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The Consumer Class Action

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Kansas Law Review

THE CONSUMER CLASS ACTION

*Arthur H. Travers, Jr.**

*Jonathan M. Landers***

Although the so-called "consumer revolution" that erupted during the last decade shows no signs of abating, there has of late been something of a shift in emphasis. Until recently, many, if not most, consumer spokesmen stressed the inadequacy of existing substantive standards, and the thrust of their legislative effort was to secure laws that would make unlawful certain objectionable business practices theretofore sanctioned by law. Thus, the 1960's saw the passage of legislation designed to force merchants to make certain disclosures regarding interest rates, to establish minimal safety standards for automobiles and other products, to reduce the amount of confusing packaging, etc.

At present the focus seems to be less upon securing new substantive rules of behavior and more upon the problems of securing compliance with standards already established. Recent revelations regarding the deficiencies of the law courts and the enforcement agencies have underlined the obvious truth that it is not enough to pass a law prohibiting or requiring certain conduct; some mechanism must be provided to secure compliance. While some laws may be virtually self-enforcing, it is painfully apparent that the tendency of businessmen to obey the law simply because it is the law cannot be relied upon exclusively. Presumably, it is less profitable to obey the law, otherwise no law would be needed. Moreover, many prohibited practices are hard, if not impossible, to distinguish from what most businessmen would call "progressive merchandising." Their conduct seems thus morally laudable as well as profitable; any qualms to the contrary are dismissed by the notion that most consumers are really too shrewd to be injured and the remainder don't deserve protection.¹

But, existing sanctions also seem ineffectual to secure compliance. Accordingly, a variety of new sanctions and enforcement mechanisms are now under consideration. Among these, the proposal to give consumers a private right of action enforceable by a class suit in the federal courts has received the lion's share of the attention.² It has been extravagantly praised and damned in

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¹ See generally F. SUTTON, S. HARRIS, C. KAYSEN, & J. TOBIN, *THE AMERICAN BUSINESS CREED* 139-55 (1962).

² The Nixon Administration has introduced companion bills in the House and Senate, S. 3201, 91st Cong., 1st Sess. (1969), H.R. 14931, 91st Cong., 1st Sess. (1969), and Senator Tydings has introduced a different bill, S. 3092, 91st Cong., 1st Sess. (1969).

testimony before Congressional committees,³ and it has received considerable attention from legal scholars. This article is intended to shed additional light on the problem. First, it examines the ends that may be attained through the class action that are unattainable with present remedies. Next, it looks at the reasons underlying the push for specific federal legislation. Then, it discusses some of the problems of qualifying for class action treatment under new rule 23 of the Federal Rules of Civil Procedure. Finally, it looks at several of the problems that will be presented in litigating consumer class actions.

I. THE NEED FOR A CONSUMER CLASS ACTION

Consumer fraud encompasses an infinite variety of deceptive and illegal practices engaged in by those who directly or indirectly sell goods or render services to persons purchasing such goods or services for personal, household, or agricultural uses. Proponents of a consumer class action have argued that it would give consumers a needed procedural mechanism to combat consumer frauds. At present, however, such frauds are generally dealt with solely by governmental activity, usually through an administrative agency, or by private litigation. It is well, at the outset, to examine the felt deficiencies of these techniques.

A. *Governmental Action*

For reasons which are well known, and can be briefly stated, victims of consumer frauds have become increasingly disenchanted with the performance of government agencies. For example, the Federal Trade Commission, the chief consumer watchdog in Washington, has recently been criticized by both "Nader's Raiders" and an American Bar Association commission for failing to set rational priorities, for becoming bogged down in protracted, often pointless administrative proceedings, for over-emphasizing voluntary compliance techniques and under-utilizing formal complaint proceedings, and for failing to police the behavior of past respondents.⁴

But, many of the problems plaguing the FTC are not limited to that agency. In general, federal, state, and local agencies nominally protecting consumers are woefully understaffed and underfinanced, morassed in a sea of red tape, and unbearably slow acting. Many such agencies are far more responsive to the interests of the industry they are supposed to be regulating than to the interests of the consumers they are supposed to be protecting. In part this results from legal requirements that agencies be staffed from the regulated

³ See B.N.A., ANTITRUST AND TRADE REGULATION REPORT No. 448, pp. A-2, A-7 (Feb. 10, 1970).

⁴ E. COX, R. FELLMEYER, & J. SCHULZ, THE CONSUMER AND THE FEDERAL TRADE COMMISSION (1969), revised and published in a trade edition as, THE "NADER REPORT" ON THE FEDERAL TRADE COMMISSION (1969); REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969); *Hearings on S. 860 and S. 2045, Before the Subcommittee on Executive Reorganization of the Committee on Government Operations, United States Senate*, 91st Cong., 1st Sess. 81-121, 365-98 (1969).

industries;⁵ in part it stems from continuous contacts with the industry and virtual isolation from consumers. Apart from the problems posed by inefficient or unenthusiastic enforcement, many of the federal and state agencies charged with protecting the consumer against fraudulent or deceptive practices are limited to seeking injunctive relief or cease and desist orders, or in practice seek such prospective forms of relief (including the even weaker assurance of voluntary compliance) in the overwhelming majority of cases initiated. This means that the injured consumer who does complain cannot obtain restitution through agency action. Moreover, a merchant has little to lose by engaging in consumer frauds while prolonging the litigation since those profits earned before he comes to the agency's attention, and while the proceedings are pending, are his forever.⁶

B. *Private Individual Litigation*

On the other hand, private litigation is often not a viable alternative. Whether the consumer fraud is to be asserted affirmatively to gain a monetary recovery, or defensively, to resist payment of an otherwise legal obligation, the relatively small amount of the consumer's loss makes it virtually impossible for him to induce an attorney to litigate the issue.⁷ Moreover, even if the consumer could secure an attorney, the costs of the action—including attorney's fees, unrecovered litigation expenses, as well as the loss of working time in attending interviews, pre-trial activities, and trial itself—are sufficiently high to deter even the most fervent suitor. Although some of the out-of-pocket costs can be avoided if the consumer acts as his own counsel, doing so will certainly increase the time commitment he must make to the litigation. At the same time, because he is untrained in legal niceties, and because he is emotionally involved in the case, the consumer is likely to give himself poor representation.

In some cases, a consumer may qualify for the assistance of a Legal Aid office. However, some offices have maximum income limits that effectively exclude many consumers. Even if the consumer can qualify, Legal Aid offices are often so inundated with work and so understaffed that they must attempt to resolve the case with a minimum amount of effort.⁸ In practice, this often means attempting to negotiate a settlement of the client's grievance. Many merchants are only too glad to make such adjustments since only a small per-

⁵ For example, the Kansas Truth in Lending Act—a major piece of consumer legislation—is enforced by officials who are required by statute to have a close connection with the industries being regulated. KAN. STAT. ANN. §§ 16-403(a), 16-805, 16-808(a), (c), (e), 17-2232-33, 74-3104, 75-1304 (1964 and Supp. 1969).

⁶ See, e.g., Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 B.U.L. REV. 559 (1968); Tydings, *Fair Play For Consumers*, TRIAL, February-March at 37 (1970); Note, *Translating Sympathy for Deceived Consumers Into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 424-27, 442-45 (1966).

⁷ Note, *Translating Sympathy for Deceived Consumers Into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 403 nn.52-53, 409 n.100 (1966).

⁸ Professor Paul G. Garrity, Deputy Director of the National Consumer Law Center, has estimated that during fiscal year 1968 alone Legal Services Attorneys handled approximately 475,000 legal matters, of which 18 per cent, or 85,000, were consumer problems. See Senate Hearings on S. 1980: The Consumer Class Action Jurisdiction Act, a summary of testimony prepared by the National Consumer Law Center. 115 CONG. REC. [Senate] 11411, 11412 Sept. 26, 1969.

centage of consumers complain. Obviously, such individualized restitution is as ineffective as a cease and desist order in deterring illegal practices.⁹ If the merchant refuses to settle, the Legal Aid office may not be willing to engage in litigation because it results in an undue commitment of limited resources, or it may be confronted with a reluctant plaintiff who is unwilling or unable to devote the necessary time to the litigation.

C. *Objectives of the Class Action*

To many consumer advocates, the class action device seems an ideal solution to the gaps left by the existing set of remedies. First, it can provide restitution to all victims of consumer frauds simply by virtue of their status as class members. In this respect, the class action is particularly appealing because it enables the representative to press the claims of those consumers who are unwilling or unable to participate in litigation. To be sure, the class action is often praised as enabling consumers with small claims to aggregate them into a claim large enough to make litigation economically feasible.¹⁰ While it can be argued that liberal permissive joinder rules allow all consumers interested in litigation to sue as a group without the necessity of resorting to a class action,¹¹ implicit in the argument for the class action is the idea that the number of defrauded consumers will be too large for convenient joinder and that many of that number will be interested in the litigation only if some representative sues for them. In summary, the class action seems to ensure restitution to defrauded consumers without any action on their part.

Second, the class action is thought to act as an effective deterrent to deceptive practices, where existing administrative and legal processes have failed, since the merchant will apprehend high damage awards, heavy litigation expenses, and extensive unfavorable publicity.¹² If deceptive practices generate the most profit for the merchant, as discussed above, governmental action which allows the merchant to retain all or most of his profits (perhaps with the deduction of minimal penalties) will not materially alter his business behavior. But a weapon that forces the merchant to disgorge all the profits of his deceptive conduct, and imposes additional costs as well, may make it less profitable for the merchant to persist in consumer frauds than it would be for him to shift to unobjectionable techniques.

