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Amended Rule 23: A Dependant's Point of View

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AMENDED RULE 23: A DEFENDANT'S POINT OF VIEW

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The Advisory Note to amended Rule 23 indicates that the primary purpose of the class action device is the conservation of time, effort and expense by consolidation of multiple law suits into one action. A second avowed purpose is the provision of a forum for small claimants unable to afford separate litigation. However, these two objectives are potentially conflicting. The availability of a forum to numerous small claimants who would not otherwise have asserted their grievances invites the expenditure of considerable time, effort and money. Mr. Weithers notes the tendency of the courts of appeal to favor the open-forum purpose of the Rule, and argues for a more balanced accommodation of policies committed to the discretion of the trial courts.

I. INTRODUCTION

On July 1, 1966, Rule 23 of the Federal Rules of Civil Procedure was completely rewritten in order to alleviate the many interpretive problems inherent in the former Rule 23. Although the amended Rule is certainly a substantial improvement over its predecessor,[1] the language used is new and thus has been the subject of varying interpretation. Essential to a comprehensive analysis of these questions of construction is a knowledge of the overriding purposes of the class action in general. One must not attempt to decipher the interpretational issues in a vacuum but must rather view them in the light of the overall motives and purposes of Rule 23 itself. It is the purpose of this article to discuss several of these essential purposes in order to lay the proper guidelines for an intelligent appreciation of the fundamentals of amended Rule 23.

Basically, the amended Rule permits class actions in three situations. Paragraph (b)(1) permits a class action if the prosecution of

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[1] Indeed, the former Rule 23 was the subject of extensive criticism. See, e.g., Z. Chafee, Some Problems of Equity 200 (1950); Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684 (1941); Keeffe, Levy & Donovan, Lee Defeats Ben Hur, 33 Cornell L.Q. 327 (1948); Note, Federal Class Actions: A Suggested Revision of Rule 23, 46 Colum. L. Rev. 818 (1946). But cf. Simeone, Procedural Problems of Class Suits, 60 Mich. L. Rev. 905, 953 (1962); VanDercreek, The "Is" and "Ought" of Class Actions Under Federal Rule 23, 48 Iowa L. Rev. 273, 283 (1963).

separate actions (1) could force the party opposing the class into several incompatible positions or (2) if litigation by one member of a group would as a practical matter be dispositive of the interests of the other members of the group who are not parties to the action.[2] It should be noted that both of the (b)(1) situations providing for class action treatment assume either the commencement of numerous lawsuits, or the imminence of such an assault.

Paragraph (b)(2) permits a class action where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."[3] Typical of class actions of this type are actions in the civil rights area where a party is charged with discriminating unlawfully against a class.[4]

To appreciate the utility and propriety of the class action device in the (b)(1) and (b)(2) situations, one may visualize the difficulties likely to arise from resort to separate actions by or against individual members of the class.[5] This same purpose provides the basis for a (b)(3) type of class action.

Paragraph (b)(3) is by far the most drastic innovation of the amended Rule. It is quite different from its supposed counterpart in the prior Rule, the "spurious" class provision.[6] Whereas a decision under (b)(3) is binding on all members of the class who do not specifically exclude themselves, the spurious class was merely a permissive joinder device binding only those persons who actually intervened in the action.[7] The change in the binding nature of this type of class action

[2] Examples of the first type of (b)(1) class actions include actions against a municipality to declare a bond issue invalid or limit it, or to prevent or limit the making of a particular appropriation. An example of the second type of (b)(1) class action is an action brought by a single policy holder against a fraternal benefit association attacking a financial reorganization of the society. Here, indeed, it would be impossible to confine the effects of the attack to the individual plaintiffs. For additional examples, see Advisory Committee's Note to Amended Rule 23, 39 F.R.D. 98, 100 (1966) [hereinafter cited as Advisory Note, 39 F.R.D. at —].

[3] Fed. R. Civ. P. 23(b)(2).

