by requiring him to bear all of the burden of costs of notice, the court of appeals specified that, in this type of case, the plaintiff must always be the one to pay.[139] The court of

---

[135]The SEC brief, which was quoted in Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968), stated:

> In view of the existence both of a cohesive financial community, which includes broker-dealers who have obligations to their investor clients, and of publications exclusively concerned with matters of interest to that community, publication by itself might reasonably be expected to reach a significant portion of any class of public investors.

Id. at 501.

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

> This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.

Id. at 317.

[137]391 F.2d at 569-70.

[138]West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1090-91 (2d Cir.) *cert. denied*, 404 U.S. 871 (1971).

[139]479 F.2d at 1009. The court stated that its indication in the earlier appeal that the plaintiff must pay was not dictum. However, the court stated that other situations do exist, such as derivative stockholder's suits or actions

appeals did not elaborate much further on this aspect of its decision except to observe that if the defendants were required to pay for notice, they would be unable to recover whatever funds they had expended should they subsequently prevail upon the merits.[140]

To require the plaintiff to bear the expenses of providing notice may, in the end, prove a harsh but unavoidable conclusion. Thus, the problem with this aspect of the decision may not lie so much in the result reached as in the court's failure to fully explain the factors on both sides of this issue which the court saw as ultimately weighing in favor of burdening the plaintiff. The district court indicated that there are strong arguments on both sides of the issue of whether the court should exercise discretion in allocating costs to relieve one party and burden another.[141] The issue certainly cannot be dismissed out of hand,[142] and the court of appeals' opinion does not add much to a thoughtful resolution of the problem.

In many consumer class actions the court's willingness or ability to allocate the financial burden of giving notice will determine whether or not the plaintiff can proceed with his action.[143] The issue of who should pay for notice is not settled by rule 23, which says only that the court shall direct notice to be given.[144] Still, the general rule is that the plaintiff must bear this burden, for, after all, it is he who seeks, and presumably will obtain, the benefits of the class action procedure.[145] Indeed, to require a de-

---

involving public utility corporations, in which the circumstances may be such that the defendant may have to provide or pay for notice. *Id.* at 1009 n.5.

[140]*Id.* at 1008. The cost of notice required by the district court was $21,660 ($1,000 for individual notice, $20,660 for notice by publication). 52 F.R.D. at 267-68. Of this amount, the defendant was ordered to pay 90% or $19,494. 54 F.R.D. at 573. It was estimated that individual notice to the two million identifiable class members would have cost over $200,000. 52 F.R.D. at 260.

[141]52 F.R.D. at 269.

[142]*See* Comment, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement*, 29 MD. L. REV. 137, 156 (1969).

[143]*See* Dolgow v. Anderson, 43 F.R.D. 472, 498 (E.D.N.Y. 1968).

[144]FED. R. CIV. P. 23(c)(2). The plaintiff's ability to give notice is not a prerequisite to maintaining a class action under 23(a) or (b). It may be argued, however, that a representative's capacity to pay for notice is a factor in his ability to adequately protect the interests of the class. *See id.* 23(a)(4).

[145]*See* Alameda Oil Co. v. Ideal Basic Indus., Inc., 326 F. Supp. 98 (D. Colo. 1971); Cusick v. N.V. Nederlandsche Combinatie Voor Chem. Indus.,

fendant to take the extraordinary step of paying for notice to the class opposing him raises the equitable uncertainties inherent in compelling a party to act against his own best interests.[146]

There are, however, recognized situations in which the courts can exercise the power to assign the burden of notice costs to the defendant, especially when the defendant is better able to bear the expense.[147] *Dolgow v. Anderson*[148] is typical of the first cases which have allocated costs in this manner.[149] Ordinarily, such cases have been stockholders' derivative actions, and the rationale for shifting the notice cost burden, as stated in *Dolgow,* was based upon three factors: the fiduciary duty owed to the plaintiffs by the corporate defendants, the interest of the defendants in res judicata, and the ability to bear the expense of notice.[150] Later, courts not only rejected the rigid rule that the plaintiff must always bear all notice costs, but went on to articulate a broader view of the various factors involved in the allocation determination. In *Berland v. Mack*[151] the court set forth the following relevant factors: the merits of the claim, the defendant's interests in res judicata, the number of named plaintiffs, the financial capacity of the named plaintiffs, the

---

317 F. Supp. 1022 (E.D. Pa. 1970); Herbst v. Able, 47 F.R.D. 11 (S.D.N.Y. 1969); Richland v. Cheatham, 272 F. Supp. 148 (S.D.N.Y. 1967); 3B J. MOORE, FEDERAL PRACTICE ¶ 23.55 (2d ed. 1969).

