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MANAGEABILITY UNDER THE PROPOSED UNIFORM CLASS ACTIONS ACT

by Storrow Moss Gordon

Since the adoption of new federal rule 23, the class action procedure has been the center of intense and often acrimonious debate.¹ Most of this debate has centered on the form of class action which permits large numbers of loosely affiliated plaintiffs to sue for damages.² Proponents of this form of action have hailed it as one of the most socially useful remedies in history,³ while detractors have condemned it as inherently wasteful and potentially destructive.⁴ The debate has not been confined to the ranks of scholarly commentators and attorneys practicing in the class action field; the courts themselves have often lined up on one side or the other of this heated argument.⁵

Of all the concepts introduced by rule 23, the manageability requirement has evoked perhaps the most important judicial response in terms of the continued viability of the mass class action.⁶ Despite the fact that manageability is a vague and judgmental concept, recent federal court decisions have restricted the discretion of federal courts to finding the manageability requirement satisfied through the use of flexible procedural tools.⁷ Thus, access to the federal system for the mass class action plaintiff has been severely restricted.⁸

Although the state forum remains theoretically available, most of the current state class action forms are either modelled after new federal rule 23 and follow closely the developments in the federal courts or are based on older and even more restrictive models.⁹ Recently, however, the National Conference of Commissioners on Uniform State Laws has proposed a Uniform Class Actions Act¹⁰ which could, if adopted, significantly broaden

1. Compare AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE 6 (1972) with Moore, *The Potential Function of the Modern Class Suit*, 2 CLASS ACT. REP. 47 (1973).

2. FED. R. CIV. P. 23(b)(3).

3. See, e.g., Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 BUS. LAW. 1259 (1970).

4. See, e.g., Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199 (1976).

5. Compare Buford v. American Fin. Co., 333 F. Supp. 1243, 1251 (N.D. Ga. 1971) (rule 23(b)(3) used as a device for the solicitation of litigation), with Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969) (if there is an error made, let it be made in favor of and not against the maintenance of a class action).

6. See Schuck, *Class Actions Maintainable*, in CLASS ACTIONS 89, 120 (1973).

7. See *In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), aff'd, 417 U.S. 156 (1974).

8. Cf. Snyder v. Harris, 394 U.S. 332 (1969) (plaintiff class members may not aggregate their individual claims to reach the \$10,000 amount in controversy jurisdictional requisite); accord, Zahn v. International Paper Co., 414 U.S. 291 (1973).

9. See Sullivan & Fuchsberg, *Major Class Action Considerations*, in CLASS ACTION PRIMER I (J. Fuchsberg ed. 1973).

10. UNIFORM CLASS ACTIONS ACT, adopted by the National Conference of Commissioners on Uniform State Laws, August 1976, subject to revision by the Style Committee (on file in Underwood Law Library, Southern Methodist University) [hereinafter cited as U.C.A.A.].

the availability of the mass class action in the state courts. This Comment examines the means by which the Uniform Class Actions Act attempts to solve the manageability problems which have arisen under the federal rule, analyzes the policy decisions embodied in the Act, and delineates some of the consequences of the Act for class action litigants in the state courts.

I. HISTORICAL DEVELOPMENT OF THE CLASS ACTION

The class action device grew out of the bill of peace developed by the English courts of equity. Intended originally to allow the resolution of multiple common claims in one proceeding, the bill of peace evolved into a device which permitted representative suits by a named plaintiff on behalf of parties similarly situated.¹¹ As an exception to the general rule that all parties materially interested in the subject matter of the suit were to be made parties,¹² the representative action required that common questions predominate over individual questions and that interested persons be so numerous that joinder was impractical.¹³ The judgment rendered in such a suit was binding not only on the parties to the action, but on all persons similarly situated.¹⁴

In 1842 Federal Equity Rule 48 expressly recognized the representative action in the federal courts;¹⁵ in *Smith v. Swormstedt*¹⁶ the United States Supreme Court recognized that the action was binding on absent class members. The first state codification of the class action device appeared in the 1849 amendment to the New York Field Code, incorporating much the same elements as the bill of peace.¹⁷

