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Class Actions from the Plaintiffs' Viewpoint

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CLASS ACTIONS FROM THE PLAINTIFFS' VIEWPOINT

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IN RECENT years there has been a growing awareness of abuses practiced against small claimants; accordingly class actions have been viewed as creatures of necessity in litigation to correct these abuses. Through the use of the class action, these small claimants are provided a forum and absent the class action, they would otherwise be without a remedy. In recognition of the importance of class actions, the court in *Illinois v. Harper & Row Publishers, Inc.*,[1] said:

> First, since many plaintiffs only purchased small quantities of the reinforced editions, most individual class members have little incentive to sue alone. Their financial claims do not justify the expense of complex antitrust litigation. . . . Only when the purchases are combined in a class action is the potential damage recovery sufficiently large to warrant litigation.[2]

Moreover, since the 1966 amendment to the class action rule,[3] class actions have come of age as an effective tool in litigating the claims of multiple party plaintiffs. It has been stated

> the class action deters the robber barrons from plundering the poor. . . . Taking away the class action and the joy of those who

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[1] 301 F. Supp. 484 (N.D. Ill. 1969).

[2] *Id.* at 489.

[3] FED. R. CIV. P. 23. In general, the class action rule following the 1966 amendment more practically describes the proper occasions for maintaining class actions; insures that a judgment arising out of a class action will include those whom the court finds to be members of the class, irrespective of whether the judgment is favorable to the class; and provides for the fair conduct of these actions.

live off the consumer will, as in the old days, be unconfined.[4]

Class action suits have realized a high degree of acceptance, particularly in the area of private enforcement of the antitrust laws.[5] This acceptance may be partly attributable to the strong public policy repeatedly expressed by the Supreme Court of the United States favoring private enforcement of federal antitrust laws.[6]

I. STATE ATTORNEYS GENERAL AS PRIVATE ENFORCERS OF ANTITRUST LAWS AND AS CLASS REPRESENTATIVES

Over the last ten years, the class action has developed significantly because of the important role played by the state attorneys general in lending weight to the private enforcement of the antitrust laws. The genesis of the participation of state attorneys general in antitrust suits began ten years ago when the Illinois Attorney General first brought a treble-damage antitrust action on behalf of 1,600 school districts separately incorporated as political subdivisions of the State of Illinois. The Attorney General not only sought to combine all these school districts within Illinois, but also effected an agreement with the neighboring states of Michigan, Minnesota and Wisconsin to share the burdens and expenses of the complex antitrust litigation. The four cases were ultimately transferred to Milwaukee for cooperative pretrial discovery by agreement of all parties. The defendants in the Illinois case attacked the power of the Attorney General to sue on behalf of political subdivisions, to bring federal antitrust proceedings and to act as a class representative under the old Rule 23.[7] Chief Judge Robson,

[4] Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338 (1971).

[5] West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971); Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391 (S.D. Iowa 1968); Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968).

[6] Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 336 (1971). *See* Note, 38 J. AIR L. & COM. 67 (1972). *See also* Leh v. General Petroleum Corp., 382 U.S. 54, 59 (1965); Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965); Bruces Juices, Inc. v. American Can Co., 330 U.S. 743, 751 (1947).

[7] FED. R. CIV. P. 23 as existing prior to the 1966 amendment defined the categories of class actions in terms of the nature of the rights involved. *E.g.*, the "true" category was defined as involving "joint, common or secondary rights";

after reviewing the Attorney General's constitutional and common law powers and the resolutions adopted by many of the school districts specifically authorizing the Attorney General to bring the action, found that in "this unique instance" the Attorney General was justified in filing a federal antitrust action and in acting as class representatives for the Illinois school districts.[8] Consequently, since the *Brunswick* decision, the courts have consistently supported the establishment of state-wide public agency classes with the attorney general as the "proper representative."[9]

In addition, the courts have recognized that state governments may act as class representatives, with the attorney general as the appropriate and competent legal representative. The legislatures have also entered the fray by expressly authorizing state attorneys general to institute federal treble-damage antitrust action on behalf of governmental agencies and others in the state. Typical of the state statutes is the Illinois Antitrust Act, which provides:

> The Attorney General may bring an action on behalf of this State, counties, municipalities, townships and other political subdivisions organized under the authority of this State in Federal Court to recover damages provided for under any comparable provision of Federal law; provided, however, this shall not impair the authority of any such county, municipality, township or political subdivision to bring such action on its own behalf nor impair its authority to engage its own counsel in connection therewith.[10]

In addition, other states have similarly authorized their respective attorneys general to institute treble-damage federal antitrust suits

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the "hybrid" category was defined as involving "several" rights related to "specific property"; and last was the "spurious" class that involved "several" rights affected by a common question and related to common relief. *See* Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 570-76 (1937).