[146]One case, for example has stated that:

> On the other hand, where as here the plaintiffs are numerous, unidentified and have no relation to the defendant other than the purchase of a manufactured good, the imposition cost [*sic*] of notice on the defendant at an early stage of the case would be highly unfair and raise serious questions of due process.

Cusick v. N.V. Neterlandsche Combinatie Voor Chem. Indus., 317 F. Supp. 1022, 1025 n.6 (E.D. Pa. 1970). *See also* Ward & Elliott, *The Contents and Mechanics of Rule 23 Notice,* in *The Class Action—A Symposium,* 10 B.C. IND. & COM. L. REV. 557, 566 (1969).

[147]*See Developments in the Law—Multiparty Litigation in the Federal Courts,* 71 HARV. L. REV. 874, 938 (1958).

[148]43 F.R.D. 472 (E.D.N.Y. 1968). This case was a class action by stockholders against their corporation and its principal officers for manipulating stock prices and misleading investors.

[149]*See also* Bragalini v. Biblowitz, CCH FED. SEC. LAW RPTR. ¶ 92,537 (S.D.N.Y. 1969); Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969); Miller v. Alexander Grant & Co., CCH FED. SEC. LAW RPTR. ¶ 93,287 (E.D.N.Y. 1971); Lamb v. United Sec. Life Co., CCH FED. SEC. LAW RPTR. ¶ 93,489 (S.D. Iowa 1972).

[150]43 F.R.D. at 498-500.

[151]48 F.R.D. 121 (S.D.N.Y. 1969).

size of the plaintiffs' claim relative to that of the entire class, the ability of the plaintiff or plaintiffs to pay for the initial notice, and the total cost of the required notice.[152] Finally, in some recent class actions, courts have required the defendants to pay either all or a significant portion of the costs of notice even though the cases were not stockholders' derivative suits.[153] In *Ostapowicz v. Johnson Bronze Co.*[154] the court stressed the plaintiff's inability to pay and the likelihood of his success upon the merits and concluded that the costs should be apportioned equally between the plaintiff and defendant.

Still, the allocation of costs of notice to a defendant in the normal adversarial situation is not easily justified. Some guidance may be found in an analogy to preliminary injunctions which can place significant burdens upon a defendant and thus also require the close scrutiny of the courts which are asked to apply them.[155] Similarly, a comparison might be drawn to discovery orders which can, and often do, subject defendants to substantial expenditures.[156] Perhaps ultimately it would be advisable to leave the question of notice cost allocation to the cautious discretion of the trial court judge who is obviously in the best position to consider the real hardships involved in each situation.[157] At any rate, it is clear

---

[152]*Id.* at 132. *See also* Feder v. Harrington, 52 F.R.D. 178, 184 (S.D.N.Y. 1970) (*Berland* tests applied); Korn v. Franchard Corp., 50 F.R.D. 57, 60-61 (S.D.N.Y. 1970) (referred to *Berland* tests but found expense of notice not sufficiently burdensome to relieve plaintiffs from defraying the costs).

[153]*See, e.g.*, Battle v. Municipal Housing Authority, 53 F.R.D. 423, 426 (S.D.N.Y. 1971) (class action under 23(b)(2) but requiring notice with expense of preparation and mailing to be borne by defendant).

[154]54 F.R.D. 465 (W.D. Pa. 1972). The *Ostapowicz* court cited Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971). 54 F.R.D. at 466.

[155]The court of appeals viewed the preliminary injunction as a provisional remedy utilized "to preserve the *status quo*" and rejected the district court's analogy. 479 F.2d at 1014. However, such a limited conception of the preliminary injunction has been criticized:

> The concept *status quo* lacks sufficient stability to provide a satisfactory foundation for judicial reasoning. The better course is to consider directly how best to preserve or create a state of affairs in which effective relief can be awarded to either party at the conclusion of the trial.

