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CLASS ACTIONS—A REAPPRAISAL IN LIGHT OF HAWAII v. STANDARD OIL

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FROM ITS inception, the present federal class action rule[1] has presented vexing problems concerning the proper scope of judicial power. When the amended rules—including Rule 23 as to class actions—were forwarded to Congress by the Supreme Court in 1966, Justice Black dissented, stating:

> I particularly think that every member of the Court should examine with great care the amendments relating to class suits. 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 particular groups whenever in the discretion of a judge he thinks it is wise.'[2]

While a certain amount of discretion is, of course, necessary to the enforcement of any procedural rule, some courts have gone beyond Justice Black's misgivings and taken Rule 23 as an invitation to fashion new substantive remedies, particularly in the area of antitrust. The "fluid class" concepts relied upon in *Eisen v. Carlisle & Jacquelin*[3] and *In re Coordinated Pretrial Proceedings in*

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[1] FED. R. CIV. P. 23.

[2] *Amendments to Rules of Civil Procedure for the United States District Courts*, effective July 1, 1966, 383 U.S. 1029, 1035 (1966) (Black, J., dissenting).

[3] 52 F.R.D. 253 (S.D.N.Y. 1971). This opinion was the culmination of a long line of cases in this litigation. The initial determination that the case could not be maintained as a class action, 41 F.R.D. 147 (S.D.N.Y. 1966) was held appealable by the Second Circuit, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967) and ultimately reversed and remanded, 391 F.2d 555 (2d Cir. 1968). The district court on remand, 50 F.R.D. 471 (S.D.N.Y. 1970) called for further information pursuant to the Second Circuit opinion, and the opinion espousing the fluid class motion followed. The most recent opinion in this action, providing that defendants should bear ninety per cent of the cost of notice to

Antibiotics Antitrust Actions[4] provide the most striking examples. In both instances, the courts created mammoth classes consisting of millions of odd-lot traders (in *Eisen*[5]) or drug purchasers (in *Antibiotics*[6]). The courts then reasoned that the difficulties of processing these multitudinous individual claims could be avoided by awarding damages in gross to the class as a whole.[7] In this way, a fund would be created that could be distributed at a later time. Since many class members predictably will not bother to file claims,[8] however, a decision must be made at some point concerning the disposition of the unclaimed monies. In *Eisen*, the court suggested that the odd-lot charge to be imposed in future transactions be lowered by a set amount until the residual portion of the damage fund was exhausted.[9] In other words, future odd-lot traders (including those who were entering the market for the first time) would recover damages for alleged injuries suffered by those who had traded in the past (including persons who might never engage in another odd-lot transaction again). In *Antibiotics*, the court deferred the decision with respect to what to do with the unclaimed monies, but made it clear that in no event would the defendants be permitted to retain their so-called "ill-gotten" gains.[10] Both the *Eisen* and *Antibiotics* decisions were rendered prior to a determination on the merits and for the expressed purpose of effectuating antitrust rather than procedural goals.[11]

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the class because of the likelihood of plaintiff's success on the merits, appears in 558 Antitrust & Trade Reg. Rep. A-5 (S.D.N.Y. April 4, 1972).

[4] 333 F. Supp. 278 (S.D.N.Y. 1971). The court had earlier indicated its "tentative" adoption of the fluid class concept, 333 F. Supp. 278 (S.D.N.Y. 1971).

[5] Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 257 (S.D.N.Y. 1971) (class of approximately six million).

[6] *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278, 290 (S.D.N.Y. 1971) (4,851,000 class members in California alone).

[7] Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971); *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971).

[8] *See, e.g.*, West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1084 (2d Cir. 1971) (of the thirty-seven million dollars received by the states for distribution to consumers in the Antibiotics settlement, only 16.5 million dollars was claimed by individual class members).

[9] Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 264-65 (S.D.N.Y. 1971).

[10] *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971).