While the class action promises several decided advantages for the consumer, the injunction is not a prudent remedy to seek through this procedure for several reasons. In most instances, the foregoing objectives of the consumer

⁹ See Schrag, *Bleak House 1968: A Report on Consumer Test Litigation*, 44 N.Y.U.L. REV. 115, 116-18 (1969); Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 HARV. L. REV. 805, 814-15 (1967); Interview with Arthur Benson, Staff Attorney with the Legal Aid and Defender Society of Greater Kansas City in Kansas City, Missouri, February 9, 1970.

¹⁰ See Dole, *Consumer Class Actions Under the Uniform Deceptive Practices Act*, 1968 DUKE L.J. 1101, 1102-03; Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B.U.L. REV. 407, 408, 417-19 (1969); Tydings, *supra* note 6.

¹¹ See Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 438-39 (1960).

¹² See, e.g., Dole, *Consumer Class Actions Under Recent Consumer Credit Legislation*, 44 N.Y.U.L. REV. 80, 81 (1969); Tydings, *supra* note 6.

class action can only be realized if the action seeks monetary damages and is not limited to injunctive or declaratory relief. The restitutional objective cannot by definition be furthered by injunctive or declaratory relief, and since it is prospective in nature, does not help those already defrauded. Nor is the deterrent objective furthered by injunctive or declaratory relief, which allows the merchant to retain his profits, including those garnered while litigating the injunction action.

The injunction, then, does not advance either of the aims sought by consumers in the class action. In addition, there are potential difficulties in consumer class actions for injunctive relief. First, since the prospect of substantial attorney's fees in injunctive actions is ephemeral, those private attorneys nominally representing consumer clients but actually engaging in the litigation for the substantial counsel fees which a victory will generate will not be willing to prosecute such litigation. While it may be possible to rely to some extent on the ever burgeoning number of poverty agencies for such actions,¹³ experience in the securities and antitrust fields has shown that the private attorney (who will be compensated from the recovery in a successful class action) can be a forceful advocate on behalf of the consumer and can be instrumental in protecting against consumer frauds.¹⁴ Moreover, the availability of poverty agencies would not seem to make an injunctive remedy in a consumer class action any more feasible since they cannot help those victimized by consumer frauds preying on middle or upper class consumers, nor can reliance be placed on poverty agencies where no such agencies exist. Also, experience has shown that existing agencies are often too busy handling matrimonial problems, evictions, garnishments, welfare abuses and the like to devote the time, effort, and manpower necessary for successfully prosecuting the consumer class action.

While it is not our purpose to examine the availability and scope of available injunctive relief, there are certain generic problems which curtail the utility of such relief. Thus, the right to injunctive relief may be unavailable if the merchant has stopped his unlawful practice, or if an arguably unlawful practice is currently under investigation by a governmental authority which has the power to issue injunctions where necessary "in the public interest." The merchant may have used a variety of practices, thus raising questions about the scope of injunctive relief. Furthermore, an injunction is not self-enforcing, but requires the consumer and his attorney to make an additional trip to court by the consumer to enforce the court's order. Enforcing the injunction may result in a Pyrrhic victory for the consumer who finds the violation of the injunc-

¹³ See Dole, *supra* note 10, at 1111-12.

¹⁴ See, e.g., *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967); *Berland v. Mack*, 48 F.R.D. 121, 127 (S.D.N.Y. 1969); *Dolgow v. Anderson*, 43 F.R.D. 472, 484, 486, 494 (E.D.N.Y. 1968). See also Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 715-17 (1941). Mrs. Virginia Knauer, President Nixon's Special Assistant for Consumer Affairs has testified that the private bar is a "sleeping giant" that could do more for the consumer than a government agency. See Senate Hearings on S. 1980, 115 CONG. REC. 11411, 11412 Sept. 26, 1969, the Class Action Jurisdiction Act, a summary of testimony prepared by the National Consumer Law Center.

tion excused as being unintentional or insubstantial or that the court excused the defendant with a small fine and a promise to behave in the future.¹⁵

Finally, a major justification for the consumer class action has been the failure of federal and state agencies, armed only with the injunctive power, to protect consumers. In this connection, it has forcefully been urged that only the fear of substantial damage awards—such as those which might be recovered in a class action—will deter consumer frauds.¹⁶ Consumers deserve stronger weaponry than that which has already failed. Indeed, the *Holland Furnace* case, cited by proponents as demonstrating the need for the consumer class action, is a clear example of the inadequacy of the injunctive remedy.¹⁷

D. Present Availability of Class Actions

At this point, it may be asked why, if the class action is so powerful, has it not already been utilized in cases involving consumer fraud? The class action is allowed in virtually all state courts and in the federal courts.¹⁸ What is wrong with present class action rules? Why should special legislation be required? If some legislative adjustment in class actions is needed, should it be state or federal?

1. *Federal Courts.* Consumer class actions may be brought in the federal courts only if jurisdictional requirements are met.¹⁹ There is rarely federal question jurisdiction since most actions to remedy consumer frauds have their genesis in state law. Likewise, complete diversity of citizenship between the representatives of a class and the defendants is sometimes difficult to obtain. Moreover, any case founded upon diversity or the general federal question provision must meet the jurisdictional requirement that the amount in controversy exceed \$10,000. Prior to the 1966 amendments to the Federal Rules of Civil Procedure, it was relatively clear that individual claims of a so-called "spurious"

¹⁵ See generally Starrs, *The Consumer Class Action—Part I: Considerations of Equity*, 49 B.U.L. Rev. 211 (1969), for a discussion of the administrative problems involved with the consumer injunction action.

¹⁶ Cf. *Dolgow v. Anderson*, 43 F.R.D. 472, 485-87, (E.D.N.Y. 1968); Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658, 663 (1956); See authorities cited in note 6, *supra*.

¹⁷ See Tydings, *supra* note 6. The Holland Furnace Company engaged in the widespread practice of inducing consumers to contract for furnace repairs by representing their salesmen as building inspectors and other public officers, or heating engineers, by representing that furnaces were defective and likely to cause death or serious injury, by representing that dismantled furnaces could not be reassembled, etc. In 1936, the company agreed to a consent order (24 F.T.C. 1413-14 (1936)), and even though complaints continued, the FTC did not initiate new proceedings until 1954 which resulted in a cease and desist order in 1958 (55 F.T.C. 55 (1958)). This order was enforced by the Court of Appeals for the Seventh Circuit in 1959 and made permanent by that court's 1961 affirmance. *Holland Furnace Co. v. F.T.C.*, 295 F.2d 302 (7th Cir. 1961). Holland continued to violate the order until 1965, when the Seventh Circuit found the company and a number of its officers in contempt of court and imposed a \$100,000 fine for the company, a short prison term for the president, and minor penalties for other company officials. *In re Holland Furnace Co.*, 341 F.2d 548 (7th Cir.), *cert. denied*, 381 U.S. 924 (1965). It thus took six years (1959-65) to get enforcement of the FTC injunction. It is difficult to see why an injunction obtained in a consumer class action would have been any more effective than that obtained by the FTC. The \$100,000 fine imposed is probably substantially less than the profits Holland garnered in the six-year period by disobeying the injunction.

¹⁸ See generally Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B.U.L. Rev. 407 (1969).

¹⁹ 28 U.S.C.A. §§ 1331, 1332 (1966).

class action could not be aggregated.²⁰ Although it was argued that the 1966 amendments attempted to obliterate the old categories, the Supreme Court, in *Snyder v. Harris*,²¹ smuggled them into the new rule by determining that claims could not be aggregated to make the jurisdictional amount in class actions that would have been classed as "spurious" under the old rules. Since virtually all consumer class actions for damages would have been classified as "spurious" under the old rule, the federal courts are closed unless one—and possibly all²²—members of the class have individual claims in excess of \$10,000. Because the basic impetus for a consumer class action stems from the fact that individual consumer claims almost invariably fall far short of this figure, the federal courts are, in practice, unavailable.

2. *State Courts.* State rules regarding class actions fit one of four patterns—common-law, the Field Code provisions, the pre-1966 version of rule 23 of the Federal Rules of Civil Procedure ("old rule 23"), and the present version of Federal Rule 23 ("new rule 23"). Both the common law and Field Code requirements are elastic, authorizing a class action when there are common questions of law or fact, and the class members are too numerous to permit joinder.²³ The two versions of the Federal Rules contain these two requirements together with others addressed to the assurance of proper class representation, protection of absent class members, manageability, and compromise.

Certain preliminary observations can be made that are applicable to each of the four patterns of regulating class actions. First, there is nothing in existing restrictions which would effectively bar a court from allowing a consumer class action. For example, a court could easily find that a consumer class action satisfies the typical Field Code provision²⁴ authorizing class actions when the question is one of "common interest" or where parties are too numerous to be joined. In this respect it is significant that a handful of recent state court decisions in states that have large urban populations and are often thought of as being in the forefront of legal reform show what may prove to be a trend toward allowing the consumer class action regardless of type of governing provision. Thus far, consumer class actions have been approved in California (Field Code);²⁵ Illinois (common-law);²⁶ and Michigan (old rule 23).²⁷ It is

²⁰ See 3B J. MOORE, FEDERAL PRACTICE ¶ 23.13, at 23-2953 (1969) [hereinafter cited as MOORE].

²¹ 394 U.S. 332 (1969).

²² C. WRIGHT, FEDERAL COURTS 316 n.86 (2d ed. 1970).

²³ N.Y. Civ. Prac. § 1005; Cal. Civ. Pro. § 382; Starrs, *supra* note 10, at 427.