Developments in the Law—Injunctions, 78 HARV. L. REV. 994, 1058 (1965).

[156]*Cf.* Trans World Airlines, Inc. v. Hughes Tool Co., 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973) (discovery costing several million dollars ordered).

[157]For example, the court might look for the significance of such ironies as a defendant who gratuitously offers to pay the entire cost of generating

that this issue of cost allocation needs further examination and certainly should not be dismissed without complete judicial consideration.[158]

D. Preliminary Hearing on the Merits

As discussed earlier, the district court ordered and held a preliminary hearing on the merits to better determine whether shifting a portion of the costs of notice to the defendant would be justified.[159] The court of appeals rejected such a hearing because it is "not authorized" by the rule and because the district court had no jurisdiction "to pass on the merits."[160] This holding is also vulnerable to several compelling counterarguments. First, rule 23 does not, at any point, specifically preclude such a hearing; and, if "authorization" by the rule is indeed necessary, such authority might be found under 23(d).[161] It is submitted, however, that if nothing in the rule would prevent it, and such a hearing is otherwise lawful and appropriate, then any lack of an explicit and specific requirement or express authorization in the rule

---

a list of thousands or millions of "identifiable" class members, yet who balks at the "burdensome" cost of providing notice—especially when the former cost is equal to or greater than the latter.

[158]Note also that the plaintiff in *Eisen* argued that to require a party to pay for a notice which he simply cannot afford denies him access to relief and thus may raise constitutional questions under Boddie v. Connecticut, 401 U.S. 371 (1971). Brief for Appellee at 20. The *Boddie* case involved the application of a state's cost requirements to indigent welfare recipients seeking a divorce. The Court did observe in that case that, "a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard." 401 U.S. at 380.

[159]52 F.R.D. at 270-72; 54 F.R.D. at 565.

[160]479 F.2d at 1015-16.

[161]FED. R. CIV. P. 23(d). This section of the rule gives the court a broad authority to make various orders in conducting class actions. In part, the rule provides, "In the conduct of actions to which this rule applies, the court may make appropriate orders . . . (3) imposing conditions on the representative parties. . . ." *Id. See* Dolgow v. Anderson, 43 F.R.D. 472, 501 (E.D.N.Y. 1968); Advisory Comm. Note, 39 F.R.D. at 106-07. The concluding sentence of this section of the rule provides that these "orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time." FED. R. CIV. P. 23(d). Rule 16 provides that "the court may in its discretion . . . direct the attorney for the parties to appear before it for a conference to consider . . . such . . . matters as may aid in the disposition of the action." FED. R. CIV. P. 16(a). Thus, arguably, these rules provide sufficient "authority" for the preliminary hearing conducted by the trial court.

should not be interpreted as disallowing a procedure which would aid the court in making necessary collateral determinations.

Most notably, however, in rejecting the district court's preliminary hearing on the merits, the court of appeals relied upon cases which are clearly distinguishable from the instant case. Each of the those cases was concerned with use of the preliminary hearing for the initial class action determination and not with the subsequent question of who should bear the costs of notice once the propriety of the class action has been established.[162] The reasons given by those courts for rejecting the preliminary hearings in the situations before them have little or no application here. In determining whether a case may be maintained as a class action, the court must see whether the prerequisites of rule 23(a) and (b)(3) are met.[163] The cases cited by the court of appeals correctly argue that the rule 23 prerequisites do not require that the plaintiff demonstrate the merit of his claim before his case can be considered "maintainable" as a class action—so long as the court is convinced that the complaint is not frivolous.[164] Thus, those cases recognized that a hearing on the merits, if used as a predeterminant to proceeding under rule 23, would be an additional and unnecessary barrier to the maintenance of class actions.[165] Since the courts can determine whether the rule's prerequisites