In the 1938 codification of the Federal Rules of Civil Procedure the class action was embodied in rule 23.¹⁸ This rule defined permissible class actions in terms of the jural relationships of the class members. Three categories were outlined based on the substantive character of the rights asserted by the class: the true, hybrid, and spurious categories.¹⁹ The rule did not, however, define the res judicata effect of each category upon absent class members since the rulemakers believed that to do so would involve matters of substantive law beyond the scope of the federal rules.²⁰ Nevertheless, federal courts interpreted the rule to provide that a judgment rendered would be binding on absent class members only in the true or hybrid form of action.²¹ The spurious action, which is the early equivalent of the rule

11. *How v. Tenants of Bromsgrove*, 1 Vern. 22, 23 Eng. Rep. 277 (Ch. 1681).

12. *Brown v. Howard*, 1 Eq. Cas. Abr. 163 pl. 4, 21 Eng. Rep. 960 (1701).

13. *Mayor of York v. Pilkington*, 1 Atk. 282, 26 Eng. Rep. 180 (Ch. 1737).

14. *Adair v. New River Co.*, 11 Ves. 429, 32 Eng. Rep. 1153 (1805).

15. Equity R. 48, 210 U.S. 508 n.1, 524 (1907).

16. 57 U.S. (16 How.) 288 (1853).

17. 1849 N.Y. Laws, tit. 3, § 119, at 639.

18. Fed. R. Civ. P. 23, 308 U.S. 689 (1939).

19. See Murrah, *Historical Overview and Perspective on Class Actions*, in CLASS ACTIONS, *supra* note 6, at 16. A "true" class action was proper where the right sought to be enforced for the class was joint, common, or secondary. A "hybrid" class action was proper where the right was several and specific property was the subject of the action. A "spurious" class action could be maintained where the right was several, a common question of law or fact existed, and a common relief was sought.

20. See Comment, *Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by the Securities Laws*, 116 U. PA. L. REV. 889, 891 (1968).

21. Apparently, this reflected the influence of Professor Moore's commentary on the rule.

23(b)(3) action, became merely an invitation to join.²² Since the named plaintiff could not truly represent the class, much of the benefit to absent class members was lost. In addition, the 1938 codification failed to provide the courts with workable guidelines for determining the category in which a particular claim belonged.²³ Yet the categorical labels applied by the courts had crucial consequences for the plaintiff class, not only in terms of the res judicata effect of a judgment but also with respect to a determination of jurisdictional criteria and application of the statute of limitations.²⁴

Thus, when the Advisory Committee on Rules drafted the 1966 amendments to the Federal Rules of Civil Procedure it was generally agreed that the mechanical definition of class actions in terms of jural relationships had become unworkable.²⁵ Federal rule 23 was completely revised to define the scope and nature of the class action in more practical terms and to ensure basic procedural fairness in the conduct of the action. In its present form rule 23 sets certain necessary but not sufficient conditions, such as numerosity of class members, commonality of questions of law or fact, and typicality of claims and adequacy of representation.²⁶

The rule additionally describes three types of situations in which the class action form is justified. Two of these, described in rule 23(b)(1) and (2), are related in that they are actions thought properly maintainable as class suits because they are actions which, if brought individually, would affect the interests of others similarly situated.²⁷ These types of classes, considered to have a high degree of coherency because of inherent similarity of the class members' interests, have been regarded by the courts as actions brought principally for injunctive or declaratory relief.²⁸ The most significant alteration embodied in new rule 23, however, was the recognition that a representative action brought as a matter of procedural convenience would be binding on all absent class members unless they affirmatively requested exclusion from the class.²⁹ Under rule 23(b)(3) a class action may be proper if questions of law or fact common to the class predominate over any questions affecting only individual class members. Thus, rule 23(b)(3) has come to be regarded by the federal courts as the principal vehicle for class actions seeking damages.³⁰

Unlike rule 23(b)(1) or (2) actions, class action treatment is not as clearly called for in the rule 23(b)(3) situation,³¹ but may be convenient, depending

See generally Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551 (1937).

