**Boston College Law Review**

Volume 10
Issue 3 *A Symposium Federal Rule 23 - The Class Action*

Article 4

4-1-1969

# Federal Rule 23: A Device for Aiding the Small Claimant

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# FEDERAL RULE 23: A DEVICE FOR AIDING THE SMALL CLAIMANT

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*After outlining the historical prerequisites for maintaining a class action, Mr. Ford focuses on the basic policy considerations underlying the class action device. Reasoning that the basic purpose of the class action is to remedy the grievances of the small claimant, the author discusses the deficiencies of the old Rule and the resulting need for amendment. Through an investigation of recent cases, he concludes that the courts have been sufficiently flexible in their interpretation of the amended Rule so as to achieve its basic objectives and suggests that a less flexible approach would necessitate a further amendment.*

In the brief period since its amendment, effective July 1, 1966, Federal Rule 23 has dramatically altered the nature and scope of private litigation in this country, and it portends further widespread changes. To date these changes are most noticeable in the securities and antitrust fields. The sharp upsurge in securities cases is due largely to the recognition of private rights of action under the Securities Acts,[1] to the important investigative efforts of the Securities and Exchange Commission, and to the Rule's amendment. Similarly, more and more antitrust indictments are being followed by extensive and complex class actions under the amended Rule.[2] In the initial stages of its efforts, the Judicial Panel on Multidistrict Litigation[3] has to a large extent considered, and made determinations regarding, antitrust class actions.[4] The procedures established by the amended Rule should provide the basis for the most effective mode of antitrust enforcement.

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1 See, e.g., J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Brown v. Bullock, 294 F.2d 415 (2d Cir. 1961); Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951); Kardon v. National Gypsum Co., 71 F. Supp. 798 (E.D. Pa. 1947).

2 See, e.g., Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968); see also Complaint in Philadelphia v. General Host Corp., Civ. No. 68-704 (E.D. Pa. 1968).

3 This Panel was created pursuant to the terms of the Multidistrict Litigation Act, enacted April 29, 1968. 28 U.S.C.A. § 1407 (Cum. Pocket Part 1968).

4 Reference should be made to the Panel's action regarding antibiotic drugs, protection devices and equipment, children's books, and plumbing fixtures. 5 Trade Reg. Rep. ¶¶ 50,215-18 (1968).

## I. Background of the Former Rule

In contrast to this significant activity under the Rule as amended, the long period preceding the amendment was quite calm. The former Rule was adopted in 1938, and had a long history prior to its implementation. Courts in England had determined that class actions, which at an early time had a binding effect on all members of the class, could be maintained if a common interest existed among the parties, if joinder were impossible or impracticable, and if the absentee class members were adequately represented.[5] This English practice was to a large extent responsible for the subsequent adoption in this country of Equity Rule 38.[6] Except for purposes of historical perspective, these old rules have little to do with the present Rule and practice thereunder. Both were susceptible of differing interpretations, particularly from the standpoint of binding effect on absentee class members.[7] Further, these old rules governed the equity procedure in the federal courts. Their purpose was to bring a degree of simplicity to equity pleading and practice, to reduce expenses of litigation, and to prevent delay.[8] Inasmuch as actions for damages were on the "law side of the court," these rules were inapplicable to actions of this nature.

### A. *The Right-Oriented Approach of the Former Rule*

The former Rule 23 was supposed to be essentially a restatement of the practice then existing under Equity Rule 38.[9] Whether the two Rules really did coincide, however, is doubtful. But they did share at least one characteristic—both were subject to confusing interpretation. Of course, since Rule 2 of the Federal Rules of Civil Procedure declares that there is only one form of action, the former Rule was applicable to all actions whether formerly denominated legal or equitable. The former Rule was never amended before 1966,[10] although some form of revision was clearly necessary. The principal source of confusion under it arose from its tripartite classification according to the nature of the rights sought to be enforced.[11] In a true class action, the rights sought to be enforced were "joint, or common, or secondary." The hybrid class action required that rights be several and relating to identifi-

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[5] 3A J. Moore, Federal Practice ¶ 23.02, at 3411-12 (2d ed. 1964); Z. Chaffee, Some Problems of Equity 202-03 (1950).