[4] Advisory Note, 39 F.R.D. at 102. Subdivision (b)(2) is certainly not limited to civil rights cases, however, and may include any action looking to final injunctive or declaratory relief. The Advisory Committee specifies that (b)(2) could be utilized in the antitrust area either to enjoin or to test the legality of price discrimination practices or tying arrangements. Advisory Note, 39 F.R.D. at 102.

[5] Id. at 100.

[6] The "spurious" category of class actions included actions in which the character of the right sought to be enforced was "several, and [in which] there [was] a common question of law or fact affecting the several rights and [in which] a common relief [was] sought." The category was labeled "spurious" by Professor Moore, architect of the former Rule 23. See J. Moore, Federal Rules 551; Moore & Cohn, Federal Class Actions, 32 Ill. L. Rev. 307 (1937).

[7] See Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Geo. L.J. 551, 570-76 (1937); Nagler v. Admiral Corp., 248 F.2d 319 (2d Cir. 1957); Oppenheimer v. F.J. Young & Co., 144 F.2d 387 (2d Cir. 1944).

will most definitely increase the number of class members who participate in a given action. Since the spurious class was the primary vehicle for instituting damage actions under the old Rule, only the injured members who intervened were permitted to recover. Consequently, such classes were quite small, being limited only to those who could afford the litigation. By providing that these actions are now binding on all injured parties, paragraph (b)(3) opens the door to monetary judgments of astronomical size. The amended Rule thus represents a substantial change from prior law and a substantial danger to any party opposing a class.

An example of the extremes to which such alleged classes can reach is the case of *Eisen v. Carlisle & Jacquelin*,[8] recently decided by the Court of Appeals for the Second Circuit. In that case the individual plaintiff sought damages from the defendants for himself and *all other purchasers and sellers* of "odd-lot" securities. Approximately 3,750,000 individual and corporate buyers and sellers were included in the class. The district court ruled that the action could not be brought as a class action.[9] The court of appeals, however, in a two-to-one decision, reversed the action of the trial court and remanded the case for further consideration of the issue whether the action was properly a class action.[10]

If an individual plaintiff seeking damages can now, sua sponte, bring into a district court 3,750,000 plaintiffs who have made no claim and who do not intend to do so, section (b)(3) demands special scrutiny in order to determine the true scope of the amended Rule.

II. The Basic Purpose of Subdivision (b)(3)

All three types of class actions are designed to be optional tools which the court should employ, within the discretion granted to it, to reduce the burdensome impact of multiple litigation. Because the (b)(3) type of class action is the most drastic innovation of the new Rule, its purposes and scope will receive primary attention.

The Supreme Court's Advisory Committee clearly delineates the policy of (b)(3).

> Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort and expense, and promote uniformity of decision as to persons similarly situated . . . .[11]

In explanation of the (b)(3) requirement that the "common" class questions "predominate" over the solely individual questions, the Ad-

[8] 391 F.2d 555 (2d Cir. 1968).
[9] Id.
[10] Id.
[11] Advisory Note, 39 F.R.D. at 103.

visory Committee states that "[i]t is only where this predominance exists that *economies* can be achieved by the class action device."[12] (Emphasis added.) Thus, according to the Advisory Committee, (b)(3) is a device for consolidating numerous *existing* claims to one forum in order to prevent repetitious litigation and "achieve economies of time, effort and expense."

Many courts seem to be disregarding this explicit purpose for the (b)(3) action.[13] These courts assert that Rule 23 was amended to provide a means by which small claimants who are unable to afford individual adjudication of their common injuries may obtain judicial relief. It is argued that the change in the binding judgment provisions from the spurious type to that in the (b)(3) type was intended to enable the inclusion of these small claimants in the judgment and in the corresponding relief.[14] Indeed, there has been some discussion in the past about such a humanitarian purpose within the class action,[15] but this purpose is enunciated nowhere in Rule 23. Furthermore, in practice such a principle—if embodied within (b)(3)—would produce a direct conflict with the professed purpose of economy of time, expense and effort.[16] To date, three courts of appeal have reversed dismissals of alleged class actions under the new Rule and maintained that dismissal would deprive the small claimant of a forum for relief.[17] These courts either ignored the economy principle of the new Rule, or gave it only token recognition. An analysis of the Rule makes clear, however, that the (b)(3) class action device should not be employed, regardless of incidental salutary purposes, unless the basic goal of efficiency is achieved through the avoidance of multiplicity of litigation.