[11] Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 264 (S.D.N.Y. 1971); *In re*

The creation of these fluid classes would appear to be directly contrary to the Supreme Court's decision in *Snyder v. Harris*.[12] If, as the Court held in that case, individual damage claims may not be aggregated to avoid the 10,000 dollar jurisdictional requirement in diversity and federal question suits, it is difficult to perceive why aggregation should be permitted to avoid the substantive requirement of the Clayton Act[13] that a plaintiff prove injury to his business or property.[14]

Whatever may have been the previous state of the law, however, it is clear that the Supreme Court's decision this year in *Hawaii v. Standard Oil*[15] has effectively sounded the "death knell" of the fluid class concept. In rejecting Hawaii's contention that it could sue as *parens patriae* for damages allegedly inflicted on its economy as a whole, Justice Marshall stressed that section 4 of the Clayton Act allows plaintiffs to sue only for actual injury to their business or property. Thus, while Hawaii (like its individually injured citizens) can sue in its proprietary capacity for damages suffered as a result of its own purchases of allegedly price-fixed gasoline, it cannot claim treble damages to vindicate its sovereign interest in the well-being of the state economy. The Court pointed out that Congress could have:

> required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected. Instead, Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation.[16]

The fluid class concept is functionally indistinguishable from *parens patriae*. Instead of a sovereign state, it is the private plaintiff asserting representative status who seeks to recover damages which

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Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971).

[12] 394 U.S. 332 (1969).

[13] 38 STAT. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1970).

[14] 15 U.S.C. § 15 (1970) provides in pertinent part: "Any person who shall be *injured in his business or property* by reason of anything forbidden in the anti-trust laws may sue therefore . . . and shall recover threefold the damages *by him sustained* . . . ." (emphasis supplied).

[15] 405 U.S. 251 (1972).

[16] *Id.* at 262.

other persons are claimed to have suffered. Instead of being deposited in the state treasury, the damage recovery is to be distributed to available members of the fluid class, including those who suffered no injury. These differences, however, are not distinctions. As with *parens patriae*, claims are being pressed and monies awarded to persons other than those actually injured in their business or property. As Mr. Justice Marshall observed,[17] Congress could have provided this remedy to insure antitrust compliance—but it did not do so. The district courts, therefore, may not use Rule 23 as a means of filling what they may feel is a gap in the statutory scheme of enforcement. Rules of procedure may regulate the manner in which claims are adjudicated, but they cannot donate one person's claim to another to facilitate punishing the defendant.[18]

The reverse side of *Hawaii* is shown by *Ratner v. Chemical Bank*,[19] in which Judge Frankel ruled that the class action device could not be used to assert the 100 dollar statutory minimum damage claims of some 130,000 Master Charge card holders under the Truth in Lending Act of 1968.[20]

The defendant in *Ratner* had inadvertently omitted a minor, though lawfully required item (the "nominal annual percentage rate") from its periodic statements to customers. It would have been difficult, if not impossible, for anyone to have proven actual damages as a result of this defect. The court estimated that the maximum injury that the plaintiff conceivably could have proven was less than two dollars. It was precisely because of the problems of proof and the minuteness of the amounts typically involved that Congress provided the 100 dollar minimum recovery, plus costs and attorneys' fees, as a means of encouraging "private attorneys-general" to enforce the statute. In these circumstances, Judge Frankel ruled that a class action would be "essentially inconsistent with the spe-

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[17] *Id.*

[18] It should be noted that Justice Marshall did acknowledge, in dictum, that a class action might be brought in appropriate circumstances. But the holding in *Hawaii* makes it clear that he was referring to a normal class suit in which individual claims would be proved; not a "fluid class" that would change the form but preserve the substance of the very *parens patriae* claim that the Court ruled should be dismissed.

[19] 1972 CCH CONSUMER CREDIT GUIDE ¶ 99,238 (S.D.N.Y. February 14, 1972).