[6] 226 U.S. 659 (1912).

[7] Compare Christopher v. Brusselback, 302 U.S. 500, 505 (1938) (dictum), with Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366-67 (1921) (dictum).

[8] See Century Distilling Co. v. Continental Distilling Co., 106 F.2d 486 (3d Cir. 1939), cert. denied, 309 U.S. 662 (1940).

[9] See Advisory Committee's Note to former Rule 23, 28 U.S.C. App., at 6102 (1964).

[10] A few revisions were proposed, notably the one in 1955, but these were never adopted. See 3A J. Moore, Federal Practice ¶ 23.01[4], at 3409 (Supp. 1968).

[11] See Fed. R. Civ. P. 23(a)(1)-(3), 28 U.S.C. App. at 6101 (1964).

able property. In the spurious action, the rights sought to be enforced were several but accompanied by a common question of law or fact as a basis for common relief. Each of these forms of action was utilized to some extent in the courts.[12]

The right-oriented approach of the former Rule seemed on its face to be unencumbered with difficulties. Regrettably, this was not the case. The courts did have considerable difficulty with the true and hybrid forms of action, but the spurious form of action was especially perplexing.[13] To denominate the spurious form as a class action was in itself completely anomalous. This form was nothing more than a permissive joinder device.[14] As such, the result in a given spurious action would have no binding effect on absentee class members. But some courts permitted these absentee class members to sit back until the conclusion of the action and then, if the result were favorable to them, permitted intervention to take advantage of it. This "one-way" intervention was a major disadvantage of the former Rule.[15] There were other problems under the former Rule, not the least of which was a disagreement among the courts as to whether the institution of a spurious action tolled the statute of limitations for absent class members.[16]

### B. *Adoption of the Amended Rule*

The implications of the amended Rule came as a surprise to many lawyers. Some were really not familiar with the former Rule because of its limited application, particularly in the spurious form, and hence were not fully aware of the impact of the amendment. In recent months, of course, lawyers have had many opportunities to become more familiar with the new Rule.[17] Lawyers today in the securities and

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[12] For a general review of the decisions under subsections (1), (2) and (3) of the former Rule, see Ford, The History and Development of Old Rule 23 and the Development of Amended Rule 23, 32 Antitrust L.J. 254 (1966).

[13] See cases cited in Advisory Committee's Note to Rule 23, 39 F.R.D. 98, 99 (1966) [hereinafter cited as Advisory Note].

[14] See All American Airways, Inc. v. Elderd, 209 F.2d 247, 248-49 (2d Cir. 1954).

[15] See, e.g., Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 587-90 (10th Cir. 1961), petition for cert. dismissed, 371 U.S. 801 (1962).

[16] Statute of limitations tolled: Escott v. BarChris Constr. Corp., 340 F.2d 731 (2d Cir.), cert. denied, 382 U.S. 816 (1965); Mutation Mink Breeders Ass'n v. Lou Nierenberg Corp., 23 F.R.D. 155, 162 (S.D.N.Y. 1959) (dictum). Not tolled: P.W. Husserl, Inc. v. Newman, 25 F.R.D. 264, 267 (S.D.N.Y. 1960) (dictum); Athas v. Day, 161 F. Supp. 916, 919 (D. Colo. 1958).

This statute of limitations matter may continue to be a source of some confusion under the new Rule. See Minnesota v. United States Steel Corp., 44 F.R.D. 559, 573-76 (D. Minn. 1968), and Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 460-61 (E.D. Pa. 1968).

[17] The Practicing Law Institute, on November 15, 1968, sponsored an excellent one-day program on the New Federal Class Action Rule and in connection with this program it published a handbook on the amended Rule. Many other opportunities for learning about this new Rule have been available to lawyers.

antitrust fields recognize the drastically expanding role played by the class action.

