

THE IMPACT OF CLASS ACTIONS ON CORPORATE AND SECURITIES LAW

MORDECAI ROSENFELD*

Plaintiffs filed an action on their own behalf and on behalf of all other persons who had invested in The Philanthropic Annuity Institution, charging that the defendants had breached the fiduciary duty they owed to all the investors. Defendant Thompson moved to have the complaint dismissed on the ground that there were "a great number of persons" who were members of plaintiffs' class who had not been and could not be brought before the Court. The Court overruled the demurrer:

It is evident, that if occasion here should arise to resort here for an account, as it would be impossible to bring all persons interested, the suit must be against some, being Proprietors, and accountable parties, instituted by some on behalf of all . . . but that difficulty was overcome upon this principle, that it was better to go as far as possible towards justice than to deny it altogether.¹

The Court rendering this decision was not a United States District Court interpreting Rule 23 of the Federal Rules of Civil Procedure, but rather the Court of Chancery in England speaking in the fiftieth year of the reign of George III.² This case illustrates that class actions in the securities and corporate fields did not begin as of July 1, 1966, when the amendments to Rule 23 became effective.³ In the period since 1966, however, class actions have proliferated in the federal courts. This article will suggest that the development of class actions has not only had a *dynamic* effect on the securities and corporate laws, which all would concede, but has had a *beneficial* effect as well, a conclusion that has been sharply contested.⁴

* A.B. 1951, Brown University; LL.B. 1954, Yale University; Member of the New York Bar. The author represents the plaintiff in *Eisen v. Carlisle & Jacquelin* (discussed in this article) as well as plaintiffs in other class actions.

1. *Cockburn v. Thompson*, 33 Eng. Rep. 1005, 1008 (Ch. 1809).

2. *See also City of London v. Perkins*, 1 Eng. Rep. 1524 (H.L. 1734); *Mayor of York v. Pilkington*, 26 Eng. Rep. 180 (Ch. 1737).

3. The original Federal Rules of Civil Procedure became effective in 1938, but class actions in the United States date back in time to at least before *Equity R. 38*, 226 U.S. 659 (1912). *See Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853).

4. *Compare* AMERICAN TRIAL LAWYERS ASS'N, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE (1972) (an attack on class actions) *with* Weinstein, *The Class Action Is Not Abusive* (pts. 1-2), N.Y.L.J., May 1, 1972, at 1, col. 3, May 2, 1972, at 1, col. 3 (a defense of class actions) *and* Pomerantz,

Class actions have been more responsible than any other recent development in the law for the creation of new ideas and the challenging of old doctrines. Even the basic concept of what is meant by the term "class" is being remolded through the mechanics of the "fluid class" theory, so that some courts, in an attempt to resolve the problem of how to manage efficiently a recovery involving millions of small claimants,⁵ no longer find it always necessary to channel a recovery only to the individual class members who incurred the damage. In a parallel development, the element of individual reliance, until now a *sine qua non* for recovery in a fraud action,⁶ is being bypassed. But perhaps the greatest impact of the class action has been its deterrent effect; financial statements and press releases are doubtless becoming more accurate because of the fear of a class action.

In order to place these substantive points in perspective, it is important that the procedural framework governing federal class actions be reviewed. The controlling regulation is, of course, Rule 23 of the Federal Rules of Civil Procedure. Rule 23(a), which sets forth the prerequisites of a class action,⁷ requires that the class must be numerous⁸ and that the questions of law or fact at issue must be

New Developments in Class Actions—Has Their Death Knell Been Sounded?, 25 BUS. LAW. 1259 (1970) (a defense of class actions).

5. Federal Rule of Civil Procedure 23(b)(3)(D) states that "the difficulties likely to be encountered in the management of a class action" is one of the factors to be considered by the court in determining whether a class action should be maintained. *See also* FED. R. CIV. P. 23(b)(3)(D), Comment, 39 F.R.D. 95, 104 (1966). One of the problems of management of a class action is devising a recovery technique which will apply to the entire class. *See Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 567 (2d Cir. 1968).

6. One of the traditional limitations imposed on liability for securities fraud is proof that the plaintiff actually relied upon the allegedly fraudulent statement. *See List v. Fashion Park, Inc.*, 340 F.2d 457, 462-63 (2d Cir. 1965); *Harris v. Palm Springs Alpinc Estates, Inc.*, 329 F.2d 909, 914 (9th Cir. 1964). *See also* Comment, *Reliance Under Rule 10b-5: Is the "Reasonable Investor" Reasonable?*, 72 COLUM. L. REV. 562 (1972); Comment, *Spurious Class Actions Based Upon Securities Frauds Under the Revised Federal Rules of Civil Procedure*, 35 FORD. L. REV. 295 (1966); Note, *Class Action Treatment of Securities Fraud Suits Under the Revised Rule 23*, 36 GEO. WASH. L. REV. 1150, 1156-57 (1968). In its notes accompanying the 1966 amendments to Rule 23, the Advisory Committee stated that "material variation . . . in the kinds or degrees of reliance" might militate against a class action. FED. R. CIV. P. 23(b)(3), Comment, 39 F.R.D. 95, 103 (1966).

7. The text of Rule 23(a) reads:

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.

8. Rule 23(a) has been satisfied by a class of only forty persons. *Swanson v. American*

common to all members of the class. Rule 23(b) subsumes all class actions into three categories, the last one of which, Rule 23(b)(3), includes the so-called "spurious" class actions of pre-1966 days.⁹ Virtually all of the class actions in the securities and corporate fields are brought under this category. The significance of categorizing a case under (b)(3) is that it automatically activates the notice requirements of Rule 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.

As the law has evolved since 1966, the notice requirement has assumed an almost decisive role in many class actions. Although adequate notice is a requirement in class actions, this article will suggest that it should be relegated to the level of a technicality. The broad purposes and achievements of class actions should not be funneled through and perhaps frustrated by the complications with which some courts burden Rule 23(c)(2) notices.

A second procedural rigidity affecting class actions arises from the Supreme Court's decision in *Snyder v. Harris*,¹⁰ which held that class members cannot aggregate their claims to reach the \$10,000 amount required for federal diversity jurisdiction.¹¹ The Second Cir-

Consumer Indus., Inc., 415 F.2d 1326, 1333 (7th Cir. 1969). See also *Fidelis Corp. v. Litton Indus., Inc.*, 293 F. Supp. 164, 170 (S.D.N.Y. 1968) (between thirty-five and seventy persons held sufficient).

9. A "spurious" class action (involving, for example, a common accident) was an action in which the questions of law or fact were common as to all members of the class, but in which a decision as to one class member was not binding as to non-appearing class members. On the other hand, a judgment in a "true" class action (involving, for example, the legality of a bond issue) would bind all class members, both appearing and non-appearing. In general, Rule 23(b)(3) cases reflect the old spurious class action and Rule 23(b)(1) cases reflect the old true class actions. One of the purposes of the amendments to Rule 23 adopted in 1966 was to bind all class members in Rule 23(b)(3) actions who did not affirmatively exclude themselves. It should be noted that the line between Rule 23(b)(1) cases and Rule 23(b)(3) cases is not always clear. For a general discussion of the relationship between the old class action categories and the new rules, see *Green v. Wolf Corp.*, 406 F.2d 291, 297 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969).