A. *Prerequisites and the Economy Purpose*

The prerequisites to the class action enumerated in subsection (a) anticipate, on their face, a situation where multiple litigation is either existing or imminent. These prerequisites are as follows:

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[12] Id.

[13] Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), cert. denied, 89 S. Ct. 1194 (1969); Hohmann v. Packard Instruments Co., 399 F.2d 711 (7th Cir. 1968); Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968).

[14] See statement by Benjamin Kaplan, Reporter for the Rules Committee, cited in Frankel, Amended Rule 23 From A Judge's Point of View, 32 Antitrust L.J. 295, 299 (1966).

[15] See, e.g., Frankel, supra note 14, at 298-300; Kalven & Rosenfield, supra note 1, at 717; Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 435 (1960).

[16] There certainly can be no economy in inviting parties into the action who had no intention whatsoever of asserting their claims. Such a practice can only prolong the trial and create added expense, and thus conflicts with the basic philosophy of the (b)(3) class action.

[17] Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968), cert. denied, 89 S. Ct. 1194 (1969); Hohmann v. Packard Instruments Co., 399 F.2d 711, 715 (7th Cir. 1968); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 560 (2d Cir. 1968).

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[18]

Subdivision (a)(1) speaks of the possibility of joinder, and raises the question whether joinder can be applied to *non-litigants*. Under subdivision (a)(2), how can a court determine whether there are "questions of law or fact" common to a group which includes litigants and *non-litigants*? Finally, under (a)(3) and (a)(4), do the "interests" of a *non-litigant* require protection by the representative party? The answers to these questions are negative. The wording of the prerequisites evidences the draftsmen's obvious intent that the class action be used to solve the problems inherent in multiple litigation.

B. *Requirements of (b)(3) and the Economy Purpose*

If the four initial prerequisites are met, the court is then obligated to determine under subsection (b)

> (3) . . . that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is *superior* to other available methods for the fair and efficient adjudication of the controversy.[19] (Emphasis added.)

In the absence of an affirmative finding on both requirements, no (b)(3) class action can be maintained. The Rule sets forth criteria pertinent to these findings:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.[20]

Again, an analysis of the individual topics indicates that multiplicity of litigation and potential economies are the primary matters of

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[18] Fed. R. Civ. P. 23(a).
[19] Id. at 23(b)(3).
[20] Id.

concern for the trial court. The "interest of members of the class in individually controlling the prosecution or defense of separate actions" is meaningless unless separate actions have been commenced, or are about to be commenced. The "extent and nature" of other litigation concerning the controversy also makes the existence of other litigation a major element of the necessary findings. The "desirability or undesirability of concentrating the litigation" of claims in the particular forum anticipates a circumstance of actual or threatened multiple litigation. Finally, "the difficulties likely to be encountered in the management of a class action" must be of prime concern to the court, particularly when one of the benefits to be achieved by a (b)(3) class action is the economy which such actions supposedly can achieve in the administration of justice.

Yet, as previously noted, three courts of appeal have ignored the basic purpose of Rule 23 as amended and permitted class actions to proceed in order to provide a forum for the small claimant. While it is true that a (b)(3) class action *can* provide a forum for the small claimant, this result is at most an incidental benefit of the use of the class action device to resolve in one case what otherwise would be a number of actions. The courts in the latter three cases have turned this incidental benefit into the basic justification for the maintenance of such actions.