The underlying purposes of the former Rule are not altered by the amendment. The amendment, however, does seek to clarify the former Rule and to provide machinery better suited to accomplish its purposes. From the standpoint of clarification, the amendment abolishes the former Rule's right-oriented approach. No longer is the class action either true, hybrid or spurious. Instead, the Rule now "describes in more practical terms the occasions for maintaining class actions."[18] The court need no longer be concerned with labels. Rather, its inquiry is directed toward the appropriateness of the class action device in given circumstances. From the standpoint of improved machinery, the amended Rule provides that the result of the action, whether favorable or not, is binding on each class member, provided that he has not chosen to be excluded. In addition, the amended Rule permits the court to take certain steps to assure the fair conduct of the action.

## II. Underlying Purposes of the Amended Rule

The purposes of the class action Rule are threefold. First, it seeks to reduce the burden on the courts which could result from a multiplicity of actions.[19] Utilization of the class action device should reduce repetitive litigation regarding generally related subject matter. It should be noted, however, that it may yet be too soon to predict whether the new Rule will in fact reduce multiplicity. For example, a member of a class included in an action under 23(b)(3)[20] may nevertheless institute another action at a later date involving the same subject matter, if he can establish that he failed to receive proper notice of the action, or if the class representatives failed to represent adequately the absentee class members.[21] Second, the action seeks to eliminate the risks to the parties as a result of inconsistent determinations by different courts. Third, the Rule attempts to provide a vehicle for redressing small injuries to a large number of persons.

The third purpose of the class action Rule is probably the most important. As explained by Professor Kaplan, Reporter for the Adsory Committee, the "historic mission" of the class action is "taking care of the smaller guy."[22]

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[18] See Advisory Note, 39 F.R.D. at 99.

[19] This policy is also reflected in the recently enacted Multidistrict Litigation Act. 28 U.S.C.A. § 1407 (Cum. Pocket Part 1968).

[20] In other words, one who is a member of a class described in an action under that section, and who takes no action to "opt out" as permitted by 23(c)(2).

[21] The institution of such subsequent action would be premised on the prior determination's lack of binding effect because of the absence of necessary due process safeguards. See Hansberry v. Lee, 311 U.S. 32 (1940).

[22] Departing from sound practice, I made an ex parte call to Prof. Ben Kaplan of Harvard, who, as you know, was the Reporter of the new Rules, and who

A few years after the former Rule was adopted, Kalven and Rosenfield, in a now oft-quoted article,[23] expressed the view that the principal function of the class suit should be to seek redress for wrongs which, although involving only small amounts individually, affected a great number of people.[24] To illustrate and to underscore the plight of the single, isolated, and perhaps unsophisticated person injured, they observed that:

> [t]he employee who is entitled to time and a half for overtime, the stockholder who has been misled by a false statement in a prospectus, the rate-payer who has been charged an excessive rate, the depositor in a closed bank, the taxpayer who resists an illegal assessment, or the small business man who has been the victim of a monopoly in restraint of trade, like the investor in the reorganization, finds himself inadvertently holding a small stake in a large controversy. The type of injury which tends to affect simultaneously the interest of many people is also apt to involve immensely complex facts and intricate law, and redress for it is likely to involve expense totally disproportionate to any of the individual claims.[25]

Recent decisions have recognized the need for a vehicle to redress properly the grievances of small claimants. In a preliminary ruling in the well-recognized case of *Escott v. BarChris Constr. Corp.*,[26] the

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> in a sense may be the missing Hamlet of this performance, to show cause why he did what he did about this notice thing. Ben came graciously off the beach at Martha's Vineyard to take my call, and I should say that I have some doubts about whether a man who is caught in shorts that way, without his notes, should be held firmly to everything he says. Nevertheless, with this private reservation, I did put him the question about this sub-section. He blushed and stammered a little bit—which is his way, as all of you who know him know—and then recalled that his committee had indeed thought at some length about how this notice should work. The reasoning, as he told it to me, relates to the fundamental conception that I have already touched of classes comprised of little people, who don't normally have much dealing with lawyers or with legal formalities. He got to speaking quite professorally—and I wrote down what he said—of the class action's "historic mission of taking care of the smaller guy."