The "spurious" action under the original Rule 23 was an anamoly in that it was designated a class action, but did not adjudicate the rights or liabilities of a person not a party. *Amendments to Rules of Civil Procedure, Advisory Committee's Notes*, 39 F.R.D. 69, 99 (1966).

[8] Illinois v. Brunswick Corp., 32 F.R.D. 453, 460 (N.D. Ill. 1963).

[9] *In re* Ampicillin Antitrust Litigation, Trade Cases (CCH) § 73,966 (D.D.C. 1972); *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971); West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 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); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391 (S.D. Iowa 1968).

[10] ILL. REV. STAT. ch. 38 § 60-7.8 (1970).

on behalf of political subdivisions.[11] These statutes enable state attorneys general to institute broad-based actions on behalf of all political subdivisions specifically named as plaintiffs. To that extent, they are not class actions, even though they involve the numerous governmental agencies that are normally accommodated in a class action proceeding and achieve the same purpose as a class action.

A. *State-wide Consumer Actions*

The acceptance of the attorneys general as the appropriate law officers representing a state-wide class action has more recently emerged in state-wide consumer actions. This concept of a state-wide or city-wide class of the consuming public was first developed in *West Virginia v. Chas. Pfizer & Co.*,[12] which involved settlement of a vast number of treble-damage antitrust suits charging an alleged price-fixing conspiracy in the sale of broad spectrum antibiotic drugs. In that case, settlements were achieved for (i) city-county-state hospitals as one group, (ii) governmental agencies that financed drug purchases by welfare recipients, (iii) retail and wholesale druggists, and finally, (iv) the individual consumer. The consumer fund created in the settlement of the case was utilized to provide refunds to consumers who filed appropriate claims after extensive publication of notice. The portion of the consumer fund that remained after paying consumer refunds has been set aside to finance public health projects of benefit to all the consumers in the state or geographical area involved.

The development of these public health projects and the opportunities made available to conscientious public officials for the procurement of "seed money" to finance extensive public health projects are exciting features of the broad spectrum antibiotic drug settlement proceedings. These public health projects have been initiated and recommended by the state attorneys general or city legal officers, subject to approval and supervision by the district court. Although this unique phase of the settlement plan was attacked, nevertheless, the development of these public health projects was sustained by the Second Circuit.[13]

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[11] OHIO REV. CODE ANN. § 109.81 (1969) (upon agreement between the attorney general and the political subdivision).

[12] 314 F. Supp. 710 (S.D.N.Y. 1970).

[13] 440 F.2d 1079, 1091 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

The right of the states, as class representative, to bring consumer class actions was again sustained in the broad spectrum antibiotic litigated cases, *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*[14] and more recently in *In re Ampicillin Antitrust Litigation.*[15] In the latter decision, the district court reiterated the determination, made in several previous private antitrust actions instituted by state attorneys general, that these public law officers "are the best representatives of the consumers residing within their jurisdictions."[16]

B. *Parens Patriae Distinguished*

The position of the state as a Rule 23 class action representative to recover for direct financial injuries must be distinguished from attempts at private treble-damage actions on behalf of the economy, general welfare or citizens of the state in a *parens patriae* capacity. In *Hawaii v. Standard Oil Co.*,[17] the state of Hawaii brought an antitrust complaint as *parens patriae* for the alleged adverse effect on its economy of the purported antitrust violation. The Supreme Court, in a five to two decision, rejected the *parens patriae* position of Hawaii on two grounds. First, the Court held that section 4 of the Clayton Act, which requires a showing of injury to business or property,[18] was not broad enough in application to include injury to the "general economy" of a state. Primarily, however, the Court rejected the *parens patriae* status for the purpose of recovery of damages to the general economy on the ground that the concept "would upon the door to duplicative recoveries."[19] In another court of its complaint, Hawaii alleged a Rule 23 consumer class action, but this allegation was dismissed by the district court. Although no appeal was taken from the district court's ruling, the Supreme Court, in rejecting the *parens patriae* concept, stressed the avail-

[14] 333 F. Supp. 278 (S.D.N.Y. 1971).