[20] Truth in Lending Act, 15 U.S.C. §§ 1601-1613, 1631-1644, 1661-1665 (1970).

cific remedy supplied by Congress. . . ."[21]

The significance of *Ratner* is twofold: first, the minimum damage provision of the Truth in Lending Act[22] demonstrates Congress' ability to allow for damages without proof of injury when that remedy is deemed appropriate. Conversely, in the vast majority of cases in which minimum or automatic damages are not specified in the governing statute, it may be inferred that Congress intended that each claimant prove his own individual injury. Second, Judge Frankel's decision may be broadly read as authority for the proposition that when automatic damages are provided, it would be inconsistent also to allow those claims to be aggregated by means of a class action. Thus, if automatic damages preclude class action treatment under Rule 23, it follows that a class action will always entail the problem of administering a multiplicity of individual claims; and, under *Hawaii*, these problems cannot be circumvented by resort to *parens patriae*, fluid classes or analogous devices.

A number of important consequences flow from the requirement that the individual claims of class members must ultimately be proven. First, the kind of gargantuan classes encompassing millions of putative members, which have been alleged in recent years,[23] must be recognized as inherently unmanageable. Even in

[21] *See* note 19 *supra.*

[22] *See* note 20 *supra.*

[23] *See, e.g.*, Hawaii v. Standard Oil Co., 301 F. Supp. 982, 984 n.3 (D. Hawaii 1969), *rev'd on other grounds*, 431 F.2d 1282 (9th Cir. 1970), *aff'd on other grounds*, 405 U.S. 251 (1972) (class of all gasoline consumers in Hawaii disapproved); City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D. N.J. 1971) (class of all consumers of gasoline in Pennsylvania, New Jersey and Delaware disapproved); Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd sub. nom.*, Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971) (class of all home owners in the United States alleged; claims of named plaintiffs and intervenors dismissed prior to class determination); *In re* Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Motor Vehicle Air Pollution Control Equipment, 52 F.R.D. 398 (C.D. Cal. 1970) (class of all residents of the United States disapproved; class of all farmers in the United States and all persons within a particular state approved); Reinisch v. New York Stock Exchange, 52 F.R.D. 561 (S.D.N.Y. 1971) (class of all present and future stockholders trading on both the New York and American Stock Exchanges and also other brokerage firms disapproved); Chicago v. General Motors Corp., 520 Antitrust & Trade Reg. Rep. A-1 (N.D. Ill. June 25, 1971) (class of all residents of the City of Chicago alleged); Hackett v. General Host Corp., 5 Trade Reg. Rep. (1972 Trade Cas.) ¶ 73,879 (E.D. Pa. 1970), *appeal dismissed*, 5 Trade Reg. Rep. (1972 Trade Cas.) ¶ 73,800 (3d Cir. 1972) (class of all consumers of bread in Philadelphia disapproved). *See also* Eisen v. Car-

the unusual case in which all issues other than the fact and amount of individual purchases could be litigated by the class representative,[24] the job of supervising discovery and trial with respect to over a million claims (however simple the remaining litigable issues might be) would, at a minimum, require decades of judicial time and resources.

It is no answer to assert that class action defendants will invariably settle.[25] This may not be borne out by the facts in each particular case; and there is nothing in Rule 23, the Advisory Committee Notes or elsewhere, that suggests that the Rule was intended to work practicably in a settlement but not in a litigation context. Certainly no other rule of procedure has been construed in this manner. The fact is, all of the Federal Rules of Civil Procedure, including Rule 23, are intended to provide a framework for pretrial, trial and post-trial proceedings. Any rule that is construed as doing something else would not be a rule of procedure at all and would be beyond the scope of the Enabling Act under which the Federal Rules were promulgated.[26] In short, the federal courts have never had the capacity to handle cases of the magnitude now being asserted, and there is no lawful way in which Rule 23 can be utilized to provide them with such vastly added capability.