Frankel, Amended Rule 23 From a Judge's Point of View, 32 Antitrust L.J. 295, 299 (1966).

[23] Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684 (1941).

[24] The authors suggested that in a spurious form of action under the former Rule it would be proper to permit absentee class members to intervene after a judgment favorable to the class. Id. at 712-13. This suggested procedure was essentially the "one-way" intervention later adopted by some courts. See case cited note 15 supra.

[25] Kalven & Rosenfield, supra note 23.

[26] Escott v. BarChris Constr. Corp., 340 F.2d 731 (2d Cir.), cert. denied, 382 U.S. 816 (1965). Recent proceedings in the litigation have provided new guidelines regarding liabilities under Section 11 of the Securities Act of 1933, as amended, 15 U.S.C. § 77k (1964), and the basis for establishing the "due diligence" defense. 283 F. Supp. 643 (S.D.N.Y. 1968). See Comment, *BarChris* and the Securities Acts: Practical Responses for Attorneys, 10 B.C. Ind. & Com. L. Rev. 360 (1969).

court emphasized the role of the former Rule in protecting small investors:

> In our complex modern economic system where a single harmful act may result in damages to a great many people there is a particular need for the representative action as a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group. In a situation where we depend on individual initiative, particularly the initiative of lawyers, for the assertion of rights, there must be a practical method for combining these small claims, and the representative action provides that method. The holders of one or two of the debentures involved in the present action could hardly afford to take the risk of an individual action. The usefulness of the representative action as a device for the aggregation of small claims is "persuasive of the necessity of a liberal construction of . . . Rule 23."[27]

In *Dolgow v. Anderson*[28] the court considered the claim by four purchasers of common stock of Monsanto Company, a New York Stock Exchange listed company, that Monsanto and its principal officers and directors had engaged in a scheme to manipulate the stock prices. The plaintiffs, in addition to seeking rescission, compensatory and punitive damages of $14,920, sought to represent all purchasers of Monsanto securities "similarly situated."[29] The court noted that administrative remedies, in this case, the sanctions of the Securities and Exchange Commission, do not obviate the necessity of private group redress.[30] After reviewing the statements by the Advisory Committee[31] on the amended Rule, and the opinions of other courts regarding the purpose of the Rule, the court concluded:

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[27] 340 F.2d at 733.

[28] 43 F.R.D. 472 (E.D.N.Y. 1968).

[29] Id. at 479.

[30] The court quoted from the amicus brief filed by the Securities and Exchange Commission:

> Since the enforcement activities of this Commission do not serve to make whole investors who have been injured by a fraudulent course of business and since it is economically impracticable in many instances for investors individually to pursue available remedies, the representative action appears to provide the most meaningful method by which their claims may be pursued and the Congressional policy favoring such remedies may be vindicated.

Id. at 483-84.

[31] In discussing the factors listed in subsection (b)(3) of the amended Rule, the Rules Advisory Committee stated: "[T]he amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered." 39 F.R.D. at 104.

> On oral argument in the present case, it was assumed that, in view of the fact that the costs of the litigation would far exceed any damages the individual plaintiffs might possibly recover, if this case does not proceed as a class action, it is unlikely that it would proceed at all. Thus, to hold that this action could not proceed as a class action "would . . . be tantamount to a denial of private relief."[32]

No doubt the most significant decision underscoring the purpose of the Rule is that in the Second Circuit's opinion in *Eisen v. Carlisle & Jacquelin*.[33] Here, Eisen instituted an action against two brokerage firms dealing in odd-lots seeking damages and injunctive relief on his behalf and the behalf of all other purchasers and sellers of odd-lots on the New York Stock Exchange. He charged that these firms had engaged in practices violative of Sections 1 and 2 of the Sherman Act, and had violated certain provisions of the Securities Exchange Act of 1934. The district court had dismissed the class action portion of the suit because of the questioned adequacy of representation, the extensive notice required, and the lack of predominating questions.[34] In reversing and remanding the proceedings, the Second Circuit stressed the liberal interpretation which the Rule required. In contrast to the former Rule, the court pointed out the need for a "flexible remedy."[35]

