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SOME PROBLEMS OF CONSUMER CLASS ACTIONS¹

*John Krabmer**

AS a procedural device the class action has a respectably long history² and, from its beginnings, has been recognized as an action founded at least as much upon convenience as upon legal theory.³ Interestingly enough, it was the insistence of the early equity courts on the convenient administration of justice that led to the general rule requiring all parties interested in the subject matter of a suit to be joined before the suit could go forward, and this rule presented the first barrier to the maintenance of a class suit. As Professor Chafee has pointed out, the early judges, concerned about "the possibility that the bill might be defective for nonjoinder of necessary parties,"⁴ worried little, if at all, about the binding effect on absentees of a decree in a class suit if the bill was maintained.⁵ The first hurdle, then, which the class suit had to clear was the general rule of convenience on joinder of parties. The clearing was not long in coming, resting not on complex grounds but on the same ground as the original rule. As Lord MacNaghten said in summarizing the development:

Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could 'come at justice,' to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common

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¹ To those familiar with Professor Chafee's writings, this title may seem pretentious, deriving as it does from his outstanding book, *SOME PROBLEMS OF EQUITY*. The use of a similar title here may be forgiven, I hope, on two grounds. First, it is at least descriptive and, second, it is intended as a tribute to a master's writings on equity where class actions began.

² No precise date can be fixed, but somewhere between 1675 and 1700 class actions seem to have begun a definite branching off from bills of peace. See Z. CHAFEE, *SOME PROBLEMS OF EQUITY* 157-66 (1950) and cases there cited, especially in n. 29 (hereinafter cited as CHAFEE).

³ CHAFEE 200-04.

⁴ CHAFEE 204.

⁵ CHAFEE 203.

interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent

. . . .

I think the rule as to representative suits remains very much as it was a hundred years ago. From the time it was first established it has been recognized as a simple rule resting merely upon convenience.⁶

Once it had been determined that a class suit could be maintained as an exception to the general rule of party joinder, the English judges gave some consideration to the problem of binding unjoined members of the class. However, in England, binding a person who did not have his day in court was not as important a question as it is to us under the due process clause. Thus, generally, if the class suit did not fail for non-joinder of necessary parties, any decree rendered would be binding on those not joined.⁷ In the United States, this second question of the binding effect of a decree has been more difficult,⁸ however, with the new draft of Rule 23 of the Federal Rules of Civil Procedure, it has been workably laid to rest along the lines proposed by Chafee in 1950 as an alternative to the then-existing Rule 23, which created three categories of class suits commonly termed "true," "hybrid" and "spurious."⁹ Chafee proposed to divide class suits in a way which was functionally more workable with reference to the binding effect of a decree.¹⁰ His division was a two-part one, described in his words as "Solid Class Suits" and "Invitations to Come In." Solid Class Suits were those in which the unifying factors among class members were strong, e.g., important common questions, a lack of distinctive individual interests, and close identification of the interests of the unnamed persons with the interests of the representatives.

Invitations to Come In were to be used in suits that, while having some common questions and some unifying factors, also had class mem-

⁶ *Duke of Bedford v. Ellis*, [1901] A.C. 1, 8-10 (1900).

⁷ CHAFEE 225.

⁸ The historical development is summarized in CHAFEE 225-30.

⁹ The text of both the old Rule 23 and the new Rule 23 is set out as an Appendix to this article. The new Rule became effective on July 1, 1966.

¹⁰ For a detailed discussion of the proposal which is summarized here, see CHAFEE 259-75. Chafee was not alone in his dissatisfaction with the old Rule 23, as the extensive literature indicates. See, e.g., Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941); Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327 (1948); Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 COLUM. L. REV. 818 (1946).

bers with distinctive individual interests that required assertion. Chafee considered actions under the Fair Labor Standards Act particularly suitable for Invitations to Come In. In his view, this category of actions was "like being asked to a cocktail party. Anybody who was asked can come. Unless you do come, you get no cocktails. . . ." ¹¹

Under Chafee's division, the judgment in a Solid Class Suit would be binding on all members of the class whether or not the result was favorable. In actions where Invitations to Come In were used, judgment, favorable or unfavorable, would be binding only on those who accepted the invitation with no effect on those who declined. The idea that an outsider could sit on the sidelines and share in a victory without being bound by a defeat was specifically rejected by Chafee as utterly inconsistent with the principles of *res judicata*.¹²

In addition to proposing a new division for class suits, Chafee also urged that the court determine early in the proceeding the classification of a properly brought class suit, and exercise continuing supervision of the action, including the sending of any Invitations to Come In (if necessary), deciding the adequacy of representation, and overseeing generally the conduct of the action for the protection of outsiders. The present Rule 23 incorporates many of these suggestions,¹³ including the simplified classification scheme for class suits.¹⁴ The Rule does, however, make one change in the category of suits Chafee has termed "Invitations to Come In" by attaching the addendum of "Regrets Only" instead of "R.S.V.P." A class member need not "accept" the invitation, but if he does not act affirmatively to send "regrets," his name will be left on the "guest list" and he will be bound by any judgment handed down.¹⁵

As the foregoing discussion indicates, the class action began as a means to further the "convenient administration of justice," and that same quest has continued resulting at the federal level in a revised rule that

¹¹ CHAFEE 259.