A second implication of the *Hawaii* decision is that if individual injury and damages must be proven, some reassessment would seem to be in order with respect to the kinds of cases—particularly in antitrust—that are appropriate for class action treatment. The Advisory Committee originally addressed itself to this issue with Delphic ambiguity. It said: "Private damage claims by numerous

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lisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971) and *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971), discussed in the text.

[24] More commonly, in an antitrust case, for example, there will be numerous individual fact issues bearing on the defendant's liability to a particular class member. *See* note 25 *infra.*

[25] *See, e.g.*, Dole, *The Settlement of Class Actions for Damages*, 71 COLUM. L. REV. 971, 974 (1971).

[26] 28 U.S.C. § 2072 (1970) provides in pertinent part: "The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions . . . .

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

individuals arising out of concerted antitrust violations may or may not involve predominating common questions."[27]

The Committee was far more definite in considering the suitability of class actions to air crashes and similar cases:

> A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.[28]

While some courts have assumed that the existence of a single conspiracy is sufficient to establish the predominance of common questions and thus, the suitability of a class action in an antitrust case,[29] this circumstance may actually be of no more significance than the invariable existence of a common issue with respect to negligence or product liability in an air crash. To recover, an antitrust claimant must prove that he was actually injured.[30] Thus, not only damages, but liability will depend on whether the class member purchased a product affected by the conspiracy, the person he bought from, how much he paid and how that price was determined. A class member who bought at a large discount from an intervening seller, for example, may have suffered no injury at all even if the product in question was originally sold at an overcharge.[31] The viability of the defendants' "passing-on" defense may

[27] *Proposed Rules of Civil Procedure, Advisory Committee Note to Rule 23*, 39 F.R.D. 69, 103 (1966).

[28] *Id.*

[29] *See, e.g., In re* Ampicillin Antitrust Litigation, 5 Trade Reg. Rep. (1972 Trade Cas.) ¶ 73,966 (D.D.C. May 9, 1972); Philadelphia v. American Oil Co., 53 F.R.D. 45 (D. N.J. 1971); Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969); Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968); Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968). Of course, the predominance of common questions is only one of the several prerequisites for the maintenance of a Rule 23(b)(3) class action.

[30] 15 U.S.C. § 15 (1970); Hawaii v. Standard Oil Co., 405 U.S. 251 (1972).

[31] Indeed, unless the class member purchased from such an intervening seller pursuant to a pre-existing cost-plus contract or analogous fixed-markup type of arrangement, he would be barred from proving injury under the rule of Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968). *See, e.g.*, Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd sub. nom.*, Mangano v. American Radiator

further depend upon whether, and particularly upon which terms, the class member resold.[32] Consequently, if individual injury and damages must be established, the possibility that a nominal antitrust class action might degenerate into a multitude of separate trials should be taken as seriously as would be the case with a mass accident.

A final consequence of *Hawaii* is that, if individual claims must be established, the defendants ought to be entitled to proper discovery as well as trial with respect to relevant facts. The problem, however, is that the effort and expense of responding to discovery and participating at trial may be disproportionately large in comparison to the class member's claim. The question of whether, or the degree to which, class members should be relieved from the ordinary burdens of litigation lies at the heart of much of the current controversy with respect to Rule 23.

The fluid class concept represents an effort to eliminate *any* requirement that class members participate in the litigation being conducted on their behalf. The related problems of whether class members must file statements of claim,[33] respond to interrogatories,[34] testify or present documents at trial are more difficult. Certainly, the "book-of-the-month-club" type of notice for which Rule 23 provides—i.e., all persons notified who do not affirmatively act to opt-out are deemed members of the class[35]—would seem to

& Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971); City and County of Denver v. American Oil Co., 53 F.R.D. 620 (D. Colo. 1971).

[32] Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), limited the applicability of the "pass-on" defense to the possible case in which the plaintiff resells pursuant to a pre-existing cost-plus contract.