This last, and most important, objective of the Rule is then quite clear. It is to redress the grievances of small claimants. There is really nothing new about this objective; it has always been implicit in the class action device. However, the Equity Rules and the former Rule did little to further this objective. As Professor Kaplan stressed, the "smaller guy" normally is not involved with lawyers and legal proceedings. Not many of such persons would take affirmative action to intervene in a spurious action under the former Rule. Perhaps recognizing this reluctance to litigate on the part of the "smaller guy," the drafters of the amended Rule, by obviating in subsection (c)(2) this need for affirmative action, took a major step in the direction of securing for small claimants a mode for effective compensation. Subsection (c)(2) is probably the most dramatic indication that the chief purpose of the amended Rule is to aid the small claimant.

Individuals today, probably more than they realize, are suffering from and being damaged by the practices of large corporate bodies. These practices may often involve violations of securities or antitrust

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32 43 F.R.D. at 485.

33 391 F.2d 555 (2d Cir. 1968).

34 Id. at 559.

35 Id. at 560. Many authors have indicated that the former Rule was really not effective, especially from the standpoint of protecting small claimants. See, e.g., Fales, Significance to the Antitrust Bar of Amended Rule 23, 32 Antitrust L.J. 282, 284 (1966).

laws or other federal regulatory provisions. How may the small claimant be compensated for these damages? What alternative is there to the effective use of the class action? Asked thirty years ago these questions might have been unanswerable. But today Rule 23 exists in an amended and improved form. Only a conscientious implementation of the amended Rule will bring effective group redress to small claimants. As the position of the Securities and Exchange Commission in *Dolgow* demonstrates, administrative agencies such as the SEC, the Federal Trade Commission and others simply do not have the tools available to remedy the many claims of persons injured. Unless effective use is made of the Rule the small claimant might just as well be written off; a better vehicle will not be found to assure him of compensation.

## III. Interpretation of the Rule as Furthering Its Basic Objective

The requirements for maintaining a class action under the amended Rule are more fully discussed in other portions of this Symposium. No effort will be made here to examine these requirements. However, a review of a few of the decisions under the amended Rule sheds some light on whether these requirements are being interpreted so as to further effectively the Rule's most important purpose.

### A. *The Common Question Requirement*

One of the four prerequisites to the maintenance of a class action is that there be present a common question of law or fact.[36] According to 23(b)(3), for a class action to fall under that subsection, the common questions must predominate over any questions affecting individual members only. Several decisions on this issue indicate the willingness on the part of some courts to find a predominance of common questions. In *Siegel v. Chicken Delight, Inc.*,[37] a class action instituted by five franchisees of Chicken Delight charging violations principally of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, the court recognized that there might indeed be differences in the status of the hundreds of members of the class. However, the court properly sought the "integral core of the complaint," finding in the action "a common nucleus of operative facts even though there may be lacking complete identity."[38]

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[36] Fed. R. Civ. P. 23(a)(2).

[37] 271 F. Supp. 722 (N.D. Cal. 1967).

[38] Id. at 726. This liberal approach is also found in Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42, 45 (S.D.N.Y. 1966), where the court stated:

> While there may be different kinds of misrepresentations alleged with respect to different plaintiffs, including some oral misrepresentations, and while such factors might have led to a dismissal of a class action under the old rule . . . the new Rule 23 provides the flexibility to permit this action to proceed.

See also Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968).

The courts in *Harris v. Jones*[39] and in the *Dolgow*[40] case took similar views. In *Fischer v. Kletz*,[41] an action alleging misrepresentation in the preparation of financial statements in connection with a sale of stock, the court found a "common course of conduct" noting the cumulative effect ("[l]ike standing dominoes") that brings distortion to later financial statements when they are preceded by ones containing misrepresentations.[42] It noted that there might be variances between the class members, but that these probably were not material, and, in any event, that it would be premature to rule on these matters at that stage of the proceedings.[43]