¹² CHAFEE 280. The idea that outsiders could choose—after the litigation—to share in the victory or stay out in case of defeat was originally proposed by Kalven and Rosenfield in their article, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941). Despite Chafee's objections to this result, it became the rule in several cases. See, e.g., *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), *cert. denied*, 371 U.S. 801 (1962); *York v. Guaranty Trust Co.*, 143 F.2d 503 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945).

¹³ See FED. R. CIV. P. 23, especially (c) (1), (c) (2), (d) and (e).

¹⁴ *Id.* at (b), (c) (2) and (c) (3).

¹⁵ *Id.* at (c) (3).

goes far toward making the class action a useful (and manageable) procedural device resting on sound theory. However, theory and practice often diverge and there are clear indications that the class action as a consumer protection device has fallen short of the original goal. This article will examine some of the pitfalls that exist for consumer class actions, at both the federal and state level, and will suggest some ways by which these pitfalls might be avoided and a class action successfully maintained.

Snyder v. Harris AND THE "NO-AGGREGATION" RULE

One of the major difficulties with Rule 23, as presently applied, arises from the very evil which the class action was designed to remedy—a class with numerous members, each of whom has a claim too small to justify litigation. Kalven and Rosenfield, writing in 1941, used the Insull Utilities Investments cases as an example, and noted that "[t]he investor who held, say, \$10,000 in debentures, was confronted with expenses measured by a \$60,000,000 lawsuit, not a \$10,000 one."¹⁶ The situation is essentially the same today so far as the individual consumer is concerned. His loss may well be small but the legal expenses would be the same as if the action were for a much larger sum; in fact, it is not uncommon for the legal expense actually to exceed the amount of the original claim.¹⁷ Few people, if any, are willing (or able) to act on principle when economic reality intervenes. Fraudulent operators know this well, and evidence indicates that many of them refrain from "cheating any one person out of large sums of money because they realize that 'no one bilked out of fifty dollars is going to pay a lawyer to get his money back.'" ¹⁸ On its face, a situation like this is a natural one for the class action. If enough small claims can be presented in a single action, the expenses can be shared and the litigation can proceed at an escalated level commensurate with the total value. However, in the federal arena, the Supreme Court has held, in the case of *Snyder v. Harris*¹⁹ that, despite the revision of Rule 23, the individual claims of class members cannot be aggregated to meet the requirement of juris-

¹⁶ Kalven and Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 685 (1941).

¹⁷ S. REP. NO. 1124, 91st Cong., 2d Sess. 5 (1970).

¹⁸ Note, *Translating Sympathy for Deceased Consumers Into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 409 (1966).

¹⁹ 394 U.S. 332 (1969).

ditional amount²⁰ unless the claims are joint or common. Because consumer claims are generally separate and distinct, the *Snyder* ruling effectively precludes most consumer class actions in federal courts unless Congress has waived the jurisdictional amount for the particular type of claim asserted. It has been argued that the *Snyder* rule effectively revives the old, technical categories formerly embodied in Rule 23 despite the obvious purpose of the amended rule to eradicate such a classification scheme and replace it with a functional approach.²¹ However, whether or not the *Snyder* rule is correct, it is the present interpretation of Federal Rule 23, and the consumer advocate must consider it in framing his class action complaint.

LESSENING THE IMPACT OF *Snyder v. Harris*

One obvious way to avoid the *Snyder* rule is to fit the case, if possible, into a statute that does not require a jurisdictional amount. Of course, this cannot be done in every consumer case, but there are lines of development worth considering whenever a consumer class action under Rule 23 is contemplated.

Perhaps the most significant of these developments is the discovery of the antitrust laws by consumer groups.²² Prior to the amendment of Rule 23 in 1966, relatively few consumer antitrust suits had been brought.²³ Since the amendment, consumer antitrust class actions have increased dramatically and the trend shows no sign of abating.²⁴ The broad sweep of the antitrust laws forbids anti-competitive consumer abuses such as price fixing,²⁵ territorial division agreements,²⁶ and tying

²⁰ The two most common cases for federal jurisdiction, diversity of citizenship, 28 U.S.C. § 1332 (1970), and federal question jurisdiction, 28 U.S.C. § 1331 (1970), both require that the amount in controversy exceed the sum or value of \$10,000. However, § 1331 is subject to numerous exceptions and this can be of significant value to consumers in some cases as discussed later in this article.