10. 394 U.S. 332 (1969).

11. In diversity cases the amount in controversy must exceed \$10,000 before the federal district court has jurisdiction of the case. 28 U.S.C. § 1332 (1970). In *Snyder*, the plaintiff

cuit recently extended the *Snyder* holding by denying federal diversity jurisdiction to a class action even where the named plaintiff had a claim in excess of \$10,000 on the ground that *Snyder* requires each class member to have damages in excess of \$10,000.¹² The obvious effect of *Snyder* has been to close the federal courts to all class actions except those in which jurisdiction rests on a federal statute that does not include the \$10,000 requirement. Consequently, almost all class actions in federal courts have been brought under the anti-trust¹³ and securities¹⁴ laws, where there is no jurisdictional requirement of \$10,000. This, in turn, has caused the most recent and dramatic changes in corporate law to be in the securities and antitrust areas.

CLASS ACTIONS IN SECURITIES LAW CASES

Class actions have been used most frequently under the proxy¹⁵ and anti-fraud¹⁶ provisions of the Securities Exchange Act of 1934 (Exchange Act) and the registration provisions of the Securities Act of 1933 (Securities Act).¹⁷ Although pleadings frequently allege wrongs under several of these sections, for purposes of analysis each category will be treated separately.

Proxy Violations

The simplest kind of class action that can be brought under the securities laws is a case involving an alleged proxy violation, because each member of the class is identifiable, the alleged wrong took place

alleged that corporate directors had violated their common-law fiduciary duties by selling their control stock at an illegal premium. The plaintiff challenged the sale in a class action brought on behalf of all other shareholders; although total damages were estimated to be \$1,200,000, the plaintiff alleged that her own damages were only \$8,740. Because the plaintiff's own damages were less than \$10,000, the Supreme Court held that federal courts were without jurisdiction.

If diversity of citizenship jurisdiction had existed in the *Snyder* case for a derivative action (instead of a class action), the amount in controversy would have been the entire \$1,200,000 and diversity jurisdiction would have existed. The landmark case of *Perlman v. Feldmann*, 219 F.2d 173 (2d Cir. 1955), in which jurisdiction was based on diversity, involves facts that were very similar to those alleged in *Snyder*.

12. *Zahn v. International Paper Co.*, ___ F.2d ___ (2d Cir. 1972).

13. Clayton Act § 4, 15 U.S.C. § 15 (1970).

14. Securities Act of 1933 § 22, 15 U.S.C. § 77v (1970); Securities Exchange Act of 1934 § 27, 15 U.S.C. § 78aa (1970).

15. 15 U.S.C. § 78n (1970).

16. *Id.* § 78j.

17. *Id.* § 77k.

at the same instant for all class members, and the damage to each and every class member can be measured in the same manner. Thus, two principal problems that may plague other types of class actions—identification of the class members and individual reliance—are largely missing in a proxy-fraud case.

The elements of a class action brought under the proxy provisions can best be explored through a discussion of the leading case in this area, *Mills v. Electric Auto-Lite Co.*¹⁸ In *Mills*, the plaintiffs, who were minority shareholders of Electric Auto-Lite Company, challenged their company's merger into Mergenthaler Linotype Company on the ground that the proxy statement of Auto-Lite's management was materially false and misleading in violation of section 14(a) of the Exchange Act.¹⁹ The proxy statement, in seeking shareholder approval of the merger, represented that Auto-Lite's directors recommended approval of the merger; it failed to mention that since Mergenthaler owned a majority of Auto-Lite's stock, none of Auto-Lite's directors were acting independently of Mergenthaler. The lower courts agreed that there had been a material omission in the proxy statement, but while the district court found the omission to have affected the vote on the merger,²⁰ the Court of Appeals for the Seventh Circuit held that the plaintiffs would be entitled to relief if and only if the defendants could not show by a preponderance of probabilities that the merger would have been approved anyway.²¹ The court of appeals reasoned that if the terms were fair, the Auto-Lite shareholders would have approved the merger whether or not their own directors were vigilant.²² The Supreme Court unanimously reversed:

The decision below, by permitting all liability to be foreclosed on the basis of a finding that the merger was fair, would allow the stockholders to be bypassed, at least where the only legal challenge to the merger is a suit for retrospective relief after the meeting has been held. A judicial appraisal of the merger's merits could be substituted for the actual and informed vote of the stockholders.

The result would be to insulate from private redress an entire category of proxy violations—those relating to matters other than the terms of the merger. Even outrageous misrepresentations in a proxy solicitation, if they did not relate to the terms of the transaction, would give rise to no cause of action

18. 396 U.S. 375 (1970).

19. 15 U.S.C. § 78n(a) (1970).

20. 281 F. Supp. 826, 829 (N.D. Ill. 1967).

21. 403 F.2d 429 (7th Cir. 1968).

22. *Id.* at 436.

under § 14(a). Particularly if carried over to enforcement actions by the Securities and Exchange Commission itself, such a result would subvert the congressional purpose of ensuring full and fair disclosure to shareholders.²³

The Court suggested that whether or not most Auto-Lite shareholders would have voted for the merger had they known the truth about their submissive directors might never be known.²⁴ The Court reasoned, however, that once it is established that a proxy statement is materially false, "that determination itself indubitably embodies a conclusion"²⁵ that the shareholder vote cannot be allowed to stand.

Mills thus stands for the simple proposition that proxy statements must be true. It epitomizes the need and worth of class actions, for no one else could challenge Auto-Lite's proxy. *Mills* also illustrates a defense that is raised in every class action: even assuming a statement to be false, the class action should not be allowed because each shareholder was affected *individually* by the falsehood. In ruling that a materially false proxy statement is illegal per se, thus dispensing with the requirement that each shareholder must be polled as to the possible effects of the falsity, the Supreme Court posited a clear guideline that directly overcomes one of the principal defenses to class actions—the defense of individual reliance.²⁶ Of equal importance, *Mills* may also indicate, if somewhat indirectly, that the other principal defense to class actions—the defense of unmanageability—may not be a sturdy one. This defense is based on the undeniable fact that it is impossible in many class actions to identify and repay every injured class member. Although this was not the case in *Mills*, the Supreme Court, by holding that a material falsehood is illegal per se without requiring any further proof of causation, implied that a class action can be sustained if a wrong is proven, whether or not damages can also be proven by each class member. This conclusion would mean that the only decisive issue in a class action brought under the proxy provisions should be whether or not the defendants acted legally. If they did, the case should be dismissed; if they did not, the wrongdoers should be made to disgorge any illegally obtained profits. The wrongdoer should not be permitted to argue that he

23. 396 U.S. at 381-82.

24. *Id.* at 382 n.5.

25. *Id.* at 384.

26. It has been suggested that *Mills* does not dispose of the reliance question in securities actions. See Comment, *The Impact of Class Actions on Rule 10b-5*, 38 U. CHI. L. REV. 337, 349-56 (1971), citing cases in which class actions have been dismissed because of differences in reliance among class members.

should keep his illegal gain because there exists no method for precisely repaying each victim.