### B. *Adequacy of Representation*

In the *Eisen* case,[44] one of the bases for dismissal of the class action portion by the lower court was the absence of adequate representation.[45] Here the class contained by "rough approximation" 3,750,000 members, all of whom Mr. Eisen sought to represent. The lower court felt that "with a comparatively minuscule and limited interest in odd-lot transactions," he could not adequately represent this huge class. After reviewing generally the requirements for adequate representation, the court of appeals criticized the view that "a small number of claimants cannot adequately represent an entire class . . . ," stating:

> [W]e fail to understand the utility of this approach. If class suits could only be maintained in instances where all or a majority of the class appeared, the usefulness of the procedure would be severely curtailed. . . .
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> . . . If we have to rely on one litigant to assert the rights of a large class then rely we must. The dismissal of the suit out of hand for lack of proper representation in a case such as this is too summary a procedure and cannot be reconciled with the letter and spirit of the new rule.[46]

In the *Dolgow* case, the defendants contended that representation was inadequate because of the "minuscule holdings" of the plaintiffs, the disparity in numbers between those before the court and those ab-

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39 41 F.R.D. 70, 75 (D. Utah 1966).

40 Dolgow v. Anderson, 43 F.R.D. 472, 480-82 (E.D.N.Y. 1968).

41 41 F.R.D. 377 (S.D.N.Y. 1966).

42 Id. at 381.

43 Id. at 382.

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

45 Id. at 559. Subsection (a)(4) of the amended Rule requires that "the representative parties will fairly and adequately protect the interests of the class."

46 391 F.2d at 563. See also Knuth v. Erie-Crawford Dairy Cooperative Ass'n, 395 F.2d 420, 428-29 (3d Cir. 1968); Siegel v. Chicken Delight, Inc., 271 F. Supp. 722, 727-28 (N.D. Cal. 1967).

sent, and the inability of plaintiffs' lawyer to represent such a large class. In a vigorous response, Judge Weinstein rejected all of these arguments. He stated that to stress the minuteness of the interests of the parties in court would be to "ignore the spirit of Rule 23" and that it "would be anomalous to hold that only major financial interests can make use of it."[47] Nor was he impressed by the numerical disparity. At this early state of the proceedings lack of participation by others would not merit dismissal of the class action portion. Finally, he completely rejected the arguments regarding the capacity of plaintiffs' lawyer to represent so large a class.[48]

### C. *Superiority of Class Action Device*

In actions under the amended Rule, it has become almost customary for defendants to contend that the class action device is not a superior mode of handling the matter.[49] In *Siegel* and *Fischer* this argument was given only brief attention. The courts there generally noted the absence of any indication that individuals desired to prosecute their actions alone and stressed the desirability of concentrating the action in one forum. In *Siegel,* the court rather summarily dismissed defendants' arguments along this line:

> [I]t would be specious to argue that wholesale joinder would be either practicable or desirable. Yet that is precisely the position taken by the defendants when they urge that there are other more appropriate methods for obtaining adjudication such as permissive joinder . . . or intervention . . . .[50]

In considering the superiority of the class action device, courts have often had dismal specters paraded before them by defendants with regard to the action's manageability.[51] The better reasoned decisions, and those in accord with the Rule's purposes, permit the action

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[47] 43 F.R.D. at 495.

[48] Id. at 496. The court indicated that the lawyer was admitted to practice in both state and federal courts, and it was impressed by his "competence and fervor" in the arguments and briefs which he had presented. Further, the court emphasized that the lawyer's task "is not more difficult whether he is representing one person or a class of a million. In either case, he will have to prove the same allegations if he is to prevail." Id. at 497.

In Fischer v. Kletz, 41 F.R.D. 377 (S.D.N.Y. 1966), the court rejected a suggestion by defendant that adequacy of representation required that the plaintiffs state precisely how many persons were in the class. The court said that to "place such a burden on plaintiffs would seem harsh and unnecessary. In fact, the imposition of such a requirement would make the maintenance of class actions in large securities-fraud cases very difficult, if not impossible. . . ." Id. at 384.

[49] Subsection (b)(3) of the amended Rule requires in part that the court find "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

[50] 271 F. Supp. at 725.