²¹ Bangs, *Revised Rule 23: Aggregation of Claims for Achievement of Jurisdictional Amount*, 10 B.C. IND. & COM. L. REV. 601 (1969). The majority in the *Snyder* case recognized that the "amendment to Rule 23 replaced the old categories with a functional approach to class actions" but still decided against allowing aggregation. 394 U.S. at 335.

²² The basic antitrust laws are, of course, the Sherman Act, 15 U.S.C. §§ 1-7 (1970) and the Clayton Act, 15 U.S.C. §§ 12-27 (1970).

²³ ABA SECTION OF ANTITRUST LAW, ANTITRUST DEVELOPMENTS, 1955-1968, at 274 (1968).

²⁴ See PLI FEDERAL CLASS ACTION DIGESTS (1971).

²⁵ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

²⁶ *United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

agreements,²⁷ as well as the more generalized wrongs of monopoly²⁸ and attempts to monopolize.²⁹ Because such activities are antithetical to free competition, a basic tenet of our society, treble damages are allowed for antitrust violations, and the district courts are given original jurisdiction without regard to jurisdictional amount to encourage and facilitate private actions against public wrongs.³⁰ Recent private antitrust actions have included diverse claims such as suits against auto manufacturers for conspiring to delay the development and installation of pollution control equipment in motor vehicles,³¹ suits against drug manufacturers for antitrust violations arising from the sale of antibiotics,³² and a counterclaim asserting a conspiracy to monopolize against egg producers.³³ Certainly, for the consumer advocate, the antitrust laws constitute a potent weapon for particularly grave abuses, and the possibility of asserting an antitrust claim should always be explored.

Another possible method of opening the federal courthouse door for small claims is available to correct practices violative of federal constitutional rights. The most significant case of this type to appear recently is *Adams v. Egley*,³⁴ which held unconstitutional sections 9-503 and 9-504 of the California Uniform Commercial Code.³⁵ (A similar case in the same court, *Posadas v. Star & Crescent Federal Credit*

²⁷ *IBM Corp. v. United States*, 298 U.S. 131 (1936).

²⁸ *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

²⁹ *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

³⁰ U.S.C. § 1337 (1970) provides:

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

³¹ U.S.C. § 15 (1970) states:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

For a discussion of the underlying policies of the antitrust laws, see C. KAYSSEN & D. TURNER, *ANTITRUST POLICY* (1959).

³² *In re Motor Vehicle Air Pollution Control Equipment*, 5 TRADE REG. REP. (1970 Trade Cas.) ¶¶ 73, 317 (C.D. Cal. 1970).

³³ *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970).

³⁴ *United Egg Producers v. Bauer Int'l Corp.*, 312 F. Supp. 319 (S.D.N.Y. 1970).

³⁵ 338 F. Supp. 614 (S.D. Cal. 1972). At the same time *Adams* was being decided, the United States District Court for the Northern District of California reached the opposite result on similar facts in *Oller v. Bank of America*, Case No. C-70-2559 SW, 342 F. Supp. 21 ¶ 51,807 (N.D. Cal. 1972). This case is also on appeal to the Ninth Circuit.

³⁶ Sections 9-503 and 9-504 of the California Uniform Commercial Code were

*Union*³⁶ was consolidated with *Adams* by stipulation). *Adams* was a direct descendant of *Sniadach v. Family Finance Corp.*³⁷ in which the Supreme Court invalidated the Wisconsin wage garnishment statute on due process grounds. While *Adams* was not a class action, its jurisdictional base is instructive. The plaintiff had financed the purchase of three automobiles by executing a promissory note and security agreement naming the Bank of LaJolla as payee and secured party. The note and security agreement were ultimately acquired by the defendant, Southern California National Bank. The plaintiff failed to make the required payments and, when he fell 90 days past due, the defendant Egley, acting on behalf of the bank, repossessed and sold two of the vehicles under sections 9-503 and 9-504. The sale satisfied the remaining balance on the account. The consolidated *Posadas* case also involved the repossession of a motor vehicle. In both cases the repossession was accomplished by private and peaceful means. Both plaintiffs sought declaratory relief and damages, asserting that sections 9-503 and 9-504 were unconstitutional because the plaintiffs had been deprived of property without due process of law and were denied equal protection of the laws. Damages were based upon loss of business opportunities, emotional distress, the loss of property by the repossession, and economic hardship resulting from the deprivation of the property. Jurisdiction was based on federal question jurisdiction³⁸ and the Civil Rights Acts³⁹ (which require no jurisdictional amount in controversy). On the plaintiffs' motion for summary judgment on the issue of liability, the court upheld the claim of jurisdiction:

adopted without amendment from the Official 1962 text of the Uniform Commercial Code. Section 9-503 provides:

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premise under Section 9-504.