[33] *Compare* Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 459 (E.D. Pa. 1968) *with* Wainwright v. Kraftco Corp., 5 Trade Reg. Rep. (1972 Trade Cas.) ¶ 73,946 (N.D. Ga. 1972).

[34] *Compare* Brennan v. Midwestern United Life Insurance Co., 450 F.2d 999 (7th Cir. 1971) (Rule 23 permits discovery from absent class members when necessary or helpful) *with* Wainwright v. Kraftco Corp., 5 Trade Reg. Rep. (1972 Trade Cas.) ¶ 73, 946 (N.D. Ga. 1972) (use of interrogatories to absent class members would end the usefulness of Rule 23).

[35] *See* Fed. R. Civ. P. 23(c)(2) and (3), which provides in pertinent part: "(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances . . . . The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel. (3) . . . . The judgment in an

evidence an intention on the part of the draftsmen to minimize that which class members might be called on to do. On the other hand, Rule 23 does not and could not eliminate the substantive necessity that individual claims be proven, and this requirement will inevitably impose burdens on class members that are more onerous than responding to a class action notice.

This paradox, in this author's view, arises from certain unresolved contradictions, both among the stated objectives of the Advisory Committee and between some of those objectives and the requirements of substantive law. For example, Professor Kaplan, one of the principal draftsmen of Rule 23, explained the notice provisions as follows:

> If, now, we consider the class, rather than the party opposed, we see that requiring the individuals affirmatively to request inclusion in the law suit would result in freezing out the claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step.[36]

Professor Kaplan also states, however, that the basic object of amended Rule 23(b)(3) was ". . . to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party."[37] What Professor Kaplan does not explain is how a class member could possibly be permitted to recover monies from a defendant without having to take a single affirmative step and without, at the same time, diluting important procedural safeguards (such as discovery and trial) designed to protect the opposing party.

Most revealing, however, is Professor Kaplan's concluding paragraph on Rule 23, in which he makes clear his belief that this new procedural rule will effect changes in the substantive law. He states:

> Like other innovations from time to time introduced into the Civil Rules, those as to class actions change the total situation on which

action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class."

[36] Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 397-98 (1967).

[37] *Id.* at 390.

> the statutes and theories regarding subject matter jurisdiction are brought to bear. . . . Not only must new [R]ule 23 be considered a fresh datum for deciding whether diversity of citizenship requirements are satisfied by the original parties or intervenors; it also presents a new complex in deciding questions of permissible 'aggregation' of amounts in controversy.[38]

This basic assumption that apparently influenced the drafting of Rule 23 was specifically nullified by the Supreme Court in *Snyder v. Harris*[39] when it authoritatively held that Rule 23 could not alter substantive jurisdictional rules and, specifically, does not constitute a "new complex" permitting the aggregation of class members' claims in computing the amount in controversy. If, as Professor Kaplan indicates, some of the draftsmen also harbored hopes for changing other areas of substantive law, their expectations would likewise have exceeded their mandate under the Rules Enabling Act.[40] In other words, the opt-out provisions of Rule 23 should be recognized as something of an anomaly that cannot by implication lawfully override the substantive legal framework in which the Rule must be applied.

It is, of course, possible that the disallowance of certain classes containing massive numbers of plaintiffs and the imposition of some of the normal burdens of litigation on class members will mean that some claims that are individually small, but numerous and large in the aggregate, may not be pressed. It should not be considered callous or socially irresponsible to ask, however, whether this consequence is necessarily an unacceptable one. In a recent decision,[41] the Third Circuit held that the denial of a class suit was unappealable, even when the representative plaintiff had a claim of only nine dollars and the lower court decision would thus clearly sound the "death knell" of the action. The court reasoned that if no private or public interest law firm would be willing to litigate a nine dollar

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[38] *Id.* at 399-400.

[39] 394 U.S. 332 (1969).