²⁴ Section 1005(a) of the New York Civil Practice Law and Rules provides: "Where the question is one of a common or general interest of many persons or where the persons who might be made 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 all."

²⁵ Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967); Sterling Finance Corp. v. Springston, 2 CCH POVERTY LAW REP. ¶ 9631 (Cal. Super. Ct. 1969).

²⁶ Holstein v. Montgomery Ward & Co., 2 CCH POVERTY LAW REP. ¶ 9652 (Ill. Cir. Ct. Cook Co. 1969); Kimbrough v. Parker, 344 Ill. App. 483, 101 N.E.2d 617 (1951).

²⁷ Gervais v. Annapolis Homes, Inc., 377 Mich. 674, 142 N.W.2d 7 (1966); *cf.* Theisen v. City of Dearborn, 5 Mich. App. 607, 147 N.W.2d 720 (1967). *But see* Freeman v. State-Wide Carpet Distribs., Inc., 365 Mich. 313, 112 N.W.2d 439 (1961), in which the court refused to permit plaintiffs to join similar claims against a carpet company. This decision—which has not been cited since—appears to have been overruled *sub silentio* by the later Michigan cases such as *Gervais v. Annapolis Homes, Inc.* See Starrs, *supra* note 10, at 479-80.

instructive to note that the rationale of the California court in *Daar v. Yellow Cab Co.*—that the failure to allow such actions would effectively preclude relief and would permit a wrongdoer to keep his ill-gotten gains²⁸—does not depend upon the language of the California code provision and is applicable to consumer class actions regardless of the state provision under which they are brought.

Despite the fact that a substantial number of states have followed the federal lead and enacted new rule 23, there is a dearth of authority involving consumer class actions in those states. Nonetheless, there is strong support for the proposition that new rule 23 is not designed to restrict significantly the availability of the class action, and that its detail and complexity are intended to provide courts with a more useful set of guidelines and techniques for regulating the class action.²⁹ Moreover, the federal courts have expressed a willingness, and even an eagerness, to entertain class actions for securities and antitrust claims under new rule 23, and there is no reason to expect different treatment of consumer fraud actions in states which have adopted the new rule.³⁰

Yet if it is true that nothing in the rules forbids a court to entertain a consumer class action, it is equally true that nothing compels a court to do so. A litigant or attorney contemplating such an action will have to make a judgment as to the probability of the action being sustained based on what other materials are available. Unfortunately, the authority upon which to base such a decision is rather sparse. In most states a large proportion of the class action precedents are antiquated and factually distinguishable. Also, many of them were decided under procedural rules no longer in effect. To the extent that these precedents do indicate how a court would handle a consumer class action today, a disappointingly large share of them offer highly restrictive interpretations of the class action rule in question.³¹

It may be that the courts in states with no close, current precedent would look to cases recently decided in other states, and the already numerous federal decisions in analogous fields. It is also possible that states with governing provisions other than new rule 23 will interpret their provisions as congruent with new rule 23 and its apparent receptiveness to the consumer action.³²

While, as noted, the trend is promising, there is one dark spot. New York has held that where the relief sought is *damages* rather than injunctive or

²⁸ 67 Cal. 2d at, 433 P.2d at 746, 63 Cal. Rptr. at 738. See *Contract Buyers League v. F. & F. Investment*, 48 F.R.D. 7, 12-13 (N.D. Ill. 1969).

²⁹ See, e.g., Advisory Committee's Note to MINN. STAT. ANN. Rule 23 at 413 (West 1968); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (1), 81 HARV. L. REV. 356, 394-98 (1967) [hereinafter cited as Kaplan]; NOTES OF THE ADVISORY COMMITTEE ON THE FEDERAL RULES, 39 F.R.D. 73, 98 (1966).

³⁰ See, e.g., *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968); *Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968), cert. denied, U.S. (1969); *Hohmann v. Packard Instruments Co.*, 399 F.2d 711 (7th Cir. 1968).

³¹ See generally Starrs, *supra* note 10, for a review of the governing state provisions and their application to the consumer class action.

³² In *Daar*, the California court pointed to a "substantial coincidence" between its code provisions and new rule 23. 67 Cal. 2d at, 433 P.2d at 742, 63 Cal. Rptr. at 734.

declaratory relief the class action is improper in consumer and like cases.³³ In view of the earlier conclusion that only the action for damages will achieve the objectives of the consumerists, this limitation is severe. Obviously, courts of uncommitted states are as free to follow New York as they are to follow other states permitting the damage action.

In sum, then, the situation in the state courts is beclouded by considerable uncertainty. While some private attorneys or legal aid offices may be willing to take a chance with a consumer class action if the potential recovery is large enough to make the risk worth taking, development of the consumer class action into a formidable weapon would be materially hastened by a legislative enactment that at least accorded a *prima facie* validity to consumer class actions.

E. *Elements of a Federal Solution*

While it is true that the passage of appropriate legislation by state legislatures could solve many of the problems discussed above, a brief look should be taken at possible federal correctives. A minimal federal effort would be the overruling of *Snyder v. Harris*,³⁴ either for consumers alone or for all class action litigants. This would open the federal courts for cases meeting the diversity or federal question requirements, and, while it would leave most consumer actions for state court adjudication, it would permit the development of some federal consumer class action precedents to provide guidance for state courts. But, while overturning the *Snyder* doctrine seems a necessary element in any important federal statute, it would clearly not be sufficient to make the class action an effective consumer weapon, since the uncertainty of state law would continue to deter many such actions. Possibly for this reason, two bills presently before Congress call for more significant federal involvement.

Only slightly more impressive would be federal legislation providing a federal forum for class actions to enforce state-created consumer rights until such time as the states themselves pass consumer class action bills substantially equivalent to the federal bill. Under this theory, substantive state law is adequate to protect the consumer, and state courts are deemed the preferable forum, but there would be a federal interest in making sure that the consumer had available at least one forum in which he could confidently predict that the availability of a class action would make effective enforcement of his rights possible. Federal jurisdiction would be founded upon the power to regulate

³³ *Hall v. Coburn Corp.*, N.Y.L.J., August 8, 1968, p. 2, col. 3 (Sup. Ct.), *aff'd mem.*, 31 App. Div. 2d 892, 298 N.Y.S.2d 894, *aff'd mem.*, N.Y.2d, N.E.2d, N.Y.S.2d (1969) (class action not permitted for forfeiture of credit charges due to finance company utilizing contracts printed in small type); *Onofrio v. Playboy Club*, 20 App. Div. 2d 3, 244 N.Y.S.2d 485 (1963) (dissenting opinion), *aff'd on dissenting opinion*, 15 N.Y.2d 740, 205 N.E.2d 308, 257 N.Y.S.2d 171 (1965) (class action not permitted for recovery of membership dues improperly applied); *Kovarsky v. Brooklyn Union Gas Co.*, 279 N.Y. 304, 18 N.E.2d 287 (1938) (class action permitted to enjoin special charge by utility). *But cf.* *Lichtyger v. Franchard Corp.*, 88 N.Y.2d 528, 223 N.E.2d 869, 277 N.Y.S.2d 477 (1966) permitting class action on behalf of limited partners in real estate syndicate to recover investment losses by lease agreement agreed to by defendants. Any thought that the *Lichtyger* decision heralded a new receptivity to the consumer class action in New York appears to have been squelched by the Court of Appeals' affirmance of the lower courts in *Hall v. Coburn Corp.*

³⁴ 394 U.S. 332 (1969).

activity affecting interstate commerce; in effect, there would be federal question jurisdiction to enforce consumer rights created by any state that had not been certified by the appropriate federal official as substantially equivalent in its class action provisions.³⁵

Even this would be less than the consumerists desire, however. Consumerists want more than the guaranteed right to bring a class action in *some* court; they want to be able to bring such actions in the federal courts. While it is possible to articulate the reasons for this preference in several ways, in the final analysis, they boil down to one thing: Consumers, and those who will represent them, believe that they will get a better brand of justice in the federal courts. It would, we think, be pointless to attempt to articulate some "federal interest" in providing that better brand of justice to consumers that would be distinctive and inapplicable to other groups who also feel that the federal courts are more responsive to their needs than the state courts. Suffice it to say that as long as Congress limits its efforts to consumer problems affecting interstate commerce, there will be no significant constitutional obstacle to providing federal question jurisdiction to handle consumer class suits.³⁶ So long as a measure is constitutional, the existence of a "federal interest" may adequately be evidenced by the enactment itself.

In order for Congress to make federal courts generally available to consumers, it must create a federal private right of action in consumers victimized by deceptive or fraudulent practices. The only question remaining is what body of substantive law shall be used to determine which practices can form the basis for such a private action. On the one hand, Congress could use existing federal law or build into the statute a general definition or enumeration of the practices giving rise to a federal consumer action. Or, Congress might incorporate the standards presently applicable in the several states to define an actionable practice. Obviously, combinations of these approaches are also possible. In any case, *Snyder v. Harris* must be overcome by allowing aggregation of individual claims to make the \$10,000 limitation or by dispensing with the jurisdictional amount entirely in such cases.

II. CONSUMER CLASS ACTIONS UNDER NEW RULE 23

A. General Observations

In assessing the relation of any newly authorized consumer class actions to existing class action rules, it seems best to use new rule 23 of the Federal Rules of Civil Procedure as a model. Although, as already noted, consumer class actions are difficult to bring in federal courts, consumerists have directed their major efforts to securing consumer class action legislation at the federal level,

³⁵ This official could be the Attorney General, the head of the proposed consumer protection division of the Department of Justice if the division is ever created, or the person holding the present office of consumer counsel if the office is ever filled.