Section 9-504 governs the manner and effect of the secured party's disposition of collateral after repossession.

³⁶ Reported with *Adams*, 338 F. Supp. 614 (S.D. Cal. 1972).

³⁷ 395 U.S. 337 (1969).

³⁸ 28 U.S.C. § 1331 (1970).

³⁹ U.S.C. § 1343 (1970) and 42 U.S.C. § 1983 (1970).

These Commercial Code sections set for a state policy, and the security agreements upon which the instant actions rest, whose terms are authorized by the statute and which incorporate its provisions, are merely an embodiment of that policy. It is therefore apparent that the acts of repossession were made "under color of state law" as required by the Civil Rights statutes, and that the passage of Sections 9503 and 9504 [sic], which authorize such acts are sufficient state action to raise a federal question.⁴⁰

Having decided that the jurisdictional base was sound, the court then proceeded to hold unconstitutional sections 9-503 and 9-504 on the authority of a broad reading of the *Sniadach* case. An appeal to the Ninth Circuit filed by the bank is still pending. Even aside from the very significant decision on sections 9-503 and 9-504, the *Adams* case illustrates a jurisdictional base of great value to the consumer advocate. A somewhat similar jurisdictional claim was used in *Fuentes v. Faircloth*,⁴¹ a case now pending before the United States Supreme Court.^{41a} The plaintiff there filed a class action in the Federal District Court for the Southern District of Florida attacking as unconstitutional the Florida replevin statute because it authorizes the taking of property by a sheriff without due process of law and without a search warrant in violation of the fourth amendment. The District Court held against both of these contentions.⁴² Oral arguments in the Supreme Court have been heard in the *Fuentes* case,⁴³ but no opinion has yet been handed down. Like *Adams*, *Fuentes* contains a closely intertwined mixture of procedural and substantive law, and any decision of the Supreme Court will, almost without doubt, be of great significance in the use of novel jurisdictional bases in consumer actions in federal courts.

Section 43a of the Lanham Act⁴⁴ has been suggested elsewhere as another possible ground of jurisdiction in federal courts for consumer cases.⁴⁵ However, the federal courts have been less than enthusiastic

⁴⁰ 338 F. Supp. 614, 618 (S.D. Cal. 1972).

⁴¹ 317 F. Supp. 954 (S.D. Fla. 1970), *prob. juris. noted*, 401 U.S. 906 (1971).

^{41a} After this article was written, the *Fuentes* case was affirmed by the United States Supreme Court, and is reported as *Fuentes v. Shevin*, 407 U.S. 67 (1972).

⁴² 317 F. Supp. 954.

⁴³ 40 U.S.L.W. 3233 (Nov. 16, 1971).

⁴⁴ 15 U.S.C. § 1125(a) (1970).

⁴⁵ Starrs, *The Consumer Class Action—Part I: Consideration of Equity*, 49 B.U.L. REV. 211, 244-47 (1969).

about the use of section 43a, and it appears unlikely that a resort to this section would be upheld.⁴⁶

The Consumer Credit Protection Act,⁴⁷ better known as Truth In Lending, is still another potential source of consumer class actions in the federal courts. Like the antitrust laws and the Civil Rights Act, no jurisdictional amount is required and, for cases within its purview, the Truth In Lending Act is an ideal basis for consumer class actions.⁴⁸ A consumer advocate would be well advised to consult the provisions of this act and its interpretive regulations whenever a claim presents issues involving credit transactions or credit advertising to see if his case falls within any of the numerous provisions of the statute.

PROBLEMS WITH SENDING "INVITATIONS TO COME IN"

Another difficulty with the successful maintenance of a consumer class action at the federal level under Rule 23 is the notice requirement of 23 (c) (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.

⁴⁶ *Colligan v. Activities Club of New York, Ltd.*, 442 F.2d 686 (2d Cir. 1971); see also the remarks of Professor Starrs on Section 43a in a later article, *Continuing Complexities in the Consumer Class Action*, 49 J. URBAN L. 349, 353 (1971).

⁴⁷ 15 U.S.C. §§ 1601-81 (1970).