[40] While *Snyder* places primary reliance upon Rule 82 of the Federal Rules of Civil Procedure ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ."), the Court's reasoning is at least equally applicable to a conflict between Rule 23 and the Rules Enabling Act, 28 U.S.C. § 2072 (1972) ("Such rules shall not abridge, enlarge or modify any substantive right . . . ."). *See, e.g.*, Sibbach v. Wilson, 312 U.S. 1 (1941).

[41] Hackett v. General Host Corp., 5 Trade Reg. Rep. (1972 Trade Cas.) ¶ 73,800 (3d Cir. 1972).

claim, then perhaps the verdict of the "legal market-place" should govern, and society's judicial resources would be better expended on other matters.

To what extent, then, may the "legal market-place" properly leave some wrongs unremedied? It is, of course, clear that the nature of this marketplace is changing and that the trend in the recent past has been toward opening access to the judicial system. But any trend in the law, however salutary, may reach the point in which it either is extended beyond its original rationale or comes into conflict with other, equally compelling considerations. When this happens—as this author believes it has with class actions—the pendulum begins to swing back in search of an equilibrium.

Many of the issues that are now arising with respect to class actions suggest that the goal of opening the courts to all legitimate grievances is presently coming into conflict, at a number of points, with the equally pressing needs of assuring due process to civil as well as criminal defendants and of guaranteeing the continued viability of our federal court system. If these latter considerations are not to be sacrificed, it must be recognized that the ideal of providing a damage remedy for every compensable wrong is inherently incapable of realization.

At a minimum, this means that the courts should not have to adjudicate claims that are so unimportant to the claimants that they are unwilling to prove—in response to discovery and at trial—that they were actually injured. The only conceivable rationale for asking the judicial system to assume the burden of adjudicating these claims when the claimants themselves are unwilling to do so, is that this action is deemed necessary to assure compliance with important regulatory statutes. But the specific teaching of *Hawaii* (and the implication of *Ratner*) is that the courts should not seek to supplement Congressionally provided remedies in this manner.

Indeed, the same philosophy is reflected in an even more recent Supreme Court decision, *Sierra Club v. Morton*.[42]

On its face, the *Sierra Club* case has nothing to do with class actions. It merely holds that organizations that have a solely ideological interest in the environment have no standing to seek judicial review of administrative rulings. The decision, however, was apparently influenced by a memorandum prepared by the Solicitor-

[42] 405 U.S. 724 (1972).

General, portions of which are annexed to Justice Douglas' dissent; and this document clearly places the issue before the Court—as well as class actions—in broader perspective. The Solicitor-General notes that over the past quarter century there has been a continuous "whittling away" of legal principles designed to control the number and kinds of questions that courts may properly consider. After referring particularly to doctrines of case or controversy, reviewability, justiciability, sovereign immunity, mootness, statutes of limitations, laches, jurisdictional amount and real party in interest, the Solicitor-General observes:

> Under all these headings, limitations which previously existed to minimize the number of questions decided in courts have broken down in varying degrees. I might also mention the explosive development of class actions which has thrown more and more issues into the court. . . .[43]

For the Solicitor-General, the essential issue is one of judicial power. In his view, "a government by the Judiciary" would be neither a good form of government nor the one "ordained and established in our Constitution. . . ."[44]

The memorandum of the Solicitor-General in the *Sierra Club* case thus echoes, in a broader context, Justice Black's specific concern with Rule 23 as quoted at the beginning of this article. Whatever may be the proper role of the judiciary in other instances, there are clearly constitutional objections to judges fashioning important substantive remedies in the guise of interpreting a procedural rule, which in turn was drafted by an appointed Advisory Committee under the direct auspices, not of Congress, but of the Supreme Court.[45] Thus, the basic considerations of separation of powers as well as the most recent decisions of the Supreme Court require that district courts confine the exercise of their discretion to applying Rule 23 for what it is—not a panacea, but a procedural tool for promoting efficient adjudication in particular kinds of cases.

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[43] *Id.* at 754.

[44] *Id.* at 753.

[45] *See* 28 U.S.C. § 2072 (1970).