[51] One of the matters pertinent to the findings to be made by the court under

to proceed with recognition of the built-in flexibility of the Rule, which allows appropriate orders to be made at a later stage in the proceedings.[52]

### D. *The Mandatory Notice*

The mandatory notice required by subsection (c)(2)[53] of the Rule has been troubling to many courts. The mechanics of this notice will be explored in detail later in this Symposium. It is enough here to point out that strict adherence to a requirement of actual notice to all class members would readily render the amended Rule ineffective. In *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*[54] the court stated:

> It is true that the whole concept of a large class-action might easily be stultified by insistence upon perfection in actual notice to class-members; and that courts should not be deterred from Rule 23 economies in litigation by exaggerating the presumed requirements of due process, or by the specter of an occasional successful collateral attack on the basis of due-process. . . .[55]

In *Eisen* the lower court felt that due process required individual notice to all class members who could be identified, and because of "practical financial limitations" of the parties, this notice requirement could not be met.[56] The Second Circuit in *Eisen* reversed the ruling of the district court and called for an evidentiary hearing on this and other matters. However, it did not rule out the possibility of notice by publication.[57] Further in *Dolgow*, the court emphasized, "In determining what constitutes 'the best notice practicable under the circumstances,' it is necessary to remember that the recent amendments were specif-

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subsection (b)(3) is "the difficulties likely to be encountered in the management of a class action." In School Dist. v. Harper & Row Publishers, Inc., 267 F. Supp. 1001, 1006 (E.D. Pa. 1967), the court threw up its hands at the "myriad of complex, frustrating, needless problems in attempted management."

[52] Much of this flexibility is provided by subsections (c)(1), (c)(4) and (d) of the amended Rule. See Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 566 (2d Cir. 1968); Zeigler v. Gibraltar Life Ins. Co., 43 F.R.D. 169, 173-74 (D.S.D. 1967); Siegel v. Chicken Delight, Inc., 271 F. Supp. 722, 725 (N.D. Cal. 1967); Fischer v. Kletz, 41 F.R.D. 377, 384 (S.D.N.Y. 1966); Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673, 683 (N.D. Ind. 1966).

[53] "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2).

[54] 43 F.R.D. 452 (E.D. Pa. 1968).

[55] Id. at 459.

[56] Plaintiff argued that mail notice to the entire class would cost approximately $400,000. 391 F.2d at 568.

[57] Notice by publication was allowed to inform an entire class in a taxpayers' suit. Booth v. General Dynamics Corp., 264 F. Supp. 465 (N.D. Ill. 1967).

ically designed to broaden the usefulness of the class action device."[58] It recognized that any imposed requirement demanding that the plaintiffs furnish immediate actual notice to each class member would spell a quick end to the litigation.

Many class action defendants today realize their decided advantage from the plaintiff's inability to give actual notice. In *Dolgow*, the defendants vigorously contended that there should be no class action inasmuch as the plaintiffs could never provide the required notice. This approach should not be allowed to succeed. The Rule requires the court to give the "best notice practicable under the circumstances."[59] Certainly due process requirements permit this notice to be given by publication; this view was forceably stated by Judge Weinstein in *Dolgow*.[60]

The amended Rule may have the necessary force to satisfy the purposes which have always been inherent in the class action Rule. But the rigid interpretation of certain provisions of the amended Rule might produce the same ineffectiveness that plagued the former Rule. An emphasis on numerical disparity between those represented and those representing as bearing on adequacy of representation, or a tendency to view the many problems inherent in any class action as not being adjustable within the flexible framework of the Rule, or an unwillingness to recognize the propriety of giving the mandatory notice by publication could prevent the new Rule from satisfying its objectives. Probably the statement by Judge Weinstein in *Dolgow* best underscores the flexible framework of the Rule, and the practical approach that must be taken by courts in these actions:

> A pragmatic approach is called for in order to overcome the numerous difficulties that are likely to arise in the course of a lawsuit of this magnitude. If the trial court assumes a more active role than it normally does and works closely with the attorneys, these difficulties should not prove to be insuperable.[61]

Unless this practical and flexible approach is followed, the Rule might just as well not have been amended.