Another proxy-fraud class action, *Percodani v. Riker-Maxson Corp.*,²⁷ underscores the utility of class actions in the regulation of proxy statements. A merger between Maxson Electronics Corporation and Riker Corporation was submitted to the respective shareholders for their approval. The proxy statement provided that the Riker shareholders would receive Maxson securities having "a fair market value . . . at least equivalent" to the consideration received by Maxson's principal shareholders. A Riker shareholder challenged the merger terms on the ground that the Riker shareholders were, in fact, being offered securities having a value substantially less than what the Maxson insiders had received, a fact which was exactly contrary to the information set forth in the proxy statement. The court ruled that the Riker shareholders had, indeed, been given much less than they had been promised, so that the information contained in the proxy statement was false.²⁸ The defendants argued, however, that even if the proxy statement were false, none of the Riker shareholders were harmed by the misrepresentation. They suggested that Maxson owed no duty to the Riker shareholders to pay them any particular price for their shares; consequently, the shareholders would have received the same consideration regardless of the promises made as to the value of the securities being offered. The court not only rejected that defense but also rejected a settlement of \$1,800,000 as inadequate.²⁹ Without a class action, Riker shareholders—mostly persons with small holdings and generally unable to fend for themselves on an individual basis—would be without \$3,200,000, the final amount paid in settlement.³⁰

No one would deny that all proxy statements are written more carefully because of *Mills* and *Percodani*. This deterrent effect is in itself a significant achievement of class actions. If the plaintiffs had not prevailed in these cases, proxy statements would be largely unregulated today.

27. 50 F.R.D. 473 (S.D.N.Y. 1970).

28. *Id.* at 478.

29. *Id.* The initial claim was for \$12,000,000. The court also rejected defendants' argument that larger damages would cause liquidation of the corporation. Defendants were required to prove Maxson's inability to pay more than the settlement price. *Id.* See also Comment, *supra* note 26, at 350.

30. *Percodani v. Riker-Maxson Corp.*, [1971-1972 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,337, at 91,812 (S.D.N.Y. Jan. 13, 1972).

Registration Statement Violations

Section 11 of the Securities Act imposes liability upon persons responsible for a registration statement if the registration statement or prospectus contains "an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading."³¹ *Feit v. Leasco Data Processing Equipment Corp.*³² illustrates the effect of class actions brought under section 11. Defendant Leasco tendered an offer for the stock of Reliance Insurance Company, a corporation having no relation to Leasco. The gravamen of the complaint was that Leasco deliberately failed to advise Reliance's shareholders that Reliance had a surplus of \$100,000,000. An immediate defense would be that Leasco owed no duty to Reliance's shareholders. But the District Court for the Eastern District of New York, considering the fact that "[s]ection 11 creates almost absolute liability in the issuer,"³³ held that Leasco and its inside directors were liable for not disclosing the fact that Reliance had a surplus of \$100,000,000 which Leasco wanted to acquire. The importance of *Leasco* is not limited to the fact that it vindicated a right of small shareholders; the broader implication lies in the fact that, in response to the decision, every prospectus has been drafted with particular care, for damages will necessarily flow from an omission itself, and there is no need to show how the alleged omission affected the judgment of each class member.³⁴

31. 15 U.S.C. § 77k (1970).

32. 332 F. Supp. 544 (E.D.N.Y. 1971).

33. *Id.* at 575.

34. The class action aspects of *Leasco* were relatively simple. The class members, all Reliance shareholders who had accepted Leasco's offer and had sold Leasco's securities during a ten-week period, were readily identifiable. Other section 11 cases, however, are not so confined. For example, if the alleged fraud is in the earnings statement—that is, if it is alleged that earnings in a prospectus have been materially overstated—the class could be divided into two groups: those who purchased the security on the public offering (a relatively easy group to identify), and those who bought the security on the open market after the allegedly false earnings statement appeared in the financial press (a relatively difficult group to identify).

An example of a court's preference for sub-classes in this type of case is *Herbst v. Able*, 45 F.R.D. 451 (S.D.N.Y. 1968), in which Douglas Aircraft Company was charged with having materially overstated its earnings. Class actions were initiated both by persons who had purchased Douglas securities pursuant to a prospectus which included those allegedly false statements and by those who had purchased Douglas securities on the open market after the earnings had been reported publicly. Although the allegedly false earnings statements were identical, the court created separate sub-classes for each of the categories of plaintiffs and appointed separate general counsel. In explaining the possible need for separate classes, the court, in a later decision in the case, indicated that the claims under section 11 might require a less rigid

Registration statement violations, like proxy statement violations, are monitored more effectively by class actions than by any other device. It is true, of course, that the Securities and Exchange Commission retains great powers, but rarely does the Commission seek more than injunctive relief.³⁵ The class action device provides the only practical way in which those who are damaged by a false registration statement can be repaid.

Since registration statements and proxy statements are carefully worded legal instruments, they violate the securities laws relatively infrequently. Nonetheless, class actions in the federal securities field are expanding due to the flexibility afforded by the umbrella section of the Exchange Act, section 10(b) of the Act and rule 10b-5 promulgated thereunder. Since section 10(b) has become the main theme in federal securities class actions, it will be discussed in some detail.

Section 10(b) Violations

Stated simply, section 10(b) and rule 10b-5 declare illegal any fraud "in connection with the purchase or sale of any security."³⁶ This section has been relied on in a great variety of class actions;³⁷ indeed, critics of class actions have asserted that section 10(b) has been so over-used and misused as to demonstrate the unworthiness of the class action device.³⁸

In the typical section 10(b) class action, a company's publicly-issued earnings report is challenged as false and misleading. If the company's stock drops in value, any person who bought the security after the earnings statement was published may bring a class action on behalf of all other persons who bought the security after the publication date.³⁹ Occasionally, the allegedly false earnings state-

standard of proof of wrongdoing than the claims asserted under section 10(b) of the Exchange Act. *Herbst v. Able*, 47 F.R.D. 11, 18 (S.D.N.Y. 1969). But whether or not this is true, it is clear that the class members affected by a violation of section 11 are far more readily identifiable than those members of the broader class buying Douglas securities on the open market over a period of many months. Consequently, a greater percentage of section 11 claimants than the section 10(b) claimants are likely to be repaid for their damages.

35. *But see* SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082 (2d Cir. 1972) (court granted the SEC's demand that the money be returned to the defrauded investors).

36. 15 U.S.C. § 78j (1970). *See* *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972).

37. In *Green v. Wolf Corp.*, 406 F.2d 291, 295 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969), the Second Circuit acknowledged that one-third of all securities actions are rule 10b-5 cases.

38. *See* AMERICAN TRIAL LAWYERS ASS'N, *supra* note 4, at 18-19.