This approach has not escaped criticism. Chief Judge Lumbard, dissenting from the majority in *Eisen*, noted that the amount expended in filing and processing claims in that case would probably exceed any recovery even if all the difficulties inherent in the administration of the suit were overcome.[21] He pointed out that Rule 23 did not intend that courts should hear causes of action as class actions merely because they would otherwise not hear them at all.[22] Judge Lumbard further noted that the subject matter of the action was within the jurisdiction of the Securities and Exchange Commission and should be resolved by that agency. He urged that the trial court be affirmed to "put an end to this Frankenstein monster posing as a class action."[23]

A class action of the (b)(3) type, under appropriate circumstances, can achieve economies in the administration of the court system and in the enforcement of numerous claims. However, an injudicious and indiscriminate utilization of the class action device can result in a perversion of this policy and can lead to a crushing burden on the court system by creation of massive, unmanageable litigation. Before the new Rule can achieve its intended economies, the courts must consciously resolve the conflict between two competing considerations: the

21 391 F.2d 555, 571 (2d Cir. 1968).
22 Id. at 572.
23 Id.

availability of a forum for the small claimant; and the elimination of time, effort and expense likely to result from the indiscriminate use of the (b)(3) class action device.

III. Effects of Indiscriminate Utilization of (b)(3) Class Actions

There are three obvious undesirable results of the indiscriminate approval of (b)(3) class actions: (1) the use of the class action device for the solicitation of claims; (2) the economic impact on defendants in these cases; and (3) the crushing economic and administrative burden imposed upon the courts.

Even under Rule 23 prior to amendment, the class action device was peculiarly susceptible to the solicitation of litigants by attorneys who were anxious to seek out additional members of the alleged class to join as party plaintiffs. It was recognized that activities in connection therewith might well be a violation of Canon 28 of the Canons of Professional Ethics,[24] which prohibits the stirring up of litigation.[25] The Court of Appeals for the Second Circuit has stated that it is reluctant to permit actions to proceed where they are not likely to benefit anyone but the lawyers who bring them.[26] It has also been recognized that the class action device may be a method of creating law suits where none previously existed.[27]

Under the new Rule no notice is to be given to a class until *after* determination that a class suit should proceed. The Advisory Committee's Note states that notice to alleged class members is available fundamentally for the protection of the members of the class and should *not* be used as a device for the undesirable solicitation of claims.[28] However, the notification of the class members has as its very basis for existence the bringing into court of a multitude of additional claimants or litigants.

It is conceivable that if multiple litigation has resulted from a set of circumstances, or is threatened, the class action device and the corresponding notice requirement can be utilized to effect economies in the disposition of the litigation by joining all litigants in one action. However, in the absence of such an indication, the solicitation feature of the notice seems all too apparent. If no substantial sentiment to make claims exists among members of the alleged class, the notice

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[24] Cherner v. Transitron Electronic Corp., 201 F. Supp. 934, 936 (D. Mass. 1962).

[25] ABA Canons of Professional Ethics No. 28.

[26] Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 567 (2d Cir. 1968).

[27] Berley v. Dreyfus & Co., 43 F.R.D. 397, 398-99 (S.D.N.Y. 1967).

[28] 39 F.R.D. at 107. In this regard, the Advisory Note refers to the discussions in Cherner v. Transitron Electronic Corp., 201 F. Supp. 934 (D. Mass. 1962); Hormel v. United States, 17 F.R.D. 303 (S.D.N.Y. 1955).

provision of Rule 23 provides a judicially approved method for the unlawful solicitation of clients.

A second undesirable result of the indiscriminate use of (b)(3) class actions is the economic impact which such actions can impose upon defendants. Prior to the determination of the class issue, the defendant does not know if the plaintiff represents himself, or a group of persons whose alleged combined loss would be of such magnitude that the very economic life of a defendant would be in jeopardy.

The vast amounts frequently claimed by the representative party in a typical class suit require that the very utmost in legal time and energy be expended in defense even if the defendants are completely innocent of any wrongdoing. The economic impact upon defendants in such a circumstance can be grave. When the stakes are so large, massive trial preparation must be undertaken with its corresponding expense, regardless of the innocence of the defendants.

Even after a determination of the class issue, great uncertainty exists as to the number of persons who will actually come forward and prove their claims. For this reason, any compromise settlement becomes exceptionally difficult. For example, if settlement is approached on a "nuisance" basis, counsel find it difficult to calculate the potential damages because of the many variables concerning the size of the class and persons who will actually pursue their claims.