### E. *Special Problems Involving Class Definition*

In addition to the myriad of difficulties inherent in a class action, one in particular deserves attention here. The courts have yet to con-

[58] 43 F.R.D. at 497.

[59] Nothing in the Rule requires that this notice be given by the plaintiff. At least one author feels that this notice, including its expense, should be the entire burden of the plaintiffs. Barton, Notice Requirements Under Rule 23, The New Federal Class Action Rule (P. L. I. 1968).

[60] 43 F.R.D. at 500-01.

[61] Id. at 481-82.

front and solve certain problems of discovery. An illustration will dramatize the problem. It is assumed that five individuals have evidence that certain suppliers over a period of years have fixed the prices of a product which each of these individuals use. After determining their possible damages (which for the five total approximately 2500 dollars for the period), and after retaining and consulting with counsel, they institute a class action on behalf of themselves and all other purchasers of this product. Plaintiffs, of course, feel that there are a great many members of the class. However, they have no means for securing the names and addresses of these class members. In a case where the defendants can supply this information, the major barrier to the plaintiffs in the definition of the class is whether, and under what circumstances, the court will permit discovery to secure this data. On the other hand, it may be supposed that these names and addresses cannot be furnished by defendants.[62] How will other members of the class learn of the pendency of this action? How will the plaintiffs firm up the class? These questions are not easily answered now; but, for the amended Rule to be effective in these kinds of class actions, the courts will have to fashion rules of accommodation.[63]

## IV. The Function of the Lawyer Representing Class Action Plaintiffs

The success of Rule 23 is dependent not only upon the "pragmatic approach" of the courts, but also upon a recognition by the courts of the function of the lawyer representing class action plaintiffs. Most small claimants have had little or no contact with lawyers or legal matters, and will usually have only slight contact with the action after it is instituted. The plaintiffs' lawyer has the primary responsibility for securing redress of these small grievances. In this capacity the lawyer is certainly acting in a semi-public function. As might be expected, Judge Weinstein in *Dolgow* recognized this role.

> Those who criticize the class action on the grounds that it stirs up plaintiffs and serves only to provide fees for attorneys overlook the fact that we are not dealing with the traditional lawsuit which concerns primarily those litigants before the court.
>
> . . . .
>
> Quite obviously, a major incentive to forceful prosecution

62 Perhaps this data cannot be furnished by defendants because they simply do not maintain or retain this information. Or perhaps the defendants never had access to this data, as in the case where plaintiffs have not purchased directly from defendants.

63 Perhaps in these circumstances, and after a hearing such as that ordered in *Dolgow*, a court might permit the plaintiffs, under court supervision, to publish in certain national newspapers notices announcing that the class action was pending and giving pertinent information regarding its background.

is the substantial counsel fee plaintiffs' attorney believes he may be awarded if he is successful.[64]

## V. Conclusion

Nothing said above is intended to imply that class action litigation will be without complex and involved legal and factual questions, nor that these matters will be easily resolved. What has been emphasized, however, is that the basic objectives of the Rule, and especially that objective having a regard for the grievances of the small claimant, demand that the courts adopt a pragmatic approach which utilizes the Rule's flexible framework.

It is certainly too soon to tell whether the new Rule will achieve its basic objectives. However, if an adequate period of experience under the Rule demonstrates that courts are adopting a rigid approach to the Rule's provisions, particularly those relating to the common question, adequacy of representation, superiority and notice, or are failing to appreciate the many differences between traditional forms of litigation and actions under Rule 23, one necessary recourse will remain, namely, the further amendment of the Rule.

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[64] 43 F.R.D. at 487, 495. Any suggestion to the effect that class action litigation provides plaintiffs' counsel with a means of engaging in client solicitation is simply not meaningful. In fact, he may be restricted in a number of ways from furthering the Rule's objectives because of certain strictures which govern his conduct in other kinds of practice. For example, could plaintiff's counsel, in an effort to firm up the class prior to any class action determination, properly suggest to the class representatives that they attempt informally to solicit others interested in the litigation? Probably not. But to accomplish the basic purposes of the Rule, should not he be permitted to do this?