22. Absent class members were able, however, under this provision, to benefit by waiting until the case took a favorable turn and then accepting the invitation to join. This is known as the one-way intervention technique.

23. *See, e.g., Deckert v. Independence Shares Corp.*, 27 F. Supp. 763 (E.D. Pa. 1938), *rev'd*, 108 F.2d 51 (3d Cir. 1939), *rev'd on other grounds*, 311 U.S. 282 (1940), *on remand*, 39 F. Supp. 592 (E.D. Pa.), *rev'd*, 123 F.2d 979 (3d Cir. 1941).

24. *See* Moore & Cohn, *Federal Class Actions*, 32 ILL. L. REV. 307 (1937).

25. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Advisory Note*, 39 F.R.D. 69, 98-99 (1966) [hereinafter cited as *Advisory Note*].

26. FED. R. CIV. P. 23(a).

27. Miller, *Problems in Administering Judicial Relief in Class Actions under Federal Rule 23(b)(3)* 54 F.R.D. 501 (1972).

28. *See* cases noted in Schuck, *supra* note 6, at 97, 99.

29. FED. R. CIV. P. 23(c)(2)(B).

30. *See, e.g., Sosna v. Iowa*, 419 U.S. 393, 397 n.4 (1975).

31. *Advisory Note, supra* note 25, at 102.

on the particular facts, to achieve the stated purpose of the rule: "economy of time, effort, expense and . . . uniformity of decision as to persons similarly situated."³² As the advisory note recognized, rule 23(b)(3) facilitates class action on behalf of numerous small claimants for whom an action would otherwise not be feasible in terms of costs and attorney compensation.³³ In this sense the rule 23(b)(3) form of action provides a procedural device to deal with the problem of a single harmful act resulting in a small amount of damages to many diverse people.

The effect of the new federal rule was to upset the existing balance of power between the small claimant and the large corporate defendant by greatly enlarging the number of possible plaintiffs³⁴ and thus enlarging the potential liability of the defendant. Through the aggregation of claims a collection of plaintiffs with small individual claims could conceivably become a powerful and cohesive economic unit which could effectively oppose a large corporation. The threat of enormous liability on the defendant's part gave the plaintiff class a strong bargaining tool in settlement negotiations.³⁵ The promise of a large recovery by the plaintiff class enabled the named representative to attract competent and experienced counsel in complex and lengthy litigation. As a result, many plaintiffs sought to use rule 23(b)(3) as a tool for redressing massive consumer wrongs and an alternative means of enforcing consumer protection statutes.

II. MANAGEABILITY PROBLEMS UNDER RULE 23(b)(3)

It is not surprising, therefore, that defendants tenaciously resisted the class action form from the outset. Most of the attacks, however, centered on whether an action could properly be certified as a class action instead of actually litigating on the merits.³⁶ The rule 23(b)(3) notion of procedural convenience requires the court to find not only that the proposed action fits the (b)(3) description but also that the action is "superior to other available methods for the fair and efficient adjudication of the controversy."³⁷ The elements of superiority include (1) the interest of class members in individually controlling their separate actions, (2) the extent and nature of litigation already commenced, (3) the desirability of concentrating litigation of the claims in one forum, and (4) the difficulties likely to be encountered in managing the class action. In the case of a potentially huge class of plaintiffs, it is the *manageability* aspect of superiority which has posed the most

32. *Id.* at 102-03.

33. *Id.* at 104.

34. See Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426 (1973). Class actions have been filed on behalf of all homeowners in the United States, *Mangano v. American Radiator & Standard Sanitary, Inc.*, 438 F.2d 1187 (3d Cir. 1971), and on behalf of all persons in the United States, *Handy v. General Motors, Inc.*, 518 F.2d 786 (9th Cir. 1975).

35. Milton Handler has argued that the very size of the potential recovery has engendered a form of "legalized blackmail" in which the defendant must settle rather than face the threat of expensive and time consuming litigation. Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971).

36. As of 1972, only two federal class actions seeking damages had gone to trial on the merits, and in both cases the defendant prevailed. See Schlachter, *The Case for the Fluid Class Recovery*, 1 CLASS ACT. REP. 70 (1972), for a discussion of this phenomenon.