On the other hand, the aggregate amounts claimed in some alleged class actions are of such magnitude that defendants must often accede to some settlement, regardless of the merits of the claim, and regardless of the difficulties in effecting such a settlement. The economic threat arising from the very pendency of such an action seriously impedes any financial planning by a defendant company. The credit status of an economically sound corporation can be critically affected by the mere existence of such an action. Such vast power to impede the efficient functioning of a business organization is granted under the new Rule to any lawyer filing an alleged class action.

The third undesirable effect of the indiscriminate approval of (b)(3) class actions is the considerable and often massive burden imposed upon the courts. The order declaring that an action can proceed as a class action instantaneously authorizes an action with hundreds, thousands, or even hundreds of thousands of parties.

Paragraph (c)(2) of Rule 23, as amended, provides that "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."[20] In a class action in which the alleged class consists of thousands or tens of thousands of people, the burden upon the court in preparing and mailing such notice, re-

[20] Fed. R. Civ. P. 23(c)(2).

sponding to inquiries, and tabulating returns could far exceed the budget of any district court.

In addition, paragraph (d)(2) sets forth circumstances in which additional notices to all class members may be required. Such notices can relate (1) to any step in the action, (2) to the proposed extent of the judgment, (3) to the opportunities of members to signify whether they consider the representation fair and adequate, or (4) to the requirements of a party who wishes to intervene and present claims or defenses, or otherwise come into the action.[30] It is likely that several notices to the class will be required in any class action.

An even larger burden is assumed with reference to the assessment of damages. If the issue of liability is resolved in favor of the class, the court must establish damages for each member of the class. The defendant certainly has a right to trial by jury as to this essential element of the claim. For example, in an action alleging a violation of Rule 10b-5 of the Securities and Exchange Act of 1934, the individual plaintiff must prove the details of the purchase and sale of shares, and especially of his individual reliance upon the alleged misrepresentation.[31] Such evidence as he offers on these points is, of course, subject to cross-examination and counter-testimony.

The possibility of hearing testimony from thousands of individuals regarding their damages should certainly be a serious consideration for the court before the determination that any action can proceed as a class action. It has already been pointed out in the *Eisen* case that the amount expended in filing and processing claims by 3,750,000 plaintiffs would probably exceed any recovery[32]

In one class action, the court and counsel consumed over three years in the attempt to resolve questions relating to the identification of members of the class, the determination of the amount of the total award, and the resolution of other residual and post-judgment problems.[33] Finally, a compromise settlement was made because of the inability of the court and counsel to resolve these problems to any definite degree.[34] This case was brought under Rule 23 prior to amendment, when such actions bound only those persons who intervened or who were parties to the suit. Under the new Rule 23, the problems to be resolved will certainly be multiplied.

The vast burden which is imposed upon the courts in many class

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30 Id. at 23(d)(2).

31 Kohler v. Kohler Co., 208 F. Supp. 808, 823 (E.D. Wis. 1962), aff'd, 319 F.2d 634 (7th Cir. 1963).

32 391 F.R.D. 555, 571 (2d Cir. 1968) (dissenting opinion).

33 Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1962), petition for cert. dismissed, 371 U.S. 801 (1963).

34 See reference to the *Union Carbide* case in Harris v. Jones, 41 F.R.D. 70, 73 n.5 (D. Utah 1966).

actions seems of secondary import, however, when it is considered that according to the Advisory Committee the primary purpose of the action is to achieve "economies of time, effort and expense. . . ."[35]

IV. The Discretion Granted by the Amended Rule to the Trial Court

The draftsmen of the amended Rule apparently realized that problems of application would arise. With this in mind, they armed the trial judge with considerable discretionary powers to fit the Rule to the given situation.[36] Indeed, one of the principal features of Rule 23, as amended, is the broad discretion granted to the trial court to determine whether specific litigation should be permitted to proceed as a class action. The Advisory Committee's Note states that in situations under subdivision (b)(3), class action treatment is not as clearly called for as in the (b)(1) and (b)(2) types of actions but "*may* nevertheless be convenient and desirable depending upon the particular facts."[37] (Emphasis added.)