⁴⁸ The Act provides *inter alia* in 15 U.S.C. § 1640 (1970) for civil liability:

- (a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of
 - (1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than \$100 nor greater than \$1,000; and
 - (2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.
-
- (e) Any action under this section may be brought in any United States District Court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

The subdivision (b) (3) referred to in the quoted provision is the section of Rule 23 that will commonly include consumer class actions for damages if the *Snyder v. Harris* rule is successfully avoided.⁴⁹

If the language of subdivision (c) (2) means what it says about "individual notice to all members who can be identified through reasonable effort," the cost of such notice may be so great that the action cannot go forward. Although there is some question about who should bear the cost of notice, it seems generally agreed that the plaintiff, at least initially, is the party responsible for the expense.⁵⁰ In some circumstances then, a representative with a small claim may find himself out of court because of the cost of notifying his fellow class members about the action. That these costs can be sizable is illustrated by the Second Circuit case of *Eisen v. Carlisle & Jacquelin*.⁵¹ The plaintiff there had a claim of approximately 70 dollars, but the class size was estimated at 3,750,000 and the cost of notice, based on this class size, would have been approximately 400,000 dollars. The court interpreted subdivision (c) (2) to require individual notice, and noted that if "financial considerations prevent the plaintiff from furnishing notice to these members, there may prove to be no alternative other than the dismissal of the class suit."⁵² Fortunately for the small claimant, some courts have been more willing to approach the notice requirement pragmatically.⁵³ As was said in the case of *Dolgow v. Anderson*,⁵⁴ "[i]n view of the inordinate expense that would be involved in locating and mailing notice to tens of thousands of transitory shareholders, it would be anomalous to say that this litigation may proceed as a class action and then lay down a condition which could never be met. Notice by publication might well be the most practicable method, both of giving notice and of identifying members of the class."⁵⁵ However, the court in *Dolgow*

⁴⁹ FED. R. CIV. P. 23(b)(3) is set out in the Appendix.

⁵⁰ Ward and Elliott, *The Contents and Mechanics of Rule 23 Notice*, 10 B.C. IND. & COMM. L. REV. 557, 564-67 (1969) and cases there cited. *But see* note 53 *infra*.

⁵¹ 391 F.2d 555 (2d Cir. 1968).

⁵² *Id.* at 570.

⁵³ This includes, it seems, the district court in *Eisen*, after remand. The latest opinion in the *Eisen* case determined, after remand on a preliminary hearing, that the plaintiffs had a substantial probability of success, warranting a court order that the defendants bear 90% of the cost of giving notice and the plaintiff bear 10%. 40 U.S.L.W. 2716 (April 4, 1972). Apparently the district court found an alternative, not by eliminating individual notice, but by allocating costs.

⁵⁴ 43 F.R.D. 472 (E.D.N.Y. 1968).

⁵⁵ *Id.* at 500.

made no final decision on the form of notice or on who should pay for the distribution, so the quoted language does not have the weight of a carefully considered holding. Moreover, the matter of notice may not be disposed of so easily if, as has been asserted, the question is essentially one of constitutional dimensions under the due process clause.⁵⁶ The Advisory Committee seems to have taken this position when it said, with reference to subdivision (c) (2):

This mandatory notice pursuant to subdivision (c) (2), . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject. See *Hansberry v. Lee*, 311 U.S. 32 (1940); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)⁵⁷

It is not clear, however, that the two Supreme Court cases cited by the Advisory Committee inflexibly require individual notice in all cases. In *Hansberry v. Lee*,⁵⁸ the Court was concerned with the adequacy of representation because the interests of the representatives were not the same as the interests of the class members. The question of notice was in issue only insofar as it bore on the matter of adequate representation. The Court required only a proceeding that protected the absent parties, and notice, in that case, was simply a way to insure that protection. In *Mullane v. Central Hanover Bank & Trust Co.*,⁵⁹ the Court was also faced with a situation that involved interests of representatives which differed from the interests of the group. Mailed notice was required for those trust beneficiaries whose names and addresses were known because they were on an existing mailing list. Notice by publication, however, was deemed sufficient for unknown or conjectural beneficiaries. This result was justified on the ground that "[n]otice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all."⁶⁰

The standards for notice to a class derived from *Hansberry* and *Mullane* hardly seem to be as rigid as the Advisory Committee implies. The primary requisites are, instead, the adequacy of the representation,

⁵⁶ In the case of *Eisen v. Carlisle & Jacquelin*, at the district court level, due process was construed to require individual notice. 41 F.R.D. 147 (S.D.N.Y. 1966).

⁵⁷ Advisory Committee's Note to Rule 23, 39 F.R.D. 98, 107 (1966).

⁵⁸ 311 U.S. 32 (1940).