---

[162]Miller v. Mackey Int'l, Inc., 452 F.2d 424 (5th Cir. 1971); Kahan v. Rosentiel, 424 F.2d 161 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970); Katz v. Carte Blanche Corp., 52 F.R.D. 510 (W.D. Pa. 1971); Fogel v. Wolfgang, 47 F.R.D. 213 (S.D.N.Y. 1969); Cannon v. Texas Gulf Sulphur Co., 47 F.R.D. 60 (S.D.N.Y. 1969); Mersay v. First Republic Corp. of America, 43 F.R.D. 465 (S.D.N.Y. 1968). The only case cited by the court of appeals which might lend support to its rejection of the *Eisen* district court's use of the preliminary hearing is Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969). The *Berland* court stated that such a hearing is "illusory." *Id.* at 132. However, it must be noted that first on the *Berland* court's list of factors to be considered in allocating the cost of notice is "the apparent merit or lack of merit in the claim." *Id.*

[163]*See* notes 23, 25 *supra* & accompanying text.

[164]3B J. Moore, Federal Practice ¶ 23.45[3] (2d ed. 1969). *See, e.g.*, Katz v. Carte Blanche Corp., 52 F.R.D. 510, 513-14 (W.D. Pa. 1971). Similarly, some preliminary showing of a defendant's freedom from wrongdoing is "substantially irrelevant" in determining the maintainability of a class action. Fogel v. Wolfgang, 47 F.R.D. 213, 218 (S.D.N.Y. 1969).

[165]*But see* Milberg v. Western Pac. R.R., 51 F.R.D. 280 (S.D.N.Y. 1970), *appeal dismissed*, 443 F.2d 1301 (2d Cir. 1971); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968).

have been met without resort to a preliminary hearing on the merits, the use of such a procedural devise would be "redundant."[166]

The district court in *Eisen* applied the preliminary hearing on the merits in an entirely different context.[167] In *Eisen,* the district court had already determined that the case could be maintained as a class action. The decision to hold a preliminary hearing on the merits had absolutely nothing to do with determining the propriety of the class action. The hearing used by Judge Tyler was strictly limited to its stated purpose: "the allocation of the cost of notice."[168] Such a hearing is not precluded by the reasoning of the cases cited by the court of appeals.

The court of appeals may have been correct in stating that the district court did not, at this time, have "jurisdiction to pass on the merits of the case. . . ."[169] But as to the district court's preliminary hearing, that observation is irrelevant. The fact is, the district court *did not* "pass" on the merits of this case. The district court looked very closely at the merits to make an informed determination as to the "likelihoods" involved, but did not pass on the merits.[170]

Other aspects of the Second Circuit's rejection of this preliminary hearing are similarly questionable. The court of appeals said that the findings of such a hearing are arrived at without appropriate safeguards and are extremely, and probably irre-

---

[166]Green v. Wolf Corp., 406 F.2d 291, 301-02 n.15 (2d Cir. 1968).

[167]In fact, at least two of the cases cited by the court of appeals expressly recognized the distinction between a preliminary hearing on the merits used to determine whether a case is maintainable as a class action and such a hearing used as a prelude to allocating the cost of notice. The principal case relied upon by the court of appeals was Miller v. Mackey Int'l, Inc., 452 F.2d 424 (5th Cir. 1971), which stated:

> those cases which approve the Dolgow procedure often do so *in an entirely different context,* i.e. a hearing before assessing costs of notice.

Id. at 429 n.5 (emphasis added). *See also* Katz v. Carte Blanche Corp., 52 F.R.D. 510, 513 (W.D. Pa. 1971). A later opinion in the *Katz* case may be cited for support of a preliminary hearing as used in the context of a preliminary step to an apportionment of costs of notice. *See* Katz v. Carte Blance Corp., 53 F.R.D. 539 (W.D. Pa. 1971), in which the court, in concluding that the plaintiff must bear the initial cost of notice, observed that "[a]s a result of an essentially evidentiary hearing, substantial evidence as to the merits presently appears in the records." *Id.* at 546 n.15.

[168]54 F.R.D. at 567.

[169]479 F.2d at 1016.