Regarding the issue of discretion, Professor Cohn has recently commented:

> As with joinder of parties under rule 19, the district judge, unhampered by traditional classifications, is given *a large measure of discretion* in balancing conflicting interests. Although it has been suggested that the court hearing a class action is in a poor position to determine fairness and adequacy of representation, the amended rule adopts the position of the many authorities that trust the ability of the *trial court* to decide these issues when aided by a procedure that contains a built-in flexibility.[38] (Emphasis added.)

Too few cases have as yet been decided by the courts of appeal to determine whether the discretion lodged in the trial court under the new Rule will be respected at the appellate level. However, in three recent cases the courts of appeal have reversed trial court holdings that the litigation was not suitable for class action treatment without considering the discretion issue.[39]

The practical effect of such rulings will be to eliminate the exercise

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[35] 39 F.R.D. at 102.

[36] See Newberg, Orders in the Conduct of Class Actions: A Consideration of Subdivision (d), 10 B.C. Ind. & Com. L. Rev. 577 (1969).

[37] Id.

[38] Cohn, The New Federal Rules of Civil Procedure, 54 Geo. L.J. 1204, 1214 (1966). In this regard, Mr. Cohn also refers to 2 W. Barron & A. Holtzoff, Federal Practice and Procedure § 572, at 351-52 (Rules ed. 1961); Z. Chafee, supra note 1, at 288-95.

[39] Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), cert. denied, 89 S. Ct. 1194 (1969); Hohmann v. Packard Instruments Co., 399 F.2d 711 (7th Cir. 1968); Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968).

of discretion by trial judges through utter intimidation, and thereby to frustrate the fundamental flexibility of the amended Rule. The mere allegation of class representation will then be sufficient to satisfy the standard and thus to burden the court systems with unlimited claims.

It is ironic that the courts of appeal have chosen to disregard the issue of discretion in view of Mr. Justice Black's dissent to the amended Rules. The thrust of Justice Black's criticism of the new Rules, and especially of Rule 23, was that they conferred excessive discretion upon the trial judge.

> It seems to me that they place too much power in the hands of the trial judges and that the rules might almost as well simply provide that "class suits can be maintained either for or against groups whenever in the discretion of a judge he thinks it is wise."[40]

In the final analysis, it seems that Mr. Justice Black's fears were groundless. But such is the case only because the courts of appeal have chosen to disregard the will of the majority of the Advisory Committee and to deprive the trial judge of the wide discretion that was accorded him by the amended Rule.

It is likely that further experience with Rule 23 will substantiate the wisdom of entrusting this discretion to the trial court which is best situated to determine, from all the facts and circumstances and under the guidelines of the new Rule, whether use of the class action device is desirable in a given case. Consistent reversal by the courts of appeal of trial court findings would vitiate this most important principle of the new Rule and thus undermine its essential flexibility.

V. Conclusion

The (b)(3) class action created by Rule 23, as amended, represents a drastic change in federal procedural law, having only a remote connection with the traditional class actions or the old spurious class action. It provides a new device for bringing before the court great numbers of passive litigants who would otherwise have remained silent. Unless restricted to those cases where, in the discretion of the trial judge, such actions can achieve economies of time, effort and expense, class actions will become "Frankenstein monsters," disrupting the administration of the judicial system.

The theory that such class actions can provide a forum for the small claimant frequently conflicts with the basic purpose of the Rule: the achievement of economies of time, effort and expense. The constant threat of solicitation in each of these cases should be considered carefully before they are authorized to proceed as class actions.

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[40] See Mr. Justice Black's Statement, 39 F.R.D. 272, 274 (1966).

In the final analysis, the broad discretion granted by the amended Rule to the trial judge for determining the class issue should be accorded great weight by the courts of appeal reviewing such orders. The discretion traditionally granted to United States district judges in many areas of the law has been wisely exercised, and rarely impinged upon by the courts of review. The effective utilization of the class action device will depend upon a realistic recognition of this discretion as it is exercised for the purposes consistent with the basic policy objectives of Rule 23.