³⁶ *Wickard v. Filburn*, 317 U.S. 111 (1942); *cf. Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzbach v. McClung*, 379 U.S. 294 (1964).

and both bills presently before Congress build upon rule 23. Moreover, several states have already adopted the 1966 amendments to the federal rules, and, if past experience is any guide, most others who already have procedural codes based on the federal rules will do so shortly.³⁷ Finally, the vast majority of class action precedents are federal and there is a tendency for state courts interpreting class action provisions different from rule 23 to look to federal precedents.

In order for a consumer right to be maintained as a class action, it must meet the general criteria established in rule 23(a) and fall within one of the three categories listed in 23(b).

B. Rule 23(a)

The consumer plaintiffs must meet the requirements that there be a definable class of plaintiffs, that the class be too numerous to permit joinder, that there be common questions of law or fact, and that the representatives will fairly and adequately protect the interests of the class.³⁸

1. *The "Class" Dimension.*—Ordinarily, defining the class of consumer plaintiffs should not be difficult. The class may be comprised of persons affected by a representation or series of representations made by a defendant or group of defendants, it may consist of persons who purchased a certain product or service within a specified period of time, or it may consist of persons who bear a certain relationship to the defendant.³⁹

The problem of class definition should be distinguished from problems of identifying class members and managing overly-broad classes. Whether it will be possible and economically feasible to identify class members at some stage of the litigation, either at the time of initial notice or if and when the representatives are successful, bears on the difficulty of managing the action but not on whether an appropriate class exists.⁴⁰ Accordingly, a class defined so broadly as to be unwieldy may have to be redefined and limited to meet the management problems that have arisen.⁴¹

The small size of individual consumer claims, and the relatively large numbers of class members necessary to make the action feasible will ordinarily warrant a determination that the class is, as required by rule 23(a)(1), too numerous to permit joinder.

2. *The "Representational" Dimension.*—If there is an appropriate class, the representative must establish that his claims are "typical" and that he can fairly and adequately represent the class as a whole. Although it is set forth as an

³⁷ Kansas, for example, adopted the 1966 amendments to the federal rules in 1969. KAN. STAT. ANN. § 60-223 (Supp. 1969).

³⁸ Because of the conclusion that the consumer class action will be governed by rule 23(b)(3), which requires that common questions of law or fact predominate, the common questions issue will be postponed for the discussion of the 23(b)(3) requirements.

³⁹ See *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968) (purchasers of securities during specified period); *Kronenberg v. Hotel Governor Clinton, Inc.*, 41 F.R.D. 42 (S.D.N.Y. 1966) (persons relying on false representations); *Holstein v. Montgomery Ward & Co.*, 2 CCH POVERTY LAW REP. ¶ 9652 (Ill. Cir. Ct. Cook Co. 1969) (all charge account customers of store).

⁴⁰ See *Herbst v. Able*, 47 F.R.D. 11, 21 (S.D.N.Y. 1969); *Daar v. Yellow Cab Co.*, 67 Cal. 2d 724, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

⁴¹ See *Philadelphia Elec. Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452, 461-62 (E.D. Pa. 1968).

independent requirement, the need for typicality is considered only one aspect of guaranteeing that the representative be qualified to give fair and adequate representation to the class.⁴² Therefore, differences between the representative's claims which are insufficient to warrant a finding that there is no class—such as difference on the issue of reliance or amount of damages—will not support a finding that his claim lacks typicality.

In judging whether the plaintiff could fairly and adequately represent the class, early cases tended to put a heavy burden on the plaintiff to establish his qualifications, and the courts were especially wary of actions in which the plaintiff's claim was a relatively small amount of the total amount sought.⁴³ Since the persistence of this approach would have created a difficult hurdle in the case of consumer class actions, it is fortunate that more recent authority indicates that the plaintiff's qualification will depend upon whether he has a conflict of interest with some or all of the class members, whether the action is collusive, and whether his attorney is competent to prosecute the action—in other words, "whether plaintiff will put up a real fight."⁴⁴ This seems a sound shift in emphasis toward the realities of litigation, especially the reality that it is often the plaintiff's attorney who is the moving force behind the litigation. It also seems warranted since the defendant's challenge may frequently be a litigation tactic unrelated to the representative's ability, and placing inordinate or unrealistic burdens upon the plaintiff-representative seems inconsistent with the present effort to make the class suit a useful device for processing small claims. Obviously, if another member of the class intervenes and raises the issue, a stiffer burden would be appropriate.⁴⁵ In such a case, however, the intervening class member would ordinarily be available as a more suitable substitute.

C. Rule 23(b)(2)

Rule 23(b)(2) allows a class action where "the party opposing the class has acted or refused to act on grounds generally applicable to the class as a whole." Certainly, it is true that the behavior of a merchant engaged in a single deceptive practice or single group of deceptive practices can be fairly described with the language of 23(b)(2). But, this section applies only to those types of actions in which declaratory or injunctive relief is peculiarly appropriate.⁴⁶ As noted above, the consumer's problem is not of this sort and rule 23(b)(2) would thus seem of limited utility. Not only can such an action be handled through a damage remedy, but the major impetus behind the consumer class action is based on the idea that *only* damage actions can effectively restore what the consumer has lost and deter further commission of consumer frauds.

⁴² 3B MOORE ¶ 23.06-2.

⁴³ *Eisen v. Carlisle & Jacquelin*, 41 F.R.D. 147, 151 (S.D.N.Y. 1966), *rev'd*, 391 F.2d 555 (2d Cir. 1968); *Peelias v. Caterpillar Tractor Co.*, 113 F.2d 629 (7th Cir.), *cert. denied*, 311 U.S. 700 (1940).

⁴⁴ Z. CHAFEE, *SOME PROBLEMS OF EQUITY* 231 (1950); *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562-63 (2d Cir. 1968); *Contract Buyers League v. F. & F. Investment*, 48 F.R.D. 7, 10 (N.D. Ill. 1969); *Mersay v. First Republic Corp.*, 43 F.R.D. 465, 469-70 (S.D.N.Y. 1968).

⁴⁵ See *Eisen v. Carlisle & Jacquelin*, 391 F.2d at 563 (2d Cir. 1968).

⁴⁶ Advisory Committee's Note, 39 F.R.D. at 102; Kaplan, *supra* note 29, at p. 389.

However, in some situations a class action under rule 23(b)(2) may be of some use to the consumer. To be sure, in a seemingly insignificant percentage of cases an injunctive remedy may achieve much the same thing as a damage remedy. Suppose a large number of consumers are induced to participate in a freezer plan by fraudulent representations about the quality of the freezer and the cost savings to be expected through purchase of food through the plan. If a class suit can be brought before class members have paid more than the freezer is worth, it may be possible to protect them completely by enjoining the collection of any additional payments under the plan. Plaintiffs would thus get the freezers for no more than their fair market value. Nonetheless, it does appear that very few consumer frauds will lend themselves to this approach. Moreover, as it will appear that (b)(3) is the appropriate vehicle for consumer class actions for affirmative monetary relief, there is no *a priori* reason to suppose that courts will allow consumers to circumvent specialized criteria or additional protection through artful pleading which disguises the suit as a (b)(2) action.

D. Rule 23(b)(1)

Class actions are maintainable under 23(b)(1) wherever actions by or against individuals would create one of two risks: (1) the risk to the party opposing the class (usually the defendant) that differing judgments in individual actions would "establish incompatible standards of conduct," or (2) the risk that an adjudication involving members of the class would "as a practical matter" be dispositive of the rights of non-party class members (usually plaintiffs) or "substantially impair or impede their ability to protect their interests."

For a variety of reasons, 23(b)(1) seems inapplicable to consumer class actions. First, (b)(1) actions seem to contemplate that there be an actual, as opposed to a merely theoretical, risk that a multiplicity of individual actions is likely.⁴⁷ If the proponents of consumer class actions are correct in their contentions that in the absence of a class action mechanism, individual actions will not be brought, any risk of inconsistent adjudications to the defendant seems insignificant.

Subsection (b)(1)(A) seems inapplicable to consumer class actions because it was addressed to the case where a defendant was required by law, or by necessity to treat all class members alike,⁴⁸ for example a public utility, or an upper riparian owner. However, there being nothing which requires a merchant or manufacturer to treat all consumers alike, (b)(1)(A) is not applicable.

A better case can be made for allowing consumer class actions under subsection (b)(1)(B), but it is not, in our judgment, persuasive. In effect, the argument is that the action may be brought under this subsection because any decision rendered in a suit brought by one of a class of consumers will, as a practical matter, either dispose of, or substantially affect, any subsequent action

⁴⁷ See generally 3B MOORE ¶ 23.35[1].

⁴⁸ See Advisory Committee's Note, 39 F.R.D. at 100.

brought by another member of the class simply because the first decision will be a precedent in subsequent cases. This argument, however, claims too much. For any case to qualify for class action treatment under 23(a)(2) there must be common questions of law or fact, and under 23(b)(3) these questions must "predominate." Hence, in any case meeting these criteria the first decision will be a precedent. In effect the argument from *stare decisis* converts virtually all class actions into (b)(1)(B) actions, rendering the other alternatives under rule 23(b) superfluous.

Moreover, in *Eisen v. Carlisle & Jacquelin*⁴⁹ the Second Circuit held that claims of odd-lot purchasers of securities against odd-lot dealers did not fall within (b)(1) and it seems that this result should apply equally when the purchasers are consumers and the dealers are retailers or manufacturers. By the same token, the numerous class actions based on securities frauds have consistently been held to be (b)(3) rather than (b)(1)(B) actions,⁵⁰ and it is hard to perceive any difference between a securities fraud and a consumer fraud.