39. *See* *Herbst v. Able*, 45 F.R.D. 451 (S.D.N.Y. 1968). *See* note 34 *supra*.

ment is not discovered to be false for several years, so that the class which brings an action may consist of hundreds of thousands of persons who bought the security before the revelation.⁴⁰ Furthermore, when a company makes an adjustment in a given year, such as a write-off or write-down of assets, it is often alleged in the complaint that the write-down should have been incurred earlier and that the failure to do so renders the previously reported earnings statement misleading. Again, the class may consist of hundreds of thousands of persons, most of whom cannot be easily identified.⁴¹ Interestingly, one of the most often cited section 10(b) class action cases, *Green v. Wolf Corp.*,⁴² involved a class of only 2,200 persons, although the class encompassed anyone who bought securities of Wolf Corporation over an eighteen-month period. While *Green* may be atypical because of the small size of the class involved, its holding has been broadly applied:

[A] class action may well be the appropriate means for expeditious litigation of the issues, because a large number of individuals may have been injured, although no person may have been damaged to a degree which would have induced him to institute litigation solely on his own behalf.⁴³

Class action difficulties grow, of course, with the size of the class. For example, in one section 10(b) case,⁴⁴ 4,458,400 shares of a company's stock were traded during the five-week period involved in the lawsuit, and approximately 36,000 stock certificates were issued during that period by the transfer agent. Since the Court of Appeals for the Second Circuit had established the merits of the case by holding that certain press releases were materially false and misleading,⁴⁵ the

40. Most section 10(b) cases include the allegation that earnings were overstated. See *Siegel v. Realty Equities Corp.*, 54 F.R.D. 420 (S.D.N.Y. 1972). See also *Garber v. Randell*, Civil No. 70-835 (S.D.N.Y., filed Mar. 7, 1970). The complaint in *Garber* includes the allegation that the earnings figures reported by National Student Marketing Corporation were overstated for the years 1968 and 1969.

41. Identification is difficult for several reasons: much stock is owned in "street names"; some of the persons who bought stock during the period may not be in the class because they sold the stock at a profit before the revelations were made (in addition, this group is difficult to delineate); finally, since the wrong may have taken place years before the action was begun and since the case itself might require several additional years to litigate, the existing records of names and addresses may be stale. See *Berland v. Mack*, 48 F.R.D. 121, 130 (S.D.N.Y. 1969); *Herbst v. Able*, 47 F.R.D. 11, 17 (S.D.N.Y. 1969).

42. 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969).

43. 406 F.2d at 296.

44. *Berland v. Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969).

45. *SEC v. Great American Indus., Inc.*, 407 F.2d 453 (2d Cir. 1968), *cert. denied*, 395 U.S. 920 (1969).

class action was settled, and members of the class were invited by notice to submit their claims. Many persons who were injured by the fraud did not submit a claim. Obviously, some members of the class did not receive notice; other class members may not have bothered to examine their records and fill out the necessary forms. Despite these imperfections, the only method for vindicating the claims of the class members was a class action.

The real problem of section 10(b) class actions is not the fact that the class is often very large and, in turn, difficult to identify and locate, but rather the fact that the merits of some section 10(b) actions are sometimes thought to be thin.⁴⁶ As previously noted, cases that challenge a prospectus or proxy statement involve a challenge to carefully written legal documents. Many section 10(b) cases, on the other hand, are based on press releases often hastily written with little thought as to the possible legal consequences. Thus, persons responsible for drafting these press releases often argue that little evidence exists to support a section 10(b) claim that a press release was issued for fraudulent purposes. Rather, any inaccuracies in the press release are usually attributable to the difficulty of drafting under time pressures a comprehensive statement in the form of a news release. This problem was underscored by Judge Friendly in his concurring opinion in *SEC v. Texas Gulf Sulphur Co.*:⁴⁷ “[t]he consequences of holding that negligence in the drafting of a press release . . . may impose civil liability on the corporation are frightening.”⁴⁸ The *Texas Gulf Sulphur* case presents this problem in a nutshell. A press release was drafted under great time pressure by non-lawyers for non-lawyers. There was no suggestion that the drafters did not intend for the release to be accurate. Nevertheless, the Second Circuit held that the press release was inaccurate and the market price of Texas Gulf Sulphur’s stock reflected those inaccuracies, thereby damaging tens of thousands of investors. A vigorous dissent challenged what it considered to be the majority’s “utterly unrealistic approach to the problem of the corporate press release,” observing that, for purposes of finding liability, a press release should not be treated as a prospectus.⁴⁹

46. The relationship between the merits of an action and its class status is discussed in *Miller v. Mackey Int'l, Inc.*, 452 F.2d 424 (5th Cir. 1971) and *Lamb v. United Security Life Co.*, CCH 1972 FED. SEC. L. REP. ¶ 93,489 (S.D. Iowa, May 22, 1972).

47. 401 F.2d 833, 864 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

48. 401 F.2d at 866.

49. *Id.* at 888.

The fact is, however, that far more investors rely on press releases than on prospectuses. What courts under section 10(b) have done is to make a corporation, and possibly its accountants, directors, and officers, responsible for the accuracy of the information disclosed to investors through any medium of communication.⁵⁰ If what was said to the public was knowingly or carelessly false, there should be a recovery, for the very purpose of the federal securities laws is full and honest disclosure.⁵¹ Class actions—and the specter of class actions⁵²—have become the single most important factor in the enforcement of these laws.

The legal developments resulting from section 10(b) class actions extend, however, beyond the securities laws. Although section 10(b) has often been described as the statutory reflection of common-law fraud, one of the elements of a fraud case—the element of reliance—is being made obsolete in section 10(b) actions. It is clear that if reliance were a necessary element in a section 10(b) case, a class action could not be brought because the extent to which a person relied on the alleged fraud would be a highly individual matter.

The law has responded to this problem so that individual reliance is no longer an element in a section 10(b) class action if an alleged *omission* is the crux of wrong.⁵³ But even where the alleged wrong is a positive *misstatement*, the element of reliance is being bypassed.⁵⁴ If a complaint alleges that as a result of a misstatement the

50. Accountants, directors and officers have long been subject to liability under section 10(b). See *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *ccrt. denied*, 394 U.S. 976 (1969) (directors and officers); *Fischer v. Kletz*, 41 F.R.D. 377 (S.D.N.Y. 1966) (accountants). The SEC has recently brought an action naming not only the company's accountants but also its lawyers as defendants. *SEC v. National Student Mktg. Corp.*, *filed*, Civil No. 225-72, D.D.C. Feb. 3, 1972.

51. See *Popkin v. Bishop*, 464 F.2d 714 (2d Cir. 1972).

52. Haunted by the Penn Central's collapse and threatened by lawsuits over inaccurate or misleading corporate financial reports, outside directors and auditors are creating an "early warning system" to detect corporate problems before they develop into crises. It's called the audit committee. *Wall St. J.*, May 31, 1972, at 36, col. 1.

The same point concerning the deterrent effects of lawsuits was made in regard to derivative actions by Judge Rifkind in *Brendle v. Smith*, 46 F. Supp. 522 (S.D.N.Y. 1942):

The measure of effectiveness of the stockholder's derivative suit cannot be taken by a computation of the money recovery in the litigated cases. The minatory effect of such actions has undoubtedly prevented diversion of large amounts from stockholders to managements and outsiders. Corporate attorneys now have an arsenal of authorities to support their cautioning advice to clients who may be disposed to risk evasion of the high standard the courts have imposed upon directors. *Id.* at 526.

53. See *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153 (1972).

54. See *Korn v. Franchard Corp.*, 456 F.2d 1206 (2d Cir. 1972); *Green v. Wolf Corp.*, 406

market price of a security was artificially inflated, a class action should be upheld on the theory that everyone paid the same excessive price, whether or not he read the misstatement. Thus, the test of section 10(b) liability is beginning to center around the question of whether a wrong was committed that caused damage. Causation is replacing reliance.⁵⁵

In the securities setting, where tens of millions of shares are traded everyday, it makes little sense to prevent a recovery for a false statement simply because many, or even most, class members may not have read that statement. Each class member paid a higher price as a result of the false statement, whether he read it or not. Accordingly, courts in section 10(b) cases have found it necessary to by-pass the roadblock of reliance.