[15] Trade Cases (CCH) § 73,966 (D.D.C. 1972).

[16] *Id.* at p. 92,033.

[17] 405 U.S. 251 (1972).

[18] Clayton Act, § 4, 15 U.S.C. § 15 (1970) provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[19] 405 U.S. 251 (1972).

ability of Rule 23 consumer class actions with the state being the consumer representative.[20] The Court stated:

> Where the injury to the State occurs in its capacity as a consumer in the marketplace, through a 'payment of money wrongfully induced,' . . . damages are established by the amount of the overcharge.[21]

In noting the district court's dismissal on the Rule 23 class action, the Supreme Court emphasized that the lower court did not hold "that a state could never bring a class action on behalf of some or all of its consumer citizens,"[22] and that the respondents had virtually conceded that consumer class actions might be appropriate. Significantly, the Court stressed that class actions "are definitely preferable in the antitrust area" to *parens patriae* actions since "Rule 23 provides specific rules for delineating the appropriate plaintiff-class, establishes who is bound by the action, and effectively prevents duplicative recoveries."[23]

This author believes that the Supreme Court in the *Hawaii* decision has given strong support to state-wide consumer actions instituted on behalf of the state as a consumer representative. Elsewhere in this issue, the view is proferred that the *Hawaii* decision has effectively sounded the "death knell" of the fluid class concept.[24] Rule 23 consumer class actions were encouraged; the manner of calculating and measuring damages for broad consumer classes was not considered.

II. Problems in Managing the Class

Before certifying a "class," the court must give consideration to the "difficulties likely to be encountered in the management of a class action" in reaching its finding that the issues common to the class predominate and that the class action is superior to other available methods of adjudicating the controversy.[25] This requirement imposes upon the court the need to consider procedural problems that may be encountered if a class action is established.

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[20] *Id.* at 266.

[21] *Id.* at 262 n.14.

[22] *Id.* at 266.

[23] *Id.*

[24] *See* the article by Mr. Blechman in this issue.

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

A. *Manageability*

The manageability questions in the establishment of class actions has arisen principally when consumer groups have been involved. In *Eisen v. Carlisle & Jacquelin*,[26] a class action involving some six million purchasers of odd-lot securities was sustained. While in *City of Philadelphia v. American Oil Company*,[27] a class action involving retail consumers of gasoline in the three states of Delaware, New Jersey and Pennsylvania was rejected. The size of the class was not determinative; instead, the manageability issue revolved around the proper identification of the class members and the ability to establish purchase transactions by the proposed members of the class. In the *American Oil* case, the district court recognized that the consumer class members would be impossible to identify because of their changing character from day to day, the absence of purchase records and the extreme complexity of gasoline marketing. The better view appears to be that an established, identifiable and relatively stable group of consumer class members, no matter what their numerical size, will satisfy the manageability issue.[28]

B. *Notice*

The question of the form of class suit notice after a class has been established is of primary importance. Rule 23 requires a neutral form of notice.[29] The defendants, of course, have persist-

[26] 41 F.R.D. 147 (S.D.N.Y. 1966).

[27] 53 F.R.D. 45 (S.D.N.Y. 1971).

[28] *See* Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338 (1971).

[29] Courts are required by virtue of FED. R. CIV. P. 23(c)(2) to give notice in 23(b)(3) class actions. Rule 23(c)(2) provides: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel." In all other forms of class actions, the notice requirements is discretionary with the court. Rule 23(d)(2) provides in part: "In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of their members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify

ently sought to include in a class suit notice such elements as (i) a warning of discovery burdens that might be imposed on class members, or (ii) the prospect of the sharing of costs and expenses.[30] These elements have been advocated to reduce class member participation. An additional element in notices that has been accepted by some of the district courts requires that class members file claims or estimates of claims as an affirmative requirement of their participation in the class.[31]