[170]*See* 54 F.R.D. at 571, in which the district court stated, "Plaintiff and the class have established that they *may likely* carry their burden of producing

parably, prejudicial.[171] But the court of appeals did not allege that the preliminary hearing in this particular case was actually unfair. The court simply made the statement that "in most cases" such hearings will be prejudical.[172] No reason was given as to why it should be assumed that the district court is incapable of holding a preliminary hearing on the merits which conforms to constitutional standards of due process.[173] To say that such a hearing is necessarily prejudicial is to say that the district court is incapable of maintaining a consistently objective viewpoint through to the completion of the trial on the merits.[174]

V. Conclusions

If the *Eisen* case stands, its impact upon consumer class actions will be devastating. Under this most recent *Eisen* opinion, the consumer plaintiff simply cannot pursue the class action device —he is closed out from every angle. If, for example, he can afford to pay the formidable cost of even the most minimal notice requirements, he will surely be unable to pay for notice to every individual "identifiable" member of his massive class. If the plaintiff can somehow clear the notice hurdle (if, for example, not many of his class are "identifiable"), then the quietus of his class action will be the inaccessibility of the fluid class recovery method of distributing damages. The Second Circuit's latest *Eisen* opinion has appropriately been labeled the "death knell" of consumer and environmental class actions.[175]

---

evidence that the defendants fixed prices." *Id.* (emphasis added). *See also* 54 F.R.D. at 573 stating, "Plaintiff *has excellent evidence* that the Exchange has not satisfied [its regulatory] duties." *Id.* (emphasis added).

[171] 479 F.2d at 1015.

[172] *Id.*

[173] *Cf.* Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

[174] The express purpose of the hearing held in *Eisen* was to aid the court in its determination of allocating costs of notice. *See* 54 F.R.D. at 566. The court stated quite clearly that its findings and conclusions were binding "only" for that purpose, and further, that these findings would "not be considered to prejudice any party's right to introduce more evidence and proffer further argument when the merits are reached for final determination." *Id.* at 567 (emphasis added). More problems arise, however, when the ultimate trial on the merits is before a jury. Serious steps would have to be taken to help insure that the jury would not be prejudiced by the results of prior hearing on the merits.

[175] 479 F.2d at 1026 (Oakes, J., dissenting).

But the Second Circuit has reached a doubtful result. This opinion seems utterly inconsistent with the purpose and necessary flexibility of amended rule 23. Even the *Eisen* court would agree that one of the primary functions of a class action is the vindication of small claims which have legally actionable significance only if taken as a group.[176] Yet, in this most recent opinion, the court places a disturbing emphasis upon the smallness of the individual claims involved.[177] The precept that rule 23 must be given a liberal interpretation has been affirmed so many times that it hardly needs repeating.[178] The desire to protect "many small investors" was part of the philosophy behind the revision of rule 23,[179] and the new rule was designed to provide a "thoroughly flexible remedy."[180] This most recent *Eisen* opinion does not square with any of these guidelines.

The class suit was an invention of equity[181] which resulted from the "practical necessity" of allowing large groups with common interests to enforce their rights.[182] In a case of this nature, the fluid class recovery and the notice system outlined by the district court present the best pratical method of benefiting the class. The damage question in class actions must be approached pragmatically, and the remedy must provide at least substantial justice.[183] Practicality must not outweigh constitutional rights, but it must be remembered that class actions—and particularly large consumer class actions—are fundamentally distinct from ordinary adversary proceedings. Procedures which are fundamental to normal litigation involving a single plaintiff and defendant may

---

[176]*See* 391 F.2d at 563, *citing* Escott v. Barchris Constr. Corp., 340 F.2d 731, 733 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965). *See also* Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, in *The Class Action —A Symposium*, 10 B.C. IND. & COM. L. REV. 501 (1969).

[177]*See, e.g.*, 479 F.2d at 1010, 1017.

[178]*See, e.g.*, Schneider v. Electric Auto-Lite Co., 456 F.2d 366, 370 (6th Cir. 1972); Korn v. Franchard Corp., 456 F.2d 1206, 1209 (2d Cir. 1972); Arkansas Educ. Ass'n v. Board of Educ., 446 F.2d 763, 768 (8th Cir. 1971); Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970); 391 F.2d at 563.

[179]Korn v. Franchard Corp., 50 F.R.D. 57, 60 (S.D.N.Y. 1970).

[180]391 F.2d at 560.

[181]Hansberry v. Lee, 311 U.S. 32, 41 (1940).