The defense of reliance has been only one of the high hurdles that plaintiffs in class actions have had to overcome. The other principal barrier is the defense of unmanageability. In many situations, defendants correctly argue that there is no method by which each member of a class can be made whole. From that premise, defendants argue that a class action cannot lie. It is suggested in the following discussion, however, that as a result of class actions in antitrust cases, techniques are being developed to avoid the anomalous situation of permitting the wrongdoer to profit from his own wrong simply because the class is considered to be unmanageable.

CLASS ACTIONS IN ANTITRUST CASES

The most difficult problem facing the courts in antitrust class actions is the need to create techniques which solve the unmanageability problem that accompanies any class action with a large number of members.⁵⁶ Courts have responded to the problem by devising

F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); *Wolfson v. Solomon*, 54 F.R.D. 584, 588 (S.D.N.Y. 1972); *Feder v. Harrington*, 52 F.R.D. 178 (S.D.N.Y. 1970).

55. See I A. BROMBERG, *SECURITIES LAW* § 8.6, at 209 (1971). This development in the law is parallel to the changes that made the element of privity obsolete in the early days of the automobile. See, e.g., *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). In that situation, it made no sense to hold a dealer liable while providing immunity for the manufacturer when the cause of action arose as a result of a defective automobile. For a general discussion of class actions in the consumer fields, see Julien, *Products Liability—Are Class Actions Available in Product Cases?*, N.Y.L.J., May 31, 1972, at 1, col. 1; Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338 (1971).

56. Rule 23(b) states in part:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . (3) the court finds that the questions of law or fact

several fair and practical solutions. An example of such a solution is illustrated by *West Virginia v. Chas. Pfizer & Co.*,⁵⁷ a civil action based on an alleged violation of the antitrust laws by certain drug manufacturers. In addition to actions by each of the states and cities that had bought the drugs at illegally high prices, a class action was brought on behalf of some 150,000,000 persons⁵⁸ who bought the price-fixed drugs in the period 1953-1966. Obviously, there existed no method by which the drug companies could repay each person who had overpaid. Nevertheless, notices inviting persons who had purchased the specific drugs to submit their claims were placed in virtually every general circulation newspaper in the United States. The notice also advised persons of their right under Rule 23 to exclude themselves from the lawsuit. As a result of these notices, 42 persons requested that they be excluded and 38,000 persons filed claims for a total of \$16,500,000. The *Pfizer* case was settled, and, as was foreseen, most of the settlement amount for members of the consumer class went unclaimed. Even though each of the individuals who had bought the drugs could not be repaid, the drug companies were not allowed to retain their illegally-obtained profits; rather, application of the cy pres doctrine allowed the unclaimed portion of the recovery to be given to the states to support their present health care programs.⁵⁹

Although *Pfizer* was settled, the issue of whether the consumer group constituted a proper class under Rule 23 was one of the questions before the Second Circuit.⁶⁰ The challenge to the propriety of a consumer class action was made by another group, the wholesaler-

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: . . . (D) the difficulties likely to be encountered in the management of a class action.

57. 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971). See Shapiro, *Consumer Participation in Antitrust Class Actions* (pts. 1-3), N.Y.L.J., May 30, 1972, at 1, col. 1, May 31, 1972, at 1, col. 1, June 1, 1972, at 1, col. 1.

58. Affidavit by Arthur J. Galligan, Record, at 109a, *Eisen v. Carlisle & Jacquelin*, appeal docketed, Nos. 30934 & 72-1521, 2d Cir., 1972. This affidavit was submitted by the plaintiff for the purpose of showing the manageability of the *Eisen* class.

59. Since *Pfizer* was settled, the cy pres payments were made by agreement among all the parties. Nevertheless, the drug company defendants would doubtless have not paid so grand a sum in settlement unless they feared losing an even larger sum if the case were litigated. Furthermore, in approving the settlement, the appellate court suggested that the theory of *parens patriae* might have been applicable to the case. 440 F.2d at 1089. See Comment, *Wrongs Without Remedy: The Concept of Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 43 S. CAL. L. REV. 570 (1970).

60. 440 F.2d at 1089.

retailer class, which sought to recover for itself thirty-seven million dollars allocated to the consumers' class. The essence of the challenge was that a class action could not be brought because no method existed for repaying the individual members of the class. The wholesaler-retailer class argued that the consumer class was too large, its members were unidentifiable, and the individual claims were too small to be processed. The Second Circuit rejected this challenge and held that the consumer class, estimated to include 150,000,000 persons, was a proper class under Rule 23. In so ruling, the court also specifically upheld the method by which the class members had been repaid.

Another antitrust class action that merits attention is *Eisen v. Carlisle & Jacquelin*.⁶¹ The complaint in *Eisen* alleged that the two brokerage firms transacting over 99 percent of the odd-lot business on the New York Stock Exchange fixed the price of the odd-lot differential in the period 1962-1966 in violation of the Sherman Act.⁶² The number of class members approximated 6,000,000 persons. Defendants challenged the propriety of a class action, asserting that, even if plaintiff prevailed on the merits, there existed no method to repay those individuals who had overpaid, and, therefore, the class was not manageable. The District Court for the Southern District of New York, however, took a broader view. It reasoned that if the odd-lot differential had been illegally fixed, defendants should not reap the benefit. Since it was acknowledged that individual recovery would be difficult to achieve because most of the 6,000,000 class members had only small losses, the court indicated that it could fashion a recovery technique that would be manageable: if the odd-lot differential were found to be illegal under the antitrust laws, the wrongdoers could be ordered to reduce the odd-lot differential in the future.⁶³ Thus, the wrongdoers would surrender their illegal profits, and the defense of unmanageability would be by-passed. As a result, the *class* of odd-lot buyers and sellers would be made whole, although each of the *individuals* who overpaid because of the fixed price would not necessarily be compensated. The court's theory of recovery was buttressed

61. 52 F.R.D. 253 (S.D.N.Y. 1971), *appeal docketed*, No. 30934, 2d Cir., 1972; 54 F.R.D. 565 (S.D.N.Y. 1972), *appeal docketed*, No. 72-1521, 2d Cir., 1972.

62. 15 U.S.C. §§ 1-2 (1970). An odd-lot is a transaction involving fewer than 100 shares. When an odd-lot is bought (or sold), the buyer (or seller) is charged an extra commission called the odd-lot differential.

63. 52 F.R.D. at 264-65.

by the specific finding that many of the odd-lot users of 1962-1966 continue to be odd-lot users, so "that the benefits of any recovery will flow in the main to those who bore the burden of defendants' allegedly illegal acts."⁶⁴ As in *Mills*,⁶⁵ the emphasis of the court was on the merits of the claims, not in the ultimate proof of *individual* damage.