This author believes that this notice requirement unbalances the notice in favor of the defendants and goes beyond the requirements and terms of Rule 23. Judge Edenfield in the Northern District of Georgia recently rejected the defendants' request that class members affirmatively indicate their intentions to prove damages as being contrary to the literal terms of Rule 23.[32] Judge Fullam, writing elsewhere in this issue, has favored what he calls a "show of hands" by potential class members.[33] A class suit, however, should permit participation of all defined class members who do not opt-out or indicate their desire to be specially represented. Actually, automatic participation of all other class members is necessary to assure complete resolution of all issues being litigated. Furthermore, the threatened burden suggested in class suit notices, if a member participates, creates imaginary problems for the timid, uninformed and often overworked purchasing agent, financial officer or lower echelon government employee, which most often results in unwarranted negative attitudes.

Consequently, the neutrality of a class suit notice is lost. Moreover, as a practical matter, it is frequently impossible for individual class members to determine the harm they have suffered from an antitrust conspiracy without the advice and guidance of the attorney for the class representative.

Rule 23 requires that "the best notice practicable under the circumstances" be utilized. In the past, mailed notices to members

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whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action . . . ."

[30] The Cast Iron Pipe Antitrust Cases, Civil No. 71-516 (N.D. Ala. 1971).

[31] Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968).

[32] Wainwright v. Kraftco Corp., Trade Cases (CCH) § 73,946 (N.D. Ga. 1972).

[33] See the article by Judge Fullam in this issue.

who can be reasonably identified and publication to broader classes or a combination of both have been employed. The selection of the appropriate notice is left largely to the discretion of the district judge. In considering the practicability of the notice provided, the judge must necessarily give attention to the costs and expenses involved. Frequently, the use of advanced computer techniques can substantially reduce these costs. Certainly this is true where repeated notices and contacts may have to be made with class members. In those cases an accumulation of data can be stored on the computer which can be quickly, economically and repeatedly retrieved at subsequent stages in the proceedings.

C. *Pretrial Discovery*

Frequently, defendants have directed detailed and massive discovery requests and interrogatories against class members. The apparent purpose of this technique has been to so burden many small class members to eliminate their participation. Some courts have recognized this motivation and have rejected the defendants' discovery requests, especially in areas in which the defendants themselves have relatively complete and accessible records from which they could prepare full answers.[34]

The issue presented by these defendant discovery demands against class members requires a balancing of convenience, a showing by the defendants of direct relevance to the principle issues in the case and the necessity of proceeding in this manner rather than in more convenient ways. The more popular position of judges administering complex class actions is that the common issues of the class action should be, and are, best explored with the representative parties. This is the very basis upon which class actions have been encouraged. These common issues frequently involve all of the liability questions. Only after liability discovery has been completed or liability separately established at trial, are individual class members required to supply support for their claim of damages.

D. *Damages*

The manner of determining and calculating damages in large

[34] Illinois v. Harper & Row Publishers, 301 F. Supp. 484, 491 (N.D. Ill. 1969).

class actions has been the subject of recent decisions.[35] In addition, the determination of damages presents opportunities for use of the imagination and daring of counsel and the courts.[36] For example, in *Eisen v. Carlisle & Jacquelin*,[37] the district court held that damages could be computed for the total injury to the class without each individual filing a separate claim. Distribution could then be made on an equitable basis among class members. The availability of gross sales figures and certain industry studies of the defendants provided a basis for reliable calculations of aggregate transactions from which total damages could be determined.

In the litigated antibiotic-antitrust actions,[38] Judge Miles Lord approved a procedure whereby the total amount of damages on a class-wide basis for millions of consumers would be determined by statistical means in separate proceedings after the liability trial.

The use of both established statistical procedures and economic analysis to establish the total purchases by class members and the average price differential caused by the conspiratorial actions has been gaining acceptance.[39] In contrast is the position of the defendants favoring an individual purchase-by-purchase determination of damages.

The complexities of the damage problems can be met by a bifurcated procedure; first having the liability issue determined and

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[35] 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).

[36] *See* Miller, *Problems in Administering Judicial Relief in Class Actions Under Federal Rule 23(b)(3)*, 54 F.R.D. 501 (1972) and Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497, 499 (1969).

[37] 52 F.R.D. 253 (S.D.N.Y. 1971).