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

[183]Feit v. Leasco Data Processing Equip. Corp., 332 F. Supp. 544, 587 (E.D.N.Y. 1971).

be unnecessary or subject to appropriate modification in some rule 23(b)(3) class actions.[184] If an unreasonably rigid notice requirement stops the expansion of class actions, then progress toward protection of the public's rights will not have advanced much beyond the old rule's nemesis of required intervention. In addition, it must be pointed out that there is no preordained requirement that the plaintiff must always pay the cost of notice in these cases, and a preliminary hearing on the merits to help the court make such a cost allocation determination may be appropriate, necessary, and authorized by rule 23.

The opponents of large class actions under rule 23 have been vocal and effective.[185] These critics see such suits as tools of harassment used to coerce defendants into large settlements which benefit only the lawyers who handle the litigation. Consumer class actions are characterized as unmanageable monstrosities which are flooding the already overcrowded court dockets.[186] The court of appeals was obviously influenced by such arguments, for it adopted the phrase describing these suits as "legalized blackmail"[187] and compared these class actions to "the old-fashioned strike suits made famous a generation or two ago. . . ."[188] But a comparison of rule 23 class actions to strike suits is inaccurate. A strike suit, which might be brought upon a frivolous claim, is motivated by the desire for a coerced settlement.[189] Rule 23 has safeguards against such practices. First, the court can exercise

---

[184]*See* Miller, *Problems in Administering Relief in Class Actions Under Federal Rule 23(b)(3)*, 54 F.R.D. 501, 507 (1972).

[185]*See, e.g.*, Handler, *Some Shifts from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-third Annual Antitrust Review*, 71 COLUM. L. REV. 1 (1971); Handler, *Twenty-fourth Annual Antitrust Review*, 72 COLUM. L. REV. 1, 34-42 (1972); Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375 (1972).

[186]*But see* Weinstein, *The Class Action Is Not Abusive*, 167 N.Y.L.J. 1 (May 1, 1972) & 1 (May 2, 1972); *Hearings on Consumer Protection Act of 1970, S. 3201, Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 212-17 (1970) (statement of Ralph Nader).

[187]479 F.2d at 1019, *citing* Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971).

[188]*Id.*

[189]*See* Dole, *The Settlement of Class Actions for Damages*, 71 COLUM. L. REV. 971, 974-75 (1971).

its discretionary power to refuse to allow a frivolous class action.[190] Secondly, the abuse of the "secret settlements" has been carefully guarded against in subdivisions (d)(2) and (e) of rule 23. Under 23(d)(2), notice to class members of any step in the action can be ordered, and 23(e) requires court approval of any settlement and notice to all class members of dismissal or compromise.[191]

The compelling reasons for sustaining the progress of rule 23 in this area must be weighed against the arguments of those who oppose massive class actions. Foremost of these reasons is the absence of a comparable, available remedy which offers the flexibility and results attainable under rule 23. The Court of Appeals for the Second Circuit had recognized earlier that repayment of wrongfully obtained profits could not be obtained through any public administrative agency and that this "responsibility *must* ultimately rest on the judicial system."[192] Now the court stresses that the SEC has exclusive jurisdiction to regulate rates.[193] However, as other courts have pointed out, the SEC does not have the primary responsibility for enforcement of competition.[194] The SEC lacks standing to commence antitrust suits,[195] and it certainly cannot award damages or bring a class action.[196] Clearly, there is a strong public policy in favor of private antitrust litigation,[197] and the injustice of allowing the wrongdoer to retain illegal profits and of denying compensation to the aggrieved parties is obvious.

---

[190] *See* FED. R. CIV. P. 23(a), (b).

[191] *See, e.g.*, Rothman v. Gould, 52 F.R.D. 494 (S.D.N.Y. 1971) (requiring notice to class of proposed settlement). It should also be noted that the Federal Rules of Civil Procedure provide additional protection for defendants against vexatious litigation, *See* FED. R. CIV. P. 12 (motion to dismiss); id. 56 (motion for summary judgment); Miller v. Mackey Int'l, Inc., 452 F.2d 424, 428-29 (5th Cir. 1971).

[192] 391 F.2d at 567 (emphasis added); *see* Comment, *Recovery of Damages in Class Actions*, 32 U. CHI. L. REV. 768, 785 (1965).

[193] 479 F.2d at 1011.

[194] Thill Sec. Corp. v. New York Stock Exch., 433 F.2d 264, 272 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971).