The *Eisen* principle, denominated by the court as the "fluid class" theory of damage recovery,⁶⁶ is a practical solution to the manageability problem existing in cases in which the class consists of millions of persons who individually suffered relatively small damages. Attempting to ascertain and pay each class member his exact damages may not only be too burdensome for the court, but may also be an expense that would consume too great a portion of the recovery. Consequently, courts have fashioned the fluid class theory in order to distribute the recovery efficiently and economically. The first step in applying the theory is to establish the amount of the gross damage, a figure that is usually obtainable or ascertainable from the defendants' records.⁶⁷ A damage fund is then created from which litigation expenses and claims from class members possessing adequate proof of these damages are deducted. The remainder of the damage fund constitutes the general recovery to the rest of the class.⁶⁸

An example of the application of the fluid class theory is found in *Bebchick v. Public Utilities Commission*.⁶⁹ In *Bebchick*, the Public Utilities Commission in Washington, D.C. had approved a bus fare increase from 20 to 25 cents per ride. This increase was challenged by one bus rider. The bus company argued that notwithstanding the legality or illegality of the increase, the case should be dismissed because there existed no method for returning the five cents per ride

64. *Id.* at 264.

65. See notes 18-23 *supra* and accompanying text.

66. 52 F.R.D. at 264.

67. For example, in both *Market St. Ry. v. Railroad Comm'n*, 28 Cal. 2d 363, 171 P.2d 875 (1946), see notes 72-73 *infra* and accompanying text, and *Bebchick v. Public Util. Comm'n*, 318 F.2d 187 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963), see notes 69-71 *infra* and accompanying text, the precise amounts of the damages were determined. In *Eisen*, the plaintiff was able to show that had the defendants effected the same change in the differential during the period in question (1962-1966) that they effected in 1966, public savings from that change alone would have been \$4,934,000 annually. The defendants gave no reason why the reduction could not have taken place earlier.

68. See Comment, *supra* note 55, at 364-65. However, in *Eisen*, the plaintiff has noted that since 56% of the odd-lot transactions during the period in question are preserved on computer tapes, it might be possible to give precise recovery to many small claimants.

69. 318 F.2d 187 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963).

to those who had allegedly overpaid. The court ruled, however, that the fare increase was illegal. Having decided the merits of the case in plaintiff's favor, the court had to fashion a recovery that would force the bus company to return what it had illegally obtained. Had no method of repayment been found, the court would have been in the anomalous position of permitting the defendants to benefit from their own wrong. The court recognized, of course, that separate refunds could not be made to each rider, but it fashioned another solution:

It is not feasible to require refunds to be made to individuals who paid the increase. Nevertheless, the amount realized by Transit from the increase must be utilized for the benefit of the class who paid it, that is, those who use Transit. To accomplish this Transit will be required to establish a fund in an amount equal to the 5 cent increase collected during the specified period, in other words, 5/25 or 20 per cent of the total cash fares collected The utilization and disposition of the fund, or the special account or reserve, as the case may be, shall be left to the discretion of the Commission having regulatory authority with respect to Transit, provided such discretion is exercised consistently with the purpose of benefiting Transit users in any rate proceedings pending or hereafter instituted. For example, the fund might be used to cover costs which otherwise might lead to an increase in fares, or might be used to aid in determining whether fares should be reduced now or hereafter.⁷⁰

The net result of the court's solution in *Bebchick* is that the defendant repaid what it had improperly taken to "the class who paid it"—that is, to the bus riders of Washington, D.C. To be sure, the individuals who had overpaid would not individually receive their money back, but the alternative of permitting the bus company to retain its illegally obtained profits did not appear equitable to the court.⁷¹

Bebchick, it should be noted, was not the first utility case that applied the fluid class theory. In *Market Street Railway Co. v. Railroad Commission*,⁷² the San Francisco trolley car company was held to have charged one penny too much per ride. Rather than permit the wrongdoer to be enriched by \$700,000, the California Supreme Court ordered that the full amount be turned over to the City of San

70. *Id.* at 203-04.

71. The defendant in *Bebchick* sought permission several years later to apply the reserve to what it considered to be a needed fare increase, but the court held that no fare increase had yet been justified. See *Williams v. Washington Met. Area Transit Comm'n*, 415 F.2d 922 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1081 (1969). Because of the result reached in *Bebchick*, transit riders in the 1970's will be benefiting from the decision in 1963 that a fare increase made effective in 1960 was illegal.

72. 28 Cal. 2d 363, 171 P.2d 875 (1946).

Francisco to be used for trolley car improvements. Under this approach, the defendant could not profit from his wrong and the fund would "inure to the benefit of those whose payments accumulated the fund."⁷³

The fluid class theory has also been applied to steamship rates,⁷⁴ garbage disposal fees,⁷⁵ and, most dramatically, to taxi fares. In *Daar v. Yellow Cab Co.*,⁷⁶ a taxicab rider brought a class action on behalf of all persons who had ridden in defendant's taxicabs in the previous four years. The complaint alleged that the taxicab company had purposely rigged its meters. This allegation was based on findings by California's regulatory agencies and was not challenged; instead, the defendant argued that the class action should be dismissed because the overcharge could not be returned to the tens of thousands of unidentified persons who had been wrongfully overcharged. The California Supreme Court, sitting en banc, recognized that it would not be possible to repay each member of the class but ruled that the trial court should try to fashion "a procedure that would permit the allegedly injured parties to recover the amount of their overpayments" because such a procedure "is to be preferred" over permitting the defendants to benefit from their own willful wrong.⁷⁷ The state of California, in an amicus curiae brief, urged the court to make a disposition that "would insure . . . that defendant would not retain the alleged unjustly acquired benefits";⁷⁸ and if no other procedure could be devised, it urged that the overpayments be given to the state. Since it was undisputed that the wrongdoers illegally rigged their taxi meters, the court concluded that it should do whatever it could to make the wrongdoers return their illegal gains. *Daar* was settled when the defendant agreed to reduce its future taxi fares until the past overcharges were repaid to the riding public. As in *Eisen, Market Street Railway* and *Bebchick*, the *Daar* class would receive the benefits although each of the individuals who had overpaid years earlier might not, in fact, be repaid.⁷⁹

73. *Id.* at 373, 171 P.2d at 881.

74. *Alaska S.S. Co. v. FMC*, 344 F.2d 810, 815 n.4 (9th Cir. 1965).

75. *Olson v. Superior Court*, 274 Cal. App. 2d 316, 79 Cal. Rptr. 136 (1969).

76. 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

77. *Id.* at 715, 433 P.2d at 746, 63 Cal. Rptr. at 738.

78. *Id.* at 715 n.15, 433 P.2d at 746 n.15, 63 Cal. Rptr. at 738 n.15.

79. It has been suggested that *Daar* might not provide a foundation for the emergence of a fluid class theory, as the California Supreme court stated in *Daar* and in *Vasquez v. Superior Court*, 4 Cal. 3d 800, 815, 484 P.2d 964, 973, 94 Cal. Rptr. 796, 805 (1971), that individual demonstration of damages was a requisite to recovery. See Comment, *supra* note 55, at 367.