⁵⁹ 339 U.S. 306 (1950).

⁶⁰ *Id.* at 319.

the cohesiveness of the class and the consequences of requiring individual notice.⁶¹ That some type of notice is constitutionally required cannot be gainsaid but, as has been suggested, "many types are available short of individual notice to every member of the class. It [the court] could order individual notice to a random sample of the class, individual notice to those in the class whose claims are above a certain amount, individual notice only to those members of the class whose names and addresses are presently available or readily ascertainable, notice by publication, or any combination of these methods."⁶² When the cost of individual notice becomes so great that the class action cannot be maintained if that form of notice is required, the court should carefully consider the use of other types of notice which might be constitutionally permissible under the circumstances of the particular case and not simply impose individual notice out-of-hand. The language of subdivision (c) (2) appears broad enough to encompass this consideration, but the consumer advocate should be alert to the possibility that the individual notice question will be raised, and be prepared to show the court that some other form of notice or an allocation of the cost of notice would satisfy the requirements of due process and efficient management of the class action.

THE CONSUMER CLASS ACTION AND THE "COMMON INTEREST" RULE

The final problem to be discussed regarding class suits, that seems to be of particular relevance to lawyers contemplating a consumer class action, is the impact of the "common interest" rule. This is a basic requirement of the class action device whether common law, Field Code or Federal Rule 23 in procedural origin. The requirement that all members of the class share a common interest was stated by Justice Story in his summary of the requisites for a class suit:

- (1) Where the question is one of a common or general interest, and one or more sue, or defend for the benefit of the whole;
- (2) Where the parties form a voluntary association for public or private purposes, and those, who sue, or defend, may fairly

⁶¹ As Rule 23(c)(2) says: "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." (Emphasis added).

⁶² Kirkpatrick, *Consumer Class Litigation*, 50 ORE. L. REV. 21, 39 (1970).

- be presumed to represent the rights and interests of the whole;
- (3) Where the parties are very numerous, and although they have, or may have, separate distinct interests; yet it is impracticable to bring them all before the court.⁶³

The common interest requirement can create special difficulty in consumer cases. Typically, each consumer injured by a seller's misrepresentation or illegal overcharge, for example, will have engaged in a transaction distinct from other transactions between the same seller and other consumers—at least on a purely factual basis. Some courts taking a generous view of the consumers' situation, have treated the issue presented by a class action not as the defendant's conduct toward each member of the class but rather whether the defendant's conduct has been illegal. This view at least recognizes a common interest among class members on the liability issue, leaving the damage issue to be determined separately. It is, in effect, a way of looking at a class action as presenting a question of law (common to all members of the class) rather than a series of factually separate transactions (which are not common). Cases of seller overcharges have been particularly suitable for such treatment.⁶⁴ Not all courts, however, have been willing to consider class action complaints in this light but rather have emphasized the individuality of each transaction and refused to find a sufficient "common interest" to allow a class action to proceed.⁶⁵ A classic example of this approach is the case of *Hall v. Coburn Corp. of America*.⁶⁶ The plaintiffs had purchased goods from several New York merchants in separate transactions and had signed retail installment sales contracts supplied to the merchants by the defendant financing company. The contracts, assigned to the defendant immediately after the sales were made, were identical. All of them violated § 1 of the New York Retail

⁶³ J. STORY, EQUITY PLEADINGS § 97 (2d ed. 1840). The Field Code provisions are very similar: [W]hen the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole. N.Y. Laws 1849, ch. 438, § 119. Cf. FED. R. CIV. P. 23 (a).

⁶⁴ E.g., *Gas Serv. Co. v. Coburn*, 389 F.2d 831 (10th Cir. 1968), *rev'd on other grounds*, 394 U.S. 332 (1969); *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967); *Kovarsky v. Brooklyn Union Gas Co.*, 279 N.Y. 304, 18 N.E.2d 287 (1938).

⁶⁵ E.g., *Moscarella v. Stamm*, 288 F. Supp. 453 (E.D.N.Y. 1968); *Gaynor v. Rockefeller*, 15 N.Y.2d 120, 204 N.E.2d 627, 256 N.Y.S.2d 584 (1965); *Society Million Athena, Inc. v. National Bank of Greece*, 281 N.Y. 282, 22 N.E.2d 374 (1939).

⁶⁶ 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970).