37. FED. R. CIV. P. 23(b)(3).

acute problems for the courts and presented the most formidable barrier to the class action plaintiff.³⁸

What precisely constitutes manageability is not entirely clear. Some courts have merely held that classes exceeding a certain size are inherently unmanageable.³⁹ Problems of manageability, however, have been recognized as composed of two principal components, the problems of providing notice of the institution of the suit to absent class members, and the problems of calculating and distributing damages to the absent class members.⁴⁰

A. *The Notice Problems Under Federal Rule 23*

Unlike the earlier version of rule 23, the 1966 amendment set out measures designed to ensure procedural fairness.⁴¹ Rule 23(c)(2) mandates notice to absent class members in a rule 23(b)(3) action; in particular, individual notice to all reasonably ascertainable class members is required. Since the new rule is designed to eliminate the earlier practice of one-way intervention on the part of absent class members,⁴² the judgment in a rule 23(b)(3) action is binding on all class members.

Rule 23(c)(2) reflects the concern that due process be accorded class members not named as parties in the action. In order to protect the interests of absent class members in individually controlling their own actions, an interest considered stronger in the rule 23(b)(3) action, class members are also given the option of excluding themselves from the class and the effect of the judgment. Thus, rule 23(c)(2) is also designed to effectuate the "opt-out" provisions.⁴³

For the massive plaintiff class the superficially innocent notice provision can impose a potentially staggering burden. The cost of identifying, locating, and mailing notice to millions of individuals can preclude a class action at its inception. When the claims of individual class members are too small to make any individual action feasible or to support any interest in individual control of claims, a strict reading of rule 23(c)(2) is particularly onerous.

Within a few years of the adoption of new rule 23 a substantial body of case law arose as to the scope of the notice requirement. The issues revolved around three principal questions: (1) whether procedural due process required notice to the absent class; (2) what form of notice was required by rule 23(c)(2); and (3) who should pay for the notice. From the beginning, however, judicial answers to these questions were in irreconcilable conflict,

38. See Shlachter, *supra* note 36, at 70.

39. See, e.g., *United Egg Producers v. Bauer Int'l Corp.*, 312 F. Supp. 319 (S.D.N.Y. 1970) (class comprised of all consumers of eggs in the United States held unmanageable); *Hackett v. General Host Corp.*, 1972 TRADE CAS. (CCH) ¶ 73, 879 (E.D. Pa. 1970), *appeal dismissed*, 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972) (denying class status to 1.5 million purchasers of bread in Philadelphia stores).

40. The UCAA has incorporated to some degree the notions of superiority and manageability. See notes 201-02 *infra* and accompanying text.

41. *Advisory Note, supra* note 25, at 99.

42. See note 22 *supra*. See also Comment, *supra* note 20, at 916, for a discussion of the deliberation of the Advisory Committee to the 1966 Rules on this point.

43. With the increasing hostility to class actions, it has been suggested that the federal rule be amended to require opt-in rather than opt-out provisions. Walsh, *Improvements in the Judicial System: A Summary and Overview*, 70 F.R.D. 223, 229 (1976).

depending to a large degree on the court's view of the usefulness of the class action device.

Early Case Law. The advisory committee designed the rule 23(c)(2) notice requirement to fulfill the dictates of due process.⁴⁴ In reference to rule 23(d)(2), however, the committee also noted that the need for notice would decrease as the cohesiveness of the class and the adequacy of representation increased.⁴⁵ While early court decisions under the 1966 version of rule 23 recognized that the rule itself required notice, not all agreed with the advisory committee that due process also required it.⁴⁶ In *Golgow v. Anderson*⁴⁷ the court noted that adequacy of representation and not actual notice to the class members was the essential requirement of due process necessary to bind class members to a judgment.⁴⁸ On the other hand, a substantial number of cases, relying on *Mullane v. Central Hanover Bank & Trust Co.*,⁴⁹ have held that due process requires notice not only in the rule 23(b)(3) form of action but in the (b)(1) and (b)(2) forms as well.⁵⁰

The courts have also been in conflict as to what form the rule 23(c)(2) notice should take.⁵¹ The rule itself requires "the best notice practical under the circumstances, including individual notice to all . . . who can be identified through reasonable effort."⁵² The best notice under the circumstances of a mass class action is not necessarily equivalent to individual notice, however, since the economic and administrative difficulties of locating and notifying individual class members can be formidable. In drafting the notice provision, the advisory committee apparently took *Mullane* as its model.⁵³

44. *Advisory Note, supra* note 25, at 99.