[195] *See* Hawaii v. Standard Oil Co., 405 U.S. 251 (1972).

[196] 54 F.R.D. at 573. The district court pointed out that "the Commission has done all that it could do by requiring the Exchange to establish the Rule which lowered the differential in 1966." *Id.*

[197] *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 131 (1969); United States v. Borden Co., 347 U.S. 514, 518 (1954); Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co., 326 F.2d 841, 845 (2d Cir. 1963), *cert. denied*, 376 U.S. 952 (1964).

The private class action is the *only* means of providing repayment of illegal profits when those profits result from small individual wrongs perpetrated on the massive scale made possible by a technological, industrial society.[198] Defendants characterize such repayment as "confiscation" and judicial creation of a "pot of gold."[199] But if consumer fraud or price fixing is proven at trial, would it be preferable to leave the illegally obtained "pot of gold" in the corporate coffers?[200] Without the private consumer class action there will be little to deter those who would reap huge profits by treading a "little" upon the rights of many. Public faith in our judicial system requires that a forum be provided for the adjudication of such violations. The historic role of the courts has been to find some means of compensating when a wrong has been done[201] and, in so doing, to avoid letting lawbreakers retain the fruits of their illegality.[202]

No doubt the critics are correct in claiming that these suits have considerable *in terrorem* effect,[203] but arguably that aspect of the consumer class action provides a necessary deterrent—an important supplement to law enforcement.[204] If these private actions can be maintained, they will provide a significant deterrent to conduct proscribed by federal laws.[205] The court of appeals has argued that Congress should create "some public body" to handle these problems;[206] however, since private actions already play such

---

[198]*See* Dolgow v. Anderson, 43 F.R.D. 472, 482-83 (E.D.N.Y. 1968).

[199]*See, e.g.*, Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 383-84 (1972).

[200]*See In Re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278, 287 (S.D.N.Y. 1971).

[201]Biglo v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946). The Supreme Court declared that "[t]he constant tendency of the courts is to find some way to which damages can be awarded where a wrong has been done." *Id.* at 265, *quoting from* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 565-66 (1931).

[202]*See* Hanover Shoe Co. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

[203]*See, e.g.*, 479 F.2d at 1019.

[204]*See* Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 BUS. LAW. 1259, 1261 (1970).

[205]*See* Miller, *Problems in Administering Judicial Relief in Class Actions under Federal Rule 23(b)(3)*, 54 F.R.D. 501, 508 (1972).

[206]479 F.2d at 1019.

an important role in the legislative scheme of federal antitrust and securities laws,[207] Congress has already acted. Congressional policy clearly favors private litigation for effective enforcement of antitrust laws.[208] Again deferring to Congress, the opponents of consumer class actions make the argument that the recoveries involved are actually penalties, and only Congress should determine how such money is best spent.[209] However, under the doctrine of *cy pres,* the courts have long been recognized as being capable of similar determinations.[210]

All this is not to say that every consumer class action must be allowed. Each case will necessarily turn on its own facts,[211] and certainly there will be some cases which are not manageable. But the *Eisen* decision would prohibit virtually *all* large class actions. Instead, because of the vital public interest involved in class actions of this type, dismissal of an otherwise meritorious suit for management reasons should be the exception rather than the rule.[212] Because of policy arguments favoring class actions, doubts should be resolved in favor of their use,[213] and, when the determination is close, courts should err in favor of the class suit.[214] It should be noted that the rule itself provides some means which the courts can utilize to avoid dismissal of class actions as unmanageable.[215] One such alternative, which was completely ignored by the *Eisen* court, is the possibility that the class could be divided

---

[207]*See* Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), *cert. denied,* 394 U.S. 928 (1969).

[208]"Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." Minnesota Mining & Mfg. Co. v. N.J. Wood Finishing Co., 381 U.S. 311, 318 (1965).

[209]*See* 479 F.2d at 1019.

[210]*See* note 101 *supra. See also* Miller, *Problems in Administering Judicial Relief in Class Actions under Federal Rule 23(b)(3),* 54 F.R.D. 501, 510 (1972).

[211]City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 73 (D.N.J. 1971).

[212]*See* MANUAL FOR COMPLEX LITIGATION 28 n.36 (West Pub. 1973).