Installment Sales Act because substantial portions of each contract were printed in a type size smaller than that required by the Act.⁶⁷ The New York Court of Appeals affirmed the dismissal of the class action complaint on the ground that the plaintiffs had not satisfied the "common interest" requirement because "[a] number of persons made a number of quite different and unrelated contracts with a number of different and unrelated sellers using the same written form which is claimed to be illegal. This does not become a common question because the same finance company is the assignee of the contracts and prepared them for use by the contracting parties."⁶⁸ This interpretative view can clearly be the death knell for many otherwise well-founded class actions and counsel should, whenever possible, urge the court to consider the issue as a question of law instead of a question of fact to avoid this kind of over-emphasis on the distinctness of each separate transaction.

The difficulties with the common interest requirement do not, however, stop with mere interpretive approaches. Even if a court is willing to view the issues as questions of law arising from a repetitious pattern of conduct, the type of wrongdoing alleged may present uniquely individual elements *as a part of the cause of action*, and prevent the more generous interpretive approach from being used effectively. Perhaps the most frequent example of this situation is the class action for fraudulent misrepresentation. Because an action for fraud includes the elements of misrepresentation and reliance on the misrepresentation, the courts have found it difficult to reconcile the individual nature of these elements with the requirement that the class members share a "common interest."⁶⁹ However, as Professor Starrs has pointed out, there is one group of cases in which the courts have been able to overcome the misrepresentation problem with some consistency—the securities fraud cases.⁷⁰ The simplest of these cases are those in which the

⁶⁷ The New York Retail Installment Sales Act provides, in pertinent part: "A retail installment contract or obligation shall be dated and in writing; the printed portion thereof shall be in at least eight point type." N.Y. PERS. PROP. LAW § 402(1) (McKinney 1962). "In case of failure by any person to comply with the provisions of this article, the buyer shall have the right to recover from such person an amount equal to the credit service charge or service charge imposed and the amount of any delinquency, collection, extension, deferred or refinance charge imposed." N.Y. PERS. PROP. LAW § 414(2) (McKinney 1962).

⁶⁸ 26 N.Y.2d 396, 400, 259 N.E.2d 720, 721, 311 N.Y.S.2d 281, 282-83.

⁶⁹ See cases cited in Simeone, *Class Suits under the Codes*, 7 W. RES. L. REV. 5 (1955).

⁷⁰ STARRS, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B.U.L. REV. 407, 423 (1969).

same misrepresentation is made to all members of the class by writing such as a prospectus, financial statement or other form of inducement. Here, even a court that looked with disfavor on a class action founded on more complex facts was willing to say that "[c]lass actions in securities cases are maintainable where there has been a standardized misrepresentation to a group through a prospectus, proxy statement, financial statements or form letter" ⁷¹ Less well established, but used at least occasionally, is the approach taken by the court in *Fischer v. Kletz*⁷² which involved several different financial statements issued over a two-year period. The lack of *identical* misrepresentations was deemed unimportant because the different financial information provided by each statement was not "material" in its variation. In another case involving similar, but varying misrepresentations, the court emphasized the common course of conduct of the defendants over a period of time, and allowed the action to proceed.⁷³ Like the cases of consumer overcharge, the pattern or course of the defendant's conduct has been utilized to find a common question presented on the issue of misrepresentation.⁷⁴

The reliance factor has been more difficult to resolve by reference to the defendant's *modus operandi*, necessitating the use of other methods to avoid dismissal. Perhaps the most successful approach was taken by the plaintiffs, and apparently endorsed by the court in the case of *Dolgow v. Anderson*,⁷⁵ which noted:

Moreover, plaintiffs may not even have to prove individual reliance—the only issue that may prove to be troublesome. They are contending that the purchase of Monsanto stock at a price which was affected by defendants' improper activities constitutes sufficient reliance.

For a class of consumer plaintiffs not concerned exclusively with damages, the reliance problem can be avoided by a complaint that seeks injunctive relief for the class vis-à-vis the defendant and damages only for the representatives (who must still prove their own reliance).⁷⁶

⁷¹ *Moscarella v. Stamm*, 288 F. Supp. 453, 462 (E.D.N.Y. 1968).

⁷² 41 F.R.D. 377 (S.D.N.Y. 1966).

⁷³ *Kroenberg v. Hotel Governor Clinton, Inc.*, 41 F.R.D. 42 (S.D.N.Y. 1966).

⁷⁴ *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968); *Fidelis Corp. v. Litton Indus., Inc.* 293 F. Supp. 164 (S.D.N.Y. 1968).

⁷⁵ 43 F.R.D. 472, 491 (E.D.N.Y. 1968).

⁷⁶ See generally, Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B.U.L. REV. 407 (1969).

The prayer for an injunction against further wrongdoing of a similar nature presents, of course, a question of law which can be determined without the need for proof of reliance by every member of the class. However, if the class is interested in damage recovery this method is obviously unsatisfactory, and it may be necessary to treat reliance as a separate issue (like damages) and require proof by every member of the class.