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

[39] Miller, *supra* note 36, at 512-13 concludes: "Accordingly, a federal court should feel free to experiment in awarding relief under rule 23. It has the tools to shape the remedy to meet the exigencies of each case and difficulties in administration should not be allowed to destroy the usefulness of the class action procedure. . . . Class actions under rule 23(b)(3) pose many new challenges to the federal courts that must be met with flexibility and imagination. Fortunately, the amended rule gives them numerous tools with which to administer and expedite large cases that otherwise might well prove unmanageable if the court were obliged to follow a more rigid and less fluid procedural structure. If properly utilized, it may well be that Rule 23, for all of its complexity and the many questions its text leaves unanswered, will prove to be a key building block in the federal courts' continuing effort to make our procedural system responsive to the needs of contemporary society."

then separately proceeding to the damage problem. This could be accomplished either with a single jury, two separate juries or the appointment of a special master to determine the amount of damages and report to a jury—all without infringing upon the right of trial by jury.

A likely solution to the complexity and manageability problems inherent in the determination of damages for large classes of plaintiffs would be the use of special masters in jury trials. Rule 53(b) contemplates the use of a special master in civil jury trials; the Supreme Court has approved and commended reference to a special master in jury, as well as non-jury cases "where accounts are complex and intrincate, or the documents and other evidence voluminous, or where extensive computations are to be made."[40] As Justice Clark observed in *LaBuy v. Howes Leather Co.*,[41] the need to conserve judicial resources in a jury case may require the use of a special master:

> We agree that the detailed accounting required in order to determine the damages suffered by each plaintiff might be referred to a master after the court has determined the overall liability of defendants, provided the circumstances indicate that the use of the court's time is not warranted in receiving proof and making the tabulation.[42]

In addition, there is much precedence approving the use of a special master in civil jury actions involving numerous transactions and voluminous records.[43]

The special master could be appointed after the determination of the liability issue. He would have nothing to do with supervising discovery or dealing with discovery issues, but instead his function would be to conduct hearings and receive evidence on the detailed, tedious issues involved in the calculation of the quantum of damages to individual class members. This approach follows the pro-

[40] *Ex Parte* Peterson, 253 U.S. 300, 313 (1920).

[41] 352 U.S. 249 (1957).

[42] *Id.* at 259.

[43] Burgess v. Williams, 302 F.2d 91, 94 (4th Cir. 1962); Graffis v. Woodward, 96 F.2d 329, 332 (7th Cir. 1938), *cert. denied*, 305 U.S. 631 (1938); Connecticut Importing Co. v. Frankfort Distilleries, Inc., 42 F. Supp. 225, 227 (D. Conn. 1940); Newcomb v. Universal Match Corp., 25 F. Supp. 169, 172 (E.D.N.Y. 1938); United States v. Wilson, 21 F.R.D. 173, 174 (N.D. Tex. 1957); Bercovici v. Chaplin, 3 F.R.D. 409, 410 (S.D.N.Y. 1943).

cedure approved by Judge Murrah in *Union Carbide & Carbon Corp. v. Nisely*.[44] When the special master has completed his proceedings, he would submit his findings to the court in written form. The court would then have the opportunity to rule upon any objections, and as modified by the ruling, the report would constitute *prima facie* evidence for the jury's consideration.[45] Hopefully, this suggested procedure for the use of a special master may obviate some of the problems that have been raised in criticism of the pursuit of a single damage recovery for the class that would be distributed in subsequent proceedings.

III. CONCLUSION

At this juncture, the concept of class actions under Rule 23 is in its development stages. Moreover, many significant and vital problems remain. This article has focused on selected problems in the area of class actions and is not intended as an exhaustive treatment. But constructive solutions to these selected problems, as well as other problems in the class action field can be reached with the ingenuity of the courts and counsel.

[44] 300 F.2d 561 (10th Cir. 1962).

[45] *Ex parte* Peterson, 253 U.S. 300, 311 (1920); Charles A. Wright, Inc. v. F.D. Rich Co., 354 F.2d 710 (1st Cir.), *cert. denied*, 384 U.S. 960 (1966); Burgess v. Williams, 302 F.2d 91, 94 (4th Cir. 1962); Connecticut Importing Co. v. Frankfort Distilleries, Inc., 42 F. Supp. 225, 227 (D. Conn. 1940).