The fluid class theory also has support in the analogous situation of derivative stockholder actions. In such cases, recoveries, when made, are usually granted many years after the occurrence of the alleged wrong. The recovery redounds, therefore, to the benefit of the corporation's shareholders at the time of the recovery and not to those shareholders who actually incurred the damage.⁸⁰ This result in derivative cases has never been questioned because the action is brought on the corporation's behalf, and it is the corporation which recovers; therefore, changes in the shareholder list have been considered irrelevant. It is only a slight extension of this argument to suggest that for purposes of a class action, the class continues, even though some of its members may change.

It is suggested, therefore, that unmanageability need not be a bar to bringing a class action. Where a defendant charges a price for its goods or services that is fixed by law, as in *Eisen* and *Daar*, reductions could be made in the future until the overcharge is repaid to the class. Where the price is not regulated, as in *Pfizer*, defendants may be ordered to give the illegally obtained money to a charity or philanthropic institution by invoking the *cy pres* doctrine. Finally, defendants might be required to return their illegal profits to the government for the specific benefit of the class who overpaid, as in *Market Street Railway*, or for the good of the general population, as was suggested by the state of California in *Daar*. In short, there are indications that the law of class actions may be moving toward the principle that a plaintiff's case depends only upon its substantive merits, not upon defenses related to procedural aspects of the class action. To be sure, most of the litigated cases espousing that view have fashioned a technique for recovery which specifically benefits the class on whose behalf the action was begun. But these cases also strongly imply that the more important factor is that the wrongdoers should be forced to return their illegally obtained profits and not that individual class members have a right to repayment. Indeed, some precedents are possibly being shaped that would permit a plaintiff to succeed in a class action even if there were no method by which the class itself could directly receive the benefits.⁸¹

80. For an extreme example of ownership change, see *Perlman v. Feldmann*, 129 F. Supp. 162 (D. Conn. 1952), *rev'd*, 219 F.2d 173 (2d Cir. 1955), *on remand*, 154 F. Supp. 436 (D. Conn. 1957). The ultimate recovery went to a new owner who had purchased 95 percent of the company's shares subsequent to the wrongs alleged in the original complaint. See MOODY'S INDUSTRIAL MANUAL 2646 (1955).

81. See *California v. Frito-Lay, Inc.*, 333 F. Supp. 977 (C.D. Cal. 1971), *appeal docketed*,

As an indication of the recognition that has been given to the fluid class theory, it is interesting to note that the editors of the *Manual for Complex and Multidistrict Litigation* have proposed this addition to the *Manual*:

In this connection, when there exists a class of millions, in which there is a continuous substantial change in individual membership, if that class is entitled to money relief, channeling such relief to the class with its current membership may result in substantial justice without incurring an unbearable expense in identifying the individual members of the original class.⁸²

The degree of acceptance which will be accorded these developments is as yet unclear, for the overwhelming number of cases still adhere to an orthodox approach to class actions, and some courts still maintain a strong bias against class actions. Perhaps the most extreme illustration of the fact that progress towards liberality in class action determinations has not been universal and that those actions can still be hobbled, if not barred, by technical defenses is *Zachery v. R.H. Macy & Co.*⁸³ In *Zachery*, a New York court held that several department stores were charging illegally excessive interest rates. The names and addresses of virtually all of the customers, as well as their interest charges, were preserved on computer tapes; therefore, direct, precise, and relatively inexpensive recovery could have been directed to those who overpaid. Even though the members of the class could be readily identified and the plaintiff's claim was meritorious, the court allowed the defendant to retain its illegally-obtained profits by denying the procedural validity of the class action.⁸⁴

No. 72-1269, 9th Cir., Feb. 8, 1972. The case is being appealed pursuant to 28 U.S.C. § 1292(b) (1970). See also the discussion of *parens patriae* in *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1089 (2d Cir. 1971). The *parens patriae* theory was also discussed by the United States Supreme Court in *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-60 (1972), but it was rejected as a basis for recovery for treble-damage antitrust claims because of the availability of class actions. Cf. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968), in which the Court upheld an antitrust judgment on the ground that otherwise the wrongdoers would "retain the fruits of their illegality"; however, this case was not a class action.

82. MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION § 1.43, at 28 (Feb. 1972 Draft).

83. 39 App. Div. 2d 116, 332 N.Y.S.2d 425 (1972). The New York Court of Appeals reversed the Appellate Division on the merits and specifically declined to discuss the appropriateness of a class action. ___ N.Y.2d ___, ___ N.E.2d ___, ___ N.Y.S.2d ___ (1973). It should be noted that a federal court permitted a class action in the identical situation. See *Zachary v. Chase Manhattan Bank*, 52 F.R.D. 532 (S.D.N.Y. 1971).

84. Although New York and California have virtually the same class action statute, the two states are poles apart on class action determinations. California is perhaps the most progressive state in the United States in this regard. See, e.g., *Vasquez v. Superior Court*, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971) (en banc); *Jones v. H. F. Ahmanson &*

PROCEDURAL DEFENSES IN CLASS ACTIONS

Although the law of class actions has developed broadening principles of recovery in the securities and antitrust fields, certain procedural rigidities, which are applicable to all Rule 23(b)(3) class actions and, consequently, to securities and antitrust class actions, have also developed. The principal procedural problem is created by the notice requirement of Rule 23(c)(2). If the plaintiff must assume the expenses of giving individual notice, the case, no matter how meritorious, would often be abandoned at an early stage. For an extreme example, the defendants in *Eisen* wanted the plaintiff to mail individual notices to each of the 2,000,000 persons who could be identified from computer tapes.⁸⁵ The cost, which would include \$160,000 in postage alone, could not be borne by the plaintiff, whose total damages were \$70.⁸⁶ Some courts have, nevertheless, been inflexible, requiring the plaintiffs either to bear the cost of notice or to abandon the lawsuit.⁸⁷ Since such a result is clearly drastic, courts have begun to fashion a new device, sometimes referred to as a "mini-hearing."⁸⁸ Under this procedure, the court holds a preliminary hearing to determine the plaintiff's chances of winning at trial. If the court determines that the defendants will probably prevail, the plaintiff is required either to assume the expenses of providing notice or to drop the suit. If, on the other hand, the plaintiff's case appears to be strong, the defendant is charged with the cost of the notice.

While some courts treat the notice requirement as more of a technicality than a substantive bar, other courts have been more literal in their interpretation of Rule 23(c)(2). This literal approach is utilized by defendants, who almost invariably argue that extensive and expensive notice is necessary, hoping thereby to terminate the case before it reaches even the pre-trial stage. The defendants' principal argument has been that without full notice, class members are

Co., 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969); *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967). New York, on the other hand, is perhaps the most conservative. *See, e.g.*, *Hall v. Coburn Corp. of America*, 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970). For a helpful analysis of the class action law of New York, see Burman, *Class Actions*, 23 SYRACUSE L. REV. 653 (1972).

85. 52 F.R.D. 253, 257, 267 (S.D.N.Y. 1971).

86. 370 F.2d 119, 120 (2d Cir. 1966).

87. *See, e.g.*, *Feder v. Harrington*, 52 F.R.D. 178 (S.D.N.Y. 1970); *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968).

88. *See Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253 (S.D.N.Y. 1971); *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968).

denied the due process of law guaranteed by the Constitution. They reason that Rule 23 permits any class member to be excluded and not to be bound by the determination in the class action; therefore, a class action cannot proceed unless and until every class member is personally apprised of his right to be excluded. Defendants argue that if a class action does proceed without all members having been personally notified of their right to be excluded, the unnotified persons will have been deprived of their rights under Rule 23(c)(2) without due process of law. Defendants thus seek to benefit only themselves by seeking an early dismissal of class actions when they pose as the champions of plaintiffs' constitutional rights.