[213]Katz v. Carte Blanche Corp., 41 U.S.L.W. 2661 (3d Cir. May 22, 1973).

[214]Esplin v. Hirschi, 402 F.2d (10th Cir. 1968), *cert. denied,* 394 U.S. 928 (1969).

[215]*See, e.g.,* FED. R. CIV. P. 23(c)(4) which provides for the restructuring of complex cases by dividing the class into subclasses.

into subclasses for easier management or even test litigation.[216]

The management of these cases presents an enormous challenge, demanding an imaginative, yet considered, response from legal practitioners and the courts.[217] In some cases, the difficulties will be overwhelming,[218] but this result cannot be the foregone conclusion which the Second Circuit has now declared. Injured parties should feel that they can rely upon our judicial system. Indeed, in cases such as this, those who have been injured can turn to no other viable alternative. Judge Oakes, who dissented from a denial of rehearing in *Eisen*, referred to the court's suggestion that the matter could be handled by some vague, future Congressional remedy as "an abdication of judicial responsibility."[219] There may be an understandable reluctance to take on the burden of these cases, but this indisposition should not result from the supposed reason that the courts do not have the capability or skill to handle

---

[216]*Id. See also* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1790 (1972). The court in Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), appropriately summed up the consideration as follows:

> In sum, we hold that this is a proper case for a class action. We recommend to the district court that it make use of the freedom afforded it by Rule 23 to manage the litigation efficiently and fairly, including the creation of any necessary subclasses. We recognize that this might, in cases such as this, place additional burdens on judges but the alternatives are either no recourse for thousands of stockholders to whom the courthouse would thus be out of bounds or a multiplicity and scattering of suits with the inefficient administration of litigation which follows in its wake.

Id. at 301.

[217]The freedom to allow these class actions does leave much to the discretion of the trial judge. Fears of any abuses which might result may, however, be considerably allayed if orders permitting suits to proceed as class actions are made appealable, as the Second Circuit has indicated such orders should be. *See* 479 F.2d at 1007 n.1; note 20 *supra.*

[218]Although dismissal should be the exception, the following cases have rejected class actions at least partly on the basis of manageability problems. Schaffner v. Chemical Bank, 339 F. Supp. 329, 330 (S.D.N.Y. 1972) (rejecting class of "all persons and institutions who are or have been beneficiaries of any trust or trusts of which defendant is trustee and for whose account defendant executes securities transactions"); City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971) (rejecting class of all nongovernmental gasoline purchasers in Delaware, Pennsylvania, and New Jersey); Hawaii v. Standard Oil Co., 301 F. Supp. 982 (D. Hawaii 1969), *rev'd*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972) (rejecting class of all gasoline purchasers in Hawaii).

[219]479 F.2d at 1024 (Oakes, J., dissenting).

such complex problems.[220] The courts do have the expertise—if they lack the necessary funds or personnel, then these should be expanded to meet the demands being made upon the judiciary by an expanding society.

The most striking flaw in the arguments of the critics of large class actions is the failure to suggest an available alternative remedy.[221] In denying rehearing of the *Eisen* case, the judges of the Second Circuit have stressed the likelihood that the Supreme Court will hear this case under its certiorari jurisdiction.[222] But if the *Eisen* decision stands as it is now, the consumer has lost this hoped-for remedy against monopolies and others whose technological trangressions assume proportions large enough to affect millions. For such consumers, the procedural device of massive class actions under rule 23 will be dead. If that is the case, the search for a viable alternative remedy must immediately be given our most urgent national attention.

DAVID R. KELLY

---

[220]The handling of the *Drug Cases* clearly indicates that the courts have the capability and expertise to deal with class action litigation of this kind. *See Hearings on the Consumer Protection Act of 1970, S. 3201, Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 182-83 (1970) (statement of Judge Alfred P. Murrah).

[221]The court of appeals in *Eisen* has suggested that the injunctive relief should be sought, but this falls short of what is needed. *See* 479 F.2d at 1020. The wrongdoer will not be deterred when he knows that, even if his illegal activity might be enjoined, he can, in any event, keep whatever ill-gotten profits he has made. In addition, an injunction alone provides no financial compensation to aggrieved parties.

[222]*See* note 94 *supra*.