Finally, the Advisory Committee, in its comments, seems to place consumer actions in (b)(3). All of the examples given of (b)(1)(B) actions seem factually distinguishable from consumer class actions for fraud, whereas fraud cases are listed with antitrust cases as actions that typically will be brought under (b)(3).⁵¹ While it is possible to conjure up special cases in which (b)(1)(B) might be satisfied, these seem of little practical significance.

E. Rule 23(b)(3)

Since the overwhelming majority of consumer class actions will have to be brought under rule 23(b)(3), this means that certain specialized criteria set forth in that rule must be met. The court must determine not only that common questions of law or fact exist but that they "predominate" over the individual questions. In addition, the class action must be superior to other available methods for a fair resolution of the controversy. Both standards contemplate the exercise of broad judicial discretion.

1. *Predominance of Common Question of Law or Fact.* A finding that common questions of law or fact predominate does not mean that no individual differences among the claims of class members are permissible. In the analogous area of class actions for securities frauds, it has been held that the common questions predominate notwithstanding individual questions of reliance and damages and the fact that class members were affected by different

⁴⁹ 391 F.2d 555 (2d Cir. 1968).

⁵⁰ See, e.g., *Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); *Bragalini v. Biblowitz*, 13 FED. RULES SERV. 2d 23(b)(3), Case 8 (S.D.N.Y. 1969). See also, *Contract Buyers League v. F. & F. Investment*, 48 F.R.D. 7, 14 (N.D. Ill. 1969).

⁵¹ Advisory Committee's Note, 39 F.R.D. at 100-03. The following were given as examples of 23(b)(1)(B) actions by the Committee: actions by policyholders attacking a reorganization of a fraternal benefit society, actions by shareholders to require the declaration of a dividend or to enforce preemptive rights, actions against a fiduciary which require an accounting to restore the subject of the trust, actions by creditors against a fund which is inadequate to satisfy the claims of all creditors, actions by creditors to set aside a fraudulent conveyance, and various injunctive actions.

representations during a given period of time.⁵² Most actions based on a consumer fraud will doubtless exhibit at least that much commonality. It seems clear that consumer reliance on a group of false advertisements, or the common practice of a chain store to misweigh its meat, will qualify for class action treatment. Moreover, if experience in the securities and antitrust fields is a guide, close questions will be called in favor of the class action, with the continuing ability of the court to dismiss the action, redefine the class, or take other action if developments make it appear that the initial decision was unwise.⁵³

However, there are certain recurrent types of consumer frauds which will probably not satisfy the requirements of 23(b)(3), such as the generally dishonest merchant who uses a wide range of deceptive methods, varying them from individual to individual. For example, the merchant may misrepresent the quality of the goods to one buyer, the age of the goods to a second, the applicable warranty to a third, and the credit terms to a fourth. Aside from the fact that the defendant is the same in all four cases, there is no "common question" which would allow for class action treatment. Thus, the manufacturer with poor quality control, or the vacuum cleaner company which employs a number of salesmen, each with his distinctive "pitch," is not susceptible to class action treatment under (b)(3) because of the absence of sufficient common questions.

2. *Superiority of the Class Action.* In actions to remedy securities frauds, courts have consistently held the class action superior to other methods of adjudicating the controversy based on the small size of individual claims and the practical inability of the victims of security frauds to utilize any other methods of redress.⁵⁴ The victims of consumer frauds are likewise in a poor position to seek legal redress both because they have insufficient information to prosecute individual actions and because individual redress is prohibitively expensive.⁵⁵ Applying the factors enumerated in 23(b)(3) as pertinent, there is little individual interest in controlling the prosecution of separate actions, and there is likely to be little or no litigation already pending in the forum. Moreover, with consumers as plaintiffs, the forum will normally be proximate to the area affected by the consumer fraud. Since the wrong has had its effect in this area the desirability of having the action concentrated in such forum goes without question.

⁵² *Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); *Berland v. Mack*, 48 F.R.D. 121, 126-28 (S.D.N.Y. 1969); *Herbst v. Able*, 47 F.R.D. 11 (S.D.N.Y. 1969); *Dolgow v. Anderson*, 43 F.R.D. 472, 488-91 (E.D.N.Y. 1968). Professor Kaplan, who served as reporter to the Advisory Committee, has written that the "Committee forecast that cases of fraudulent misrepresentations or antitrust violations affecting numerous persons would be likely, although not by any means sure candidates for class treatment under subdivision (b)(3)." Kaplan, *supra* note 29, at 393.

⁵³ *See, e.g.*, *Green v. Wolf Corp.*, 407 F.2d 291 (2d Cir. 1968); *Mader v. Armel*, 402 F.2d 158 (6th Cir. 1968), *cert. denied*, 394 U.S. 930 (1969); *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969); *Hohmann v. Packard Instruments Co.*, 399 F.2d 711 (7th Cir. 1968); *Contract Buyers League v. F. & F. Investment*, 48 F.R.D. 7, 14 (N.D. Ill. 1969).

⁵⁴ *See* the cases cited in notes 52 and 53, *supra*.

⁵⁵ *See Berland v. Mack*, 48 F.R.D. 121, 128 (S.D.N.Y. 1969); *Dolgow v. Anderson*, 43 F.R.D. 472, 485 (E.D.N.Y. 1968); *Kalven & Rosenfield*, *supra* note 14, at 686.

This leaves only the factor of the difficulties likely to be encountered in the "management" of the litigation. In our judgment, this factor calls for separate treatment. An action may be sufficiently difficult to manage even as a class suit so that it is not feasible to deal with the consumer fraud involved and yet not be so difficult as to fail to qualify for class action treatment under Rule 23(b)(3). Indeed, aside from the few cases that will fail to qualify because of inordinate difficulty in management or the absence of sufficient common questions, the real problem regarding class actions seems to be whether they are feasible as a practical matter.

III. MANAGING THE CONSUMER CLASS ACTION

There are three separate, but interrelated, variables involved in analyzing problems to be encountered in managing the consumer class action. First, the size of the class may vary from a few persons who purchased a defective appliance from a dishonest merchant to millions of defrauded customers of a nationwide chain. Second, class members may be identifiable with ease or only after the expenditure of considerable time, effort, and money. Third, the amount of damages suffered by each member of the class may vary from a few cents to several hundred dollars. Obviously, these components have to be combined in such a way as to enable counsel to calculate the amount of any foreseeable judgment, and that judgment must be substantial enough to make litigation worthwhile; otherwise, the case will never be brought at all. Thus it is unlikely that the courts will be confronted with many class actions involving a small class of largely anonymous plaintiffs each of whom have apparently suffered damages of a few dollars. Apart from the need to meet such minimum requirements, however, class actions may be presented with an almost infinite variety of compositions.

A. Notice

Although rule 23(d)(2) gives a court discretionary power to order notice to class members during the course of any class action under rule 23—whether founded upon sections (b)(1), (b)(2), or (b)(3)—rule 23(c)(2) sets forth a particularized standard limited to (b)(3) actions requiring that the court direct to class members "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Since most consumer class actions will have to be brought under (b)(3) and because the cost of giving notice can be prohibitive,⁵⁶ the meaning of the quoted language becomes important.

⁵⁶ This assumes, of course, that the plaintiff must bear the cost, at least initially, of contacting class members. Kaplan, *supra* note 29, at 398 n.157 (The Advisory Committee tacitly assumed that this burden would ordinarily be borne by plaintiff); Advisory Committee's note, *supra* note 46, at 104-07. Contract Buyers League v. F. & F. Investment, 48 F.R.D. 7, 15 (N.D. Ill. 1969). The suggestion in Doglow v. Anderson, 43 F.R.D. 472, 501 (E.D.N.Y. 1968), that the court might conduct a preliminary hearing to determine whether the plaintiff's case seems sufficiently meritorious, and, if so, to shift the burden of giving notice, has been followed only under highly unusual circumstances. See Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969) (prior SEC proceeding against defendant indicates that plaintiff's suit is *prima facie* meritorious).

The basic interpretive problem is whether "individual notice to all members who can be identified through reasonable effort" is intended to be a binding definition of what shall constitute "the best notice practicable" when the identities of class members can be easily ascertained, or, whether the individual notice proviso is indicative or illustrative of what may be required in appropriate cases under the general standard of "the best notice practicable." In concrete terms, if 1,000,000 persons who purchased odd-lots during the relevant period in *Eisen* can be identified with reasonable effort, or if the defendants supply the names to the plaintiff,⁵⁷ must every one of them get individual notice of the action? Such a reading would, of course, often add materially to the burden of bringing a class action; in some cases—perhaps many cases—the additional burden would be enough to prevent the suit from being brought at all. This result may be expected in virtually any case in which the class is composed of a very large number of identified members, unless the size of the potential payoff is so large and the likelihood of its recovery so great, that the representative or his lawyer is willing to invest the necessary amount in the suit. To the extent that the drafters of the 1966 amendments to rule 23 intended to improve the class action's flexibility and usefulness, that objective is compromised by an interpretation of the notice provisions requiring personal notice to large numbers of people.

Rule 23(c)(2) may be intended to serve one or both of two cognate but different goals. On the one hand, the notice requirement may be intended to assure that no absent class member is bound by a judgment without being afforded due process of law. Alternatively, notice may be intended to make meaningful each class member's 23(c)(2) right to opt out of an action brought under rule 23(b)(3).