In the realm of theory, the case of *Harris v. Jones*⁷⁷ contain the seeds of an approach that might be the most valuable of all in handling individual issues such as reliance in large class actions, particularly if combined with a suggestion recently made by Mr. Laird Kirkpatrick. In essence, the *Harris* case used an opinion polling technique to obtain information from class members on "the types and sources of representation, if any, upon which they relied in purchasing their securities, and the time they first learned any representations were false."⁷⁸ Mr. Kirkpatrick suggested that:

In many consumer cases, the fact that the misrepresentations were the inducement to purchase is so clear from the circumstances surrounding each sale that something in the nature of a disputable presumption of reliance could be established that would make individual consideration of reliance necessary only in those instances where the defendant had evidence of nonreliance.⁷⁹

It would seem quite feasible to handle such individual issues as reliance by requiring proof by a sufficient number of class members to insure statistical reliability and, if the proof showed the allegation to be prima facie true, to then create a rebuttable presumption applicable to the class as a whole. At first glance, this approach seems to do considerable violence to our concepts of the allocation of the burden of proof and the operation of the adversary system. However, when examined from an evidentiary standpoint, the method seems appropriate. The defendant's opportunity to challenge the plaintiffs' proof would be preserved at the initial stage and, if unsuccessful there, the handicap would be merely a reallocation of the burden of proof, a not uncommon phenomenon in many other kinds of cases today.

The basis for creating this presumption is nothing more than prob-

⁷⁷ 41 F.R.D. 70 (D. Utah 1966).

⁷⁸ *Id.* at 74.

⁷⁹ Kirkpatrick, *Consumer Class Litigation*, 50 ORE. L. REV. 21, 32 (1970).

ability, the same as the basis for the creation of any other presumption.⁸⁰ The suggested approach simply recognizes this basis and applies it to class suits. It operates empirically to establish the proposition that it is more probable than not that each class member relied on the defendant's misrepresentations, or that the misrepresentations were similar or that certain damage elements are common to each plaintiff. Similar statistical proof has become more generally accepted in recent years.⁸¹ The extension of this method to class actions, with adequate safeguards to insure trustworthiness (including opportunity for cross-examination), would make the consumer class action a more valuable procedural device for the resolution of disputes.

CONCLUSION

Despite numerous attempts to enact class action bills that would directly avoid the "no-aggregation" rule of *Snyder v. Harris* in some degree and make consumer class actions more directly cognizable in the federal courts, no new legislation has come forth.⁸² Even if a new class action statute is enacted, the problems of sending "Invitations to Come In" and the hazards of the common interest rule will continue to be factors that the consumer advocate must consider before deciding to bring a class suit. The class suit, however, remains as the form of action most likely to be economically feasible for aggrieved consumers with small claims.

⁸⁰ On the reasons for creating presumptions see Morgan, *Presumptions*, 12 WASH. L. REV. 255 (1937).

⁸¹ See, e.g., *United States v. 88 Cases, More or Less*, 187 F.2d 967 (3d Cir. 1951), cert. denied, 342 U.S. 861 (1951); *Zippo Mfg. Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670 (S.D.N.Y. 1963); *Household Fin. Corp. v. Federal Fin. Corp.*, 105 F. Supp. 164 (D. Ariz. 1952). A special section of the MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION is devoted to proof of facts in complex cases and thoroughly reviews developments in the area of proof by statistical methods. MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION, pt. 1, §§ 2.61-.617 (1970).

⁸² The bills include: S. 1980, 91st Cong., 1st Sess. (1969) (introduced by Senator Tydings of Maryland); H.R. 11656, 91st Cong., 1st Sess. (1969) (introduced by Representative Eckhardt of Texas as a companion bill to S. 1980); H.R. 5630, 92d Cong., 1st Sess. (1971) (introduced by Representative Eckhardt of Texas); S. 1378, 92d Cong., 1st Sess. (1971) (introduced by Senator Bayh of Indiana as a companion bill to H.R. 5630); S. 984, 92d Cong., 1st Sess. (1971) (introduced by Senator Magnuson of Washington); S. 1222, 92d Cong., 1st Sess. (1971) (introduced by Senator Magnuson of Washington on behalf of the Nixon Administration).

These bills, and others, are extensively analyzed in Newberg, *Federal Consumer Class Action Legislation: Making the System Work*, 9 HARV. J. LEGIS. 217 (1972).

APPENDIX**FORMER RULE 23****(Class Actions)**

a. Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

b. Secondary Action by Shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

c. Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

NEW RULE 23

(Class Action)

(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 controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(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 a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best 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 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. As amended Feb. 28, 1966, eff. July 1, 1966.