There are two answers to defendants' constitutional argument. First, the essence of due process in class actions is the adequateness of the class representative (and his attorney),⁸⁹ not the sufficiency of the notice. This argument is underscored by the second response to defendants' argument. Typically, fewer than one percent of class members request to be excluded;⁹⁰ consequently, there is little reason to jeopardize the rights of over 99 percent of the class members by treating the notice requirement as a substantive bar. Since Rule 23(c)(2) requires only the "best notice practicable," notice in most instances could be reduced to the level of a ritualistic requirement without affecting any rights of the class members.⁹¹

By analogy, it should be noted that in derivative litigation the requirement of Rule 23.1 that the plaintiff make a prior demand upon directors and shareholders before bringing the action or explain why such demands were not made has long receded into a formality.⁹² The decisive question in derivative cases is whether the defendants committed a wrong which caused damage. Perhaps the notice requirement in class actions should likewise be treated as a technicality so that the merits of the plaintiff's allegations will be the focal point of

89. See *Hansberry v. Lee*, 311 U.S. 32 (1940); *Feder v. Harrington*, 52 F.R.D. 178 (S.D.N.Y. 1970).

90. See *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1083 (2d Cir. 1971) (42 individual purchasers requested to be excluded from a class of 150,000,000 persons); *AMERICAN TRIAL LAWYERS ASS'N*, *supra* note 4, at 11.

91. In *Eisen v. Carlisle & Jaquelin*, 391 F.2d 555, 568-70 (2d Cir. 1968), the court specifically rejected the argument that the requirement of notice could only be satisfied by a ritualistic process. *But see Berland v. Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969).

92. See *Levitt v. Johnson*, 334 F.2d 815 (1st Cir. 1964), *cert. denied*, 379 U.S. 961 (1965); *Gottesman v. General Motors Corp.*, 268 F.2d 194 (2d Cir. 1959). *But see In re Kauffman Mut. Fund Actions*, 337 F. Supp. 1337 (D. Mass. 1972).

the lawsuit. This is a development, however, that must await the future.

In addition to the required notice informing a member of the class that he may request to be *excluded* from the class action, it has been argued in some cases that each class member should be required to show an intent to be *included* in the class action.⁹³ Thus, some courts have held that only persons who submit their damage claims in advance of the trial remain as members of the class. Where this practice is followed, class membership shrinks almost to the vanishing point. At least one appellate court has recognized the dangers of such a requirement and has refused to sanction its use.⁹⁴

Thus, while most of the experience with class actions in the securities and antitrust fields has been concerned with developing new recovery techniques and obviating the need for individual reliance, the requirements of notice and submission of damage claims before trial have served as an anchor against change.

CLASS ACTIONS IN CONTEXT

The development in class actions has been built, case by case, largely by federal trial judges acting under Rule 23.⁹⁵ Although the law of other periods evolved over generations or even centuries, class actions have come to maturity in faster-moving times. Litigation has become prolific; consequently, the courts have gained the experience in a few years that once took scores of years.

The rapidly expanding utilization of class actions, particularly in the securities and corporate fields, has triggered controversy. It is alleged that many meritless suits are brought which defendants must settle only because of their huge potential liability (the so-called *in terrorem* argument); it is alleged that class actions clog the courts; and it is alleged that class actions benefit no one except the plaintiff's lawyer.

93. See *Lamb v. United Security Life Co.*, CCH 1972 FED. SEC. L. REP. ¶ 93,489, 92,368-69 (S.D. Iowa, May 22, 1972). The *Lamb* court rejected this argument claiming that "failure of members of the class to express interest in a lawsuit does not necessarily indicate an inadequacy in the representation. *Id.* at 92,368.

94. *Korn v. Franchard Corp.*, 456 F.2d 1206 (2d Cir. 1972).

95. See generally Miller, *Problems in Administering Judicial Relief in Class Actions Under Federal Rule 23(b)(3)*, 54 F.R.D. 501 (1972). Professor Miller has stated that class action rules should remain flexible so that district court judges could continue to display the "ingenuity . . . the innovativeness, the creativity [and] the sensitivity" which permitted them to manage "seemingly unmanageable litigation." Statement by Arthur R. Miller, Meeting of the Board of Editors for the MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION, Mar. 23, 1972.

It is not suggested here that every class action is a worthy one. However, certain points should be made. When a frivolous class action is brought, defendants usually do not shy away from making a vigorous defense, and since most defendants are substantial business entities, they can easily afford to do so. On the other hand, attorney's fees for plaintiff are contingent—that is, the plaintiff's attorney is paid only if, when, and to the extent that he is successful in recovering for the class. Thus, no motive exists for a lawyer to undertake a class action suit that he considers unworthy. While it is true that weak class actions are filed, the same charge could be made against every branch of the law; yet no one suggests, for example, that all antitrust litigation be barred because some antitrust cases are easily dismissible. With respect to the allegation that class actions clog the courts, it is suggested that Mr. Justice Black's argument is persuasive, that court congestion, even were it to exist, "should not weigh more heavily in our system of justice than assuring a full-fledged, due process trial of every bona fide lawsuit brought to vindicate an honest, substantial claim."⁹⁶ The primary justification for allowing class actions is that such actions are the only method by which small claimants can vindicate their rights against large and powerful defendants. Without class actions, huge wrongs would be unremedied. Although critics have focused on the imperfections of class actions, they have failed to suggest any alternatives.

In broadly reviewing the development of class actions in the last ten years, it should be noted that this development has reflected the general, contemporary direction of the law to develop protections for the individual. The right of one small investor to sue a large corporation to redress a wrong affecting thousands or even millions of persons is an example of the same principle that guarantees to every individual defendant in a criminal case the right to counsel,⁹⁷ and which holds that a private citizen can challenge in a court of law the right of the United States to explode an atomic device.⁹⁸ As our

96. Amendments to Rules of Civil Procedure for the United States District Courts, 383 U.S. 1029, 1034 (Black, J., dissenting). The idea that class actions clog the courts is derived not from judicial authorities but from defendants' own statements. See AMERICAN TRIAL LAWYERS ASS'N, *supra* note 4, at 13-15; Keeffe, *California Style Class Suits and Coram Nobis*, 58 A.B.A.J. 773 (1972).

97. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

98. *Committee for Nuclear Responsibility, Inc. v. Schlesinger*, 404 U.S. 917 (1971). Other types of cases underscore the law's concern with individual rights. See, e.g., *Sniadach v. Family*

nation races into an era of a trillion-dollar-per-year economy dominated by a few hundred corporate giants, it is a measure of the law's continuing respect for the individual to permit one person, through the device of a class action, to challenge alleged economic wrongs.

Fin. Corp., 395 U.S. 337 (1969) (requiring notice and a hearing before garnishment of salary); Reynolds v. Sims, 377 U.S. 533 (1964) (each vote must be equal); Office of Communications of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) (listener can challenge the renewal of a broadcasting license); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (private citizen can sue to prevent the construction of a power plant).