In a class action, due process requires only that the absent class members be sufficiently well represented to make it not unfair to bind them by any judgment.⁵⁸ To be sure, rule 23(a)(4) requires that the court be satisfied that a plaintiff will fairly and adequately represent the class in order for the action to be maintainable at all. Since the defendant may have little or no interest in exposing an inadequate representative, and may have an interest in not doing so, the customary protections afforded by the adversary process do not exist. Therefore, rule 23(c)(2) helps to ensure that an adequate representation cannot be collaterally attacked on due process grounds by requiring that absent class members have some supplemental protection in the form of a mechanism permitting individual members of the class to take a hand in the litigation if they are not satisfied with plaintiff's representation.

If rule 23(c)(2) notice is directed toward assuring the proper representa-

⁵⁷ This suggestion is hardly farfetched since after the *Eisen* decision, the defendants furnished the plaintiff with the names of about 1,000,000 class members. Note, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement*, 29 MD. L. REV. 139, 153 (1969).

⁵⁸ See *Hansberry v. Lee*, 311 U.S. 32, 43 (1940); *Dolgow v. Anderson*, 43 F.R.D. 472, 500 (E.D.N.Y. 1968); Comment, *Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided By the Securities Laws*, 116 U. PA. L. REV. 889, 905-19 (1968); Note, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement*, 29 MD. L. REV. 139, 153 (1969).

tion required by due process, this purpose can be served by personal notice which presumably enables each class member to participate if he is not satisfied with the plaintiff's representation. However, this purpose can also be served by general notice directed to all class members in the expectation that some will participate, by particularized notice to the largest claimants on the theory that they have the most at stake in assuring adequate representation, or by notice to a random sampling of class members.⁵⁹ If the judgment is collaterally attacked on due process grounds, the issue is not whether each plaintiff was notified, but rather, whether his interest were sufficiently well represented to bind him to the judgment.⁶⁰

On the other hand, since the decision whether to opt out of a class action must be made by each individual member, a notice provision intended to give absent class members the maximum opportunity to opt out would require individual notice under circumstances when such notice was not required by due process considerations. Anything short of personal notice to all identifiable members would fail to satisfy this objective.

Nonetheless, it must be admitted that the most natural reading of the rule's language—"individual notice to all members who can be identified through reasonable effort"—would mandate individual notice. In terms of the scheme of rule 23, it also appears that rule 23(c)(2) was designed to give personal notice ensuring the right of absent class members to opt out. Indeed, it would make very little sense to interpret the specific language of (c)(2) as requiring no more in (b)(3) actions than is mandated for (b)(1) and (b)(2) actions by the requirement of due process. Moreover, the contents of the notice include the explanation of the right to opt out of the action, thus tying the notice provision in with the right to opt out.⁶¹

It can be argued, however, that the language in rule 23(c)(2) requiring individual notice should be read as illustrative, not mandatory, and that the due process interpretation of the rule should be followed. The drafters of rule 23 were principally concerned with the one-way intervention which developed under old rule 23, and they felt that the class action device would be more useful if defendants were assured that a favorable decision in the class action would be binding on all class members.⁶² Moreover, the drafters intended the revised rules to broaden the availability of the class actions, and such a purpose could hardly be fulfilled if the class action were encumbered with a stringent

⁵⁹ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950); Note, *Binding Effect of Class Actions*, 67 HARV. L. REV. 1059, 1064 (1954); *supra* note 29, at 396.

⁶⁰ See *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940); Z. CHAFEE, *SOME PROBLEMS IN EQUITY* 231 (1950); Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 46 (1968); Kaplan, *supra* note 29, at 379-80.

⁶¹ See, e.g., *Eisen v. Carlisle & Jacquelin*, 41 F.R.D. 147, 151 (S.D.N.Y. 1966), *rev'd on other grounds*, 391 F.2d 555 (2d Cir. 1968); *Richland v. Cheatham*, 272 F. Supp. 148, 156 (S.D.N.Y. 1967). The Second Circuit speaks of notifying a few class members with large claims and the possibility that notice by publication may be the "best notice practicable," particularly where requirement of a different form of notice would, in effect, prevent potentially meritorious claims from being litigated" (391 F.2d at 568-70). On the other hand, the court also suggests that if many class members can be easily identified and the plaintiff cannot afford the notice, "there may prove to be no alternative other than the dismissal of the class suit" (*Id.* at 570).

⁶² Kaplan, *supra* note 29, at 385, 397; Advisory Committee's Note, 39 F.R.D. at 105-06.

requirement of personal notice.⁶³ In addition, experience shows that even when plaintiffs are given the opportunity to opt out, few have the incentive to take action.⁶⁴ It would miss the mark to assume the drafters of rule 23 would handcuff the class action to protect a right to opt out which practically no one will utilize.

Unfortunately, no help in construing rule 23(b)(3) and (c)(2) is provided by the Advisory Committee. The Committee appears to have hovered between three possible approaches to the notice problem: First, that individual notice is necessary to assure the right to opt out. We have already indicated that this rationale is inconsistent with the purpose of rule 23. Second, that (c)(2) simply incorporates the due process standard. Third, and not heretofore mentioned, that due process itself requires the right to opt out. Thus, the committee may have granted the right to opt out not because they thought it desirable, but because of constitutional necessity.

The Advisory Committee Note is also cryptic:

. . . [U]nder subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. See *Hansberry v. Lee*, . . . , *Mullane v. Central Hanover Bank & Trust Co.* . . .

It seems unlikely that the drafters really considered individual notice and the right to opt out as the sine qua non of due process. In the first place, if due process requires individual notice and the right to opt out, the (c)(2) notice provision should be applicable to (b)(1) and (b)(2) actions as well as to (b)(3) suits. As has been noted above, the precedent and commentary available to the Committee emphasized the adequacy of representation and the feasibility of individual notice in the light of factual circumstances, not notice per se. Moreover, Professor Kaplan's contemporaneous article speaks of applying the notice rules flexibly, in light of the purpose to expand the utility of class actions, and not rigidly as mandated by due process.⁶⁵

It thus seems that to read 23(c)(2) as requiring individual notice and the right to opt out is both inconsistent with the purpose of the rule and is not required by due process. In view of the lack of any discernible reason to construe 23(c)(2) as requiring individual notice and the right to opt out, the language should be construed as simply incorporating the due process standard with the "individual notice" provision being illustrative of methods which

⁶³ *Berland v. Mack*, 48 F.R.D. 121, 129 (S.D.N.Y. 1969); *Herbst v. Able*, 47 F.R.D. 11, 21 (S.D.N.Y. 1969); *Dolgow v. Anderson*, 43 F.R.D. 472, 497-98, 500 (S.D.N.Y. 1968); see *Philadelphia Elec. Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452, 459 (E.D. Pa. 1968); Comment, *Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided By the Securities Laws*, 116 U. PA. L. REV. 916-17 (1968).

⁶⁴ *Berland v. Mack*, 48 F.R.D. 121, 129 n.3 (S.D.N.Y. 1969); Frankel, *Amended Rule 23 From A Judge's Point of View*, 32 ANTITRUST L.J. 295, 299-300 (1966); Kaplan, *supra* note 29, at 397-98.

⁶⁵ Kaplan, *supra* note 29, at 395-96.

can be used to satisfy due process. While some of the early decisions did require (c)(2) notice to all identified class members, recent authority appears to have adopted the more flexible approach suggested here.

Even if the rule is read as not requiring personal notice, providing the best notice practicable will often prove a major burden. At the very least, due process requires notice which is reasonably calculated to give notice to absent class members.⁶⁶ Where a large class is involved, such minimum notice will probably consist of a relatively prominent advertisement in one or more large circulation newspapers.⁶⁷

However, even notice in a few large newspapers would probably not inform more than a small number of members of the class involved and would still be expensive, thus acting as a substantial deterrent to bringing the action.⁶⁸ The cost of notice is especially significant in the proposed consumer class action since much of the reliance for bringing such actions is being placed on poverty agencies and legal aid offices. Such organizations, however, are not likely to have more than token amounts available for such purposes.⁶⁹ It therefore appears that even the minimal notice required by due process may well eliminate some consumer class actions.

B. *Discovery and Other Pre-Trial Activities*

To the extent that advocates of consumer class actions are correct in their estimates of the impact of such actions it is true that a defendant will have much to lose by an adverse judgment. Accordingly, a defendant will have much incentive to engage in extensive pre-trial discovery to make certain that nothing is overlooked that might significantly affect the outcome of the action. In many consumer class actions, the fact that there are differences among class members on the issues of the representation made, reliance, and damages will mean that the defendant will probably wish to propound interrogatories to absent class members, and perhaps depose a sampling of them. Such discovery is the only way the defendant can learn about the plaintiff's case. Also, it is the only way the defendant will be able to penetrate the *ad damnum* of the complaint, which will often be a rough estimate by the plaintiff's attorney, to

⁶⁶ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950); *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 568 (2d Cir. 1968).

⁶⁷ See *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 569-70 (2d Cir. 1968); *Herbst v. Able*, 47 F.R.D. 11, 21 (S.D.N.Y. 1969); *Dolgow v. Anderson*, 43 F.R.D. 472, 501 (E.D.N.Y. 1968); *Booth v. General Dynamics Corp.*, 264 F. Supp. 465, 472 (N.D. Ill. 1967).

⁶⁸ See Note, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement*, 29 MD. L. REV. 148 (1969). In *Herbst v. Able*, 47 F.R.D. 11, 21 (S.D.N.Y. 1969), the court required a half-page advertisement on three separate dates in both the *New York Times* and the *Wall Street Journal*, at a total cost of over \$10,500. In *Berland v. Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969), the court required plaintiff to pay an estimated \$2,500 for personal notices to certain class members and reserved decision on whether additional notice by publication should be required. In *Contract Buyer's League v. F. & F. Investment*, 48 F.R.D. 7, 15 (N.D. Ill. 1969), plaintiffs suing to recover for a conspiracy to charge higher-than-market prices to Negro home purchasers were required to personally notify identified class members, and to notify other class members by notice published in general circulation newspapers in Chicago.

⁶⁹ For example, the Legal Aid and Defender Society of greater Kansas City has a total annual budget of \$4,000 to cover all miscellaneous expenses associated with pleading and discovery. Interview with Arthur Benson, *supra* note 9. See also *Johnson v. Robinson*, 296 F. Supp. 1165 (N.D. Ill. 1967), *aff'd*, U.S. (1969), 89 S. Ct. 1622, where the court held notice by media coverage sufficient in an action to void the one-year residency requirement for welfare.

ascertain his possible exposure with sufficient precision to permit the planning of a trial strategy and the evaluating of possible settlements.

In addition to the incentives for pretrial discovery presented by factual complexity and amount at stake, there is the further incentive created by the utility of discovery to harass the plaintiff so that he will not be interested in further prosecuting the suit and will enter a favorable settlement. Experienced practitioners are well aware of discovery's usefulness for such a purpose. Many of them are capable of using such harassing tactics skillfully enough that the plaintiff will not be able to present the court with sufficient proof to warrant the entry of a protective order.⁷⁰

The effect of discovery on the consumer class action may well be more deleterious than is commonly supposed. First, extensive discovery ordinarily delays the date of the trial substantially.⁷¹ Despite the fact that such delay may increase the interest payable on any award, it may still prove the best strategy if it will cause large numbers of class members to lose interest in the litigation and thus make a favorable settlement likely. Moreover, the defendant's ability to take discovery from absent members does not permit them to sit on the sidelines while their representative handles the litigation and thus undercuts a major advantage of the class suit. Whereas this disinclination to become involved works in favor of the class suit when the right of opting out is involved, it may work to pare down the class when discovery is sought of class members. Courts may be compelled to exclude any class member who cannot be reached or who fails to respond to the defendant's discovery moves, as, for example, by not answering interrogatories.⁷² It requires no imagination to realize that any requirement that absent class members answer interrogatories and have the answers notarized would be a more onerous task than many would be willing to perform. While all questions which require individual determinations could be ignored until the "common issues" are adjudicated,⁷³ such an approach might allow the class action to be mere "shadow boxing" for the main event, and in any event, it would further delay an already elongated process. In addition, it may seriously impede settlements by not giving the defendant any fair notion of his exposure in the event of litigation.

In addition to communicating with class members for discovery purposes, the court may also be compelled to notify absent class members at turning points of the litigation and to exclude class members who fail to respond. In this connection, rule 23(d)(2) clearly contemplates that class members will not be ignored throughout the litigation but will be informed of its progress. Of those class members who do respond to either a request for interrogatories or a

⁷⁰ A fascinating description of such tactics may be found in Schrag, *Bleak House 1968: A Report on Consumer Test Litigation*, 44 N.Y.U. L. REV. 115, 125-28 (1969).

⁷¹ See W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 101-03 (1968).

⁷² *Philadelphia Elec. Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452, 459, 462 (E.D. Pa. 1968); *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559, 577-78 (D. Minn. 1968); see *Iowa v. Union Asphalt & Roadcoils, Inc.*, 281 F. Supp. 391, 404 (S.D. Iowa 1968); *Harris v. Jones*, 41 F.R.D. 70, 74, 75 (D. Utah 1966). Compare Kaplan, *supra* note 29, at 397-98 suggesting that the Advisory Committee considered and rejected a proposal that class members be required to opt in.

⁷³ See 38 MOORE ¶ 23.45(2).

general notice under rule 23(d)(2), a significant portion will want individualized attention from plaintiff's attorney.⁷⁴ Thus there is added to the expense of each notice the expenditure in time and effort by counsel in answering individual questions.

C. Trial

It is hard to say whether the consumer plaintiff will prefer a jury trial or a trial before the judge. Obviously, any jury would be composed of consumers, and many jurymen would have had unpleasant experiences as consumers, but of course a judge is also a consumer and likewise may have had unpleasant experiences.⁷⁵ Still, it will no doubt be true that the consumer plaintiff will want a jury in some cases.

The class action being a creature of equity, it may be argued that there is no right of jury trial in the consumer class action.⁷⁶ However, the recent decision of the Supreme Court in *Ross v. Bernhard*,⁷⁷ which upheld jury trials in certain shareholder derivative actions, establishes that the right to jury trial is determined by examining the nature of the underlying right being enforced. If this right is fundamentally legal, the fact that the procedural device used is a class action will not preclude jury trial, whereas if the right is basically equitable, jury trial is not permitted.⁷⁸ To the extent, then, that consumers will consider the right to elect a jury trial as important, this dichotomy furnishes additional support for the conclusion that actions for damages, not actions for injunctions, will be of greatest significance.

The trial of a consumer class action will likely be a complicated and lengthy proceeding. Where trial is by jury, jury selection itself may present difficulties where the defendant is large and well known. It may, for example, be difficult to find jurors in the Chicago area, or anywhere else, who do not have some familiarity with and consequent feelings toward a large corporation such as Montgomery Ward. Indeed, the very factor which may incline the plaintiff to opt for jury trial—the tendency of many jurors to identify themselves as consumers—will increase the likelihood of substantial disqualification.

While predicting the length of trials can never be done with precision, it can generally be said that trials involving large sums of money, and questions which are terribly important to the parties, tend to be long and drawn out. There is nothing on the consumer class action horizon which suggests any difference.

⁷⁴ Cf. 3B MOORE ¶ 23.55, at 23-1153-56 nn.19, 22-25.

⁷⁵ Cf. *City of Grafton v. Holt*, 58 W. Va. 182, 52 S.E. 21 (1905).

⁷⁶ Cf. Z. CHAFEE, *SOME PROBLEMS OF EQUITY* 285-86 (1950). Professor Chafee willingly concedes that the more permissive joinder rules at law might well mean that a jury would be available, but argues that the historic inability of juries to deal with all of the issues posed in representative suits argues against their use.

⁷⁷ 396 U.S. 531 (1970).

⁷⁸ This result was probably implicit in the Court's earlier decision in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1958). See generally McCoid, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1 (1967).

D. Post Trial

If the plaintiff is successful, there must then be more communication with class members.⁷⁹ If damages can be computed without any additional information, such communication may be advisable simply to verify addresses and to pay recoveries to the proper parties. Usually, however, damages will not be fixed and it will be necessary for the consumer to take some affirmative action to establish his damages. While commentators have been optimistic about the ability to distribute small individual damage recoveries to large numbers of people, few have discussed the methods available,⁸⁰ and the paucity of cases provides little guidance.

In order to distribute the recoveries, it is necessary to (1) identify individual class members to the extent that such identification was not made when the action was commenced; (2) prove individual claims; and (3) distribute recoveries. The identification of class members at the conclusion of the action, perhaps years after the consumer fraud which generated the action, is difficult and expensive. Moreover, the efforts to notify class members must be more intensive than at the start of the action since class members have a direct financial interest in the recovery. Such efforts, in the case of a large class, might require very extensive advertising and even possible mailings to groups in which there would be many class members. Considering the number of personnel required to answer inquiries and to handle other mechanics it cannot be gainsaid that such efforts would be very expensive.⁸¹

Proving individual claims may pose a greater problem. For example, in *Daar v. Yellow Cab Co.*,⁸² it would have been necessary for individual taxi riders to recall taxi fares paid between five and ten years earlier to recover anything from the defendant. Some review of the allegations would have been required to prevent exorbitant claims. And, the "individual issues" problem is exacerbated if, in addition to damages, each individual must prove justifiable reliance, deception, absence of notice, or some similar matter.

Finally, merely distributing the funds would involve additional administrative expenses in terms of verifying addresses, issuing checks, explaining calculations, and the like. Coupled with deductions from the fund for attorneys fees, litigation expenses, prior notices, and other expenses, these administrative expenses could eat up a substantial portion of a recovery even in the millions of dollars. Such a possibility raises the spectre of litigation designed to punish the defendant and reward attorneys, without conferring any tangible benefit on the injured consumers.⁸³ It would appear that there are much simpler ways to punish the defendant, insofar as that is a worthy objective; it is doubtful

⁷⁹ See *Holstein v. Montgomery Ward & Co.*, 2 CCH POVERTY LAW REP. ¶ 9652 at 10,794 (Ill. Cir. Ct. Cook Cty. (1969)).

⁸⁰ See, e.g., Note, *Damages in Class Actions: Determination and Allocation*, 10 B.C. IND. & COM. L. REV. 615 (1968).

⁸¹ Consider *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968).

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

⁸³ See *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 567, 571 (2d Cir. 1968).

whether a procedure should be employed which ostensibly benefits injured consumers, but does not in fact do so.

Moreover, it has apparently been assumed that large amounts of the recovery would not be claimed because of the above-mentioned difficulties. This appears clearly possible in *Daar* since the ability of individuals to establish losses is very doubtful. One solution is to allow the state to collect any unclaimed sums,⁸⁴ but this serves only one of the functions of the class action—deterrence; it fails to accord restitution to the individuals injured. If it is known in advance that states together with successful attorneys are going to garner the lion's share of any recoveries in many of the cases, and deterrence is the primary result desired, it appears much simpler to allow states to bring actions on their own for damages to consumers and to allow the recoveries to be placed in the general tax revenues.

IV. CONCLUDING OBSERVATIONS

The ultimate objective of most consumer advocates is to create a set of institutions which enable the consumer to be sovereign in the marketplace. No goal so far-reaching is attained by the enactment of a single rule of law, the grant of a single remedy, or the creation of a single procedural mechanism. The preceding analysis indicates that in certain situations the consumer class action will prove quite useful, but in other situations it is likely to be of doubtful utility.

It is worth keeping in mind that the consumer class action does not purport to deal with many consumer problems. It presupposes the existence of a favorable body of substantive law to be enforced, and where substantive legal rules constitute the major obstacle to the vindication of the consumer, as in the case of the holder-in-due-course doctrine applied to consumer paper⁸⁵ or the lack of adequate warranty protection,⁸⁶ such rules will have to be changed first. While the class action device will overcome one factor deterring consumers from seeking legal relief, it will not eliminate certain other obstacles in the path of consumers: ignorance of their legal rights, distrust of the courts, or unwillingness to become involved.⁸⁷ These matters also require direct attack through appropriate means.

If the consumer class action is looked at solely as an instrument for securing restitution and for deterring frauds, its utility will vary depending upon the type of case presented. The small-group, high-damage situation, for example,

⁸⁴ See *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 715 n.15, 433 P.2d 732, 746 n.15, 63 Cal. Rptr. 724, 738 n.15 (1967); Note, *Damages in Class Actions: Determination and Allocation*, 10 B.C. IND. & COM. L. REV. 615, 622 (1968). Compare *Illinois Bell Tel. Co. v. Slattery*, 102 F.2d 58, 62 (7th Cir. 1939) (unclaimed damages returned to defendant).

⁸⁵ Abolition or curtailment of this doctrine heads the legislative agenda of most consumerists. See generally Note, *Translating Sympathy for Deceived Consumers Into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 414-18 (1966).

⁸⁶ See, e.g., FTC, STAFF REPORT ON AUTOMOBILE WARRANTIES (1968); REPORT OF THE TASK FORCE ON APPLIANCE WARRANTIES AND SERVICE (1969).

⁸⁷ These obstacles are especially prevalent among low-income consumers, notwithstanding the availability of legal aid programs. See D. CAPLOVITZ, *THE POOR PAY MORE* 170-78 (1963).

when a group of consumers is defrauded by a phony freezer plan, appears well-suited for the class action approach. The small numbers make it relatively easy and inexpensive to identify almost all class members. As a result, giving any required notice to class members—whether at the inception of the action, at a critical stage, or when damages are to be assessed—does not present great difficulties. The relatively large size of individual claims gives class members more incentive to participate in the investigatory and discovery phases of the action and to testify at the trial. And, if liability should be determined, individuals with large claims should be willing to participate in proceedings designed to fix their individual damages. A class action based on a freezer plan fraud appears much more easily managed than the massive securities fraud and antitrust actions that are regularly accorded class action treatment.

A second generic situation well-suited to class action treatment is presented when the defendant has an existing relationship with the class that makes any necessary communication and distribution of refunds relatively easy. Thus, in *Holstein v. Montgomery Ward & Co.*⁸⁸ (where plaintiffs sought to recover life insurance premiums which Ward billed to its charge account customers), the monthly communications between Ward and such charge account customers are important in enabling the action to proceed expeditiously. The class action is also an especially good remedy when class members do not have to take part in the proceedings in any way to get relief. Thus, if it is possible to calculate damages by a mechanical formula applicable to all class members, and to make the refunds by means of credits to existing accounts, then a class action appears especially appropriate.⁸⁹

On the other hand, class actions appear inappropriate in some cases. The large group with small individual damages creates management problems of severe proportions and also raises the spectre of litigation designed to benefit lawyers alone or to punish the defendant—a purpose more easily carried out by means other than class actions.

In addition, the class action does not deal with the generally dishonest merchant, who uses a large number of deceptive practices. As already noted, there is a serious question whether such a case even qualifies for class action treatment. But even if it does, the individual questions loom so large in the picture that managing the class action can turn out to be impossible.

Another case not suited to class action treatment is the fly-by-night operator who has neither the funds to pay any judgment, nor the will to stay in one place throughout the litigative process. While a class injunctive action may help here, such an injunction will only operate prospectively, and, because of the lack of a foreseeable money judgment, will probably be brought only by poverty agencies acting as private attorneys general who need the “class action” to confer standing. Since the fly-by-night operator lacks funds to pay a judgment, the only meaningful deterrents are criminal prosecution or requiring

⁸⁸ 2 CCH POVERTY LAW REP. ¶ 9652, at 10,794 (Ill. Cir. Ct. Cook Cty. 1969).

⁸⁹ See *Illinois Bell Tel. Co. v. Slattery*, 102 F.2d 58 (7th Cir. 1939).

such an operator to file a bond before commencing business in the jurisdiction. However, the fly-by-night operator is probably best dealt with by the existing governmental agencies as "beefed up" with the power to either issue, or easily obtain, preliminary injunctions.

Perhaps the greatest difficulty with consumer class actions is the fact that they will not provide quick relief for consumers.⁹⁰ In fact, the converse seems true: the type of action envisioned is practically a guarantee that such actions will be complicated and drawn out, and will involve substantial litigation expenses.

Considering the above shortcomings of consumer class actions in providing an effective remedy to individuals, its proponents, in supporting its utility, properly point to the deterrent value of such litigation.⁹¹ However, the very factors that may enable class actions to act as deterrents—the showcase features, the substantial threat of a large monetary judgment, and possible long-term effects on the defendant's business methods—can only induce the defendant to fight harder and to use all available resources. Moreover, utilizing the class action procedure inherently means that proceedings will be more prolonged than in an ordinary lawsuit as there are proceedings relating to the class action in addition to proceedings addressed to the principal case against the defendant.

Translating these factors into practical litigation terms, the result will be a plethora of motions, including pleading motions and motions directed toward limiting or subdividing the class, a possible motion for summary judgment, extensive discovery by the defendant coupled with strong resistance to the plaintiff's discovery efforts, a lengthy trial and appeal, and post-appeal attempts to minimize any award which is made. In cases where substantial issues have been reserved because they require individual adjudication, the initial decision against the defendant may be less than half the battle.

The *Holstein* case provides an illustration of some of the difficulties which may be expected in a consumer class action. The plaintiffs filed their complaint in January, 1968. During the ensuing fourteen months, the plaintiffs made several court appearances, filed three amended complaints, and served several briefs and memoranda covering issues raised by various motions made by the defendant. In March, 1969, the propriety of the class action was finally affirmed. This is not an unusual situation, indeed, cases involving class actions for securities frauds indicate that such extensive paperwork and long delays are the rule rather than the exception.⁹² The large class size, the many issues

⁹⁰ Many of the statements by proponents of the consumer class action stress the delay in administrative proceedings. See, e.g., Tydings, *supra* note 6, at 37; Testimony of Bess Myerson Grant, B.N.A. ANTI-TRUST AND TRADE REGULATION REP. No. 448, at A-5 (Feb. 10, 1970). But, as we have attempted to point out, a well-financed and determined defendant can delay a consumer class action just as easily as an administrative proceeding.

⁹¹ See Dole, *supra* note 10; Starrs, *supra* note 10; Tydings, *supra* note 6.

⁹² See, e.g., *Berland v. Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969) (determination of validity of class action not made until 3 years after the complaints were filed because of a pending SEC action); *Mersay v. First Republic Corp.*, CCH FED. SEC. LAW REP. (1967-69 Transfer Binder) ¶ 92,304 (S.D.N.Y. 1968) (action settled after 5 years for between 5-10% of claim). In *Contract Buyer's League v. F. & F. Investment*, 48 F.R.D. 7 (N.D. Ill. 1969), the plaintiffs, Negro homeowners, brought a class action alleging that defendants conspired to exploit racial segregation and charge exorbitant prices to Negro purchasers of

involved, and the substantial damages sought, make the use of these tactics particularly effective against poverty agencies badly strapped for manpower and funds. One commentator has related his attempts to prosecute a few "test cases" in the consumer fraud area, and his inability to avoid such delaying tactics.⁹³ It would appear that a well-financed defendant, with a lot at stake, can even cause more delay than has been described herein.

These tactics result in more than justice delayed. They encourage settlements for small amounts, and may result in lax prosecution of suits.⁹⁴ Eventually, the various dilatory tactics that defendants can employ will deter a large number of suits from being brought at all.

homes. The complaint was filed in January, 1969, and in March, 1969, the court determined the validity of the class action (48 F.R.D. 7). In May, 1969, the court wrote a lengthy opinion granting in part the defendant's motions to dismiss and limiting the class to Negro homeowners who purchased their homes within the five year limitations period (300 F. Supp. 210 (N.D. Ill. 1969)). The district court permitted an interlocutory appeal on the limitations issue and in January, 1970, the Seventh Circuit modified the district court's decision and included within the class all homeowners whose home-purchase contracts terminated within the five year period, even though the purchases were made earlier (2 CCH POVERTY L. REP. ¶ 10,800 (7th Cir. 1970)).

⁹³ Schrag, *supra* note 70.

⁹⁴ See, e.g., *Mersay v. First Republic Corp.*, CCH FED. SEC. LAW REP. (1967-69 Transfer Binder) ¶ 92,304 (S.D.N.Y. 1968) (settlement gave shareholders 5-10% of potential recovery in 5 year old action).