45. *Id.* at 107. In the rule 23(b)(1) and (2) forms of action, where class cohesiveness and adequacy of representation are considered substantial, notice is within the discretion of the court, to be given for the protection of the class or the fair conduct of the action. FED. R. CIV. P. 23(d)(2).

46. *See, e.g.,* Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619 (D. Kan. 1968) (holding that due process does not require notice); Booth v. General Dynamics Corp., 264 F. Supp. 465 (N.D. Ill. 1967).

47. 43 F.R.D. 472 (E.D.N.Y. 1968).

48. This notion was drawn from the early decision of *Hansberry v. Lee*, 311 U.S. 43 (1940), in which the Court characterized the class action as a recognized exception to the general principles of due process. The Court found that where members of a class not present as actual parties are in fact adequately represented by those who are present, the former may be bound by the judgment. *Id.* at 41. In none of the early cases dealing with the class action was notice referred to, nor, apparently, given. *See, e.g.,* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921). None of these decisions, however, involved a class action device mandating the opt-out opportunity to class members as does modern rule 23.

49. 339 U.S. 306 (1950). *Mullane* dealt with the constitutional sufficiency of notice to beneficiaries in an action brought by a trustee bank for judicial settlement of its accounts. The Court held that the fundamental requirement of due process was notice reasonably calculated to apprise interested parties of the pendency of the action; thus, when the identity and location of absent persons were known, personal notice by mail, rather than notice by publication, was held to be constitutionally required. *Id.* at 314-20. Although generally regarded as a landmark decision on due process notice requirements, *Mullane* was not a class action.

50. *Arey v. Providence Hosp.*, 55 F.R.D. 62 (D.D.C. 1972); *United States ex rel. Walker v. Mancusi*, 338 F. Supp. 311 (W.D.N.Y. 1971), *aff'd*, 467 F.2d 51 (2d Cir. 1972); *Clark v. American Marine Corp.*, 297 F. Supp. 1305 (E.D. La. 1969).

51. *Compare* Johnson v. Robinson, 296 F. Supp. 1165 (N.D. Ill. 1967) (best practical class notice was reliable media coverage), *with* Richland v. Cheatham, 272 F. Supp. 148 (S.D.N.Y. 1967) (actual notice to class members required by rule 23).

52. FED. R. CIV. P. 23(c)(2).

53. Pomerantz, *The "Notice to the Class" Under the Amended Federal Rule 23*, in THE NEW FEDERAL CLASS ACTION RULE 29, 39 (1968).

Mullane, however, had rejected any generalized formula for balancing the interests in bringing a proceeding to finality without impossible obstacles and the interests of the individual in being afforded an opportunity to be heard;⁵⁴ the Court specifically underlined the necessity of considering the practicalities and peculiarities of each case.⁵⁵ Accordingly, *Booth v. General Dynamics Corp.*,⁵⁶ a rule 23(b)(3) taxpayer's action, refused to require individual notice, although it was in fact possible to do so, because the prohibitive cost of notice would render the taxpayer suit device impotent.⁵⁷

The individual notice requirement in rule 23(b)(3) actions does not, however, necessarily sound the death knell of those actions. Rule 23(c)(2) offered no guidance as to which party should bear the high cost of such notice and the courts divided on the issue. Some courts held that the named plaintiff representatives must bear the cost of such notice;⁵⁸ some merely assumed that the burden would fall on the plaintiff.⁵⁹ Others, while requiring the plaintiffs in the case before them to bear the notice costs, refused to adopt a rigid rule that plaintiffs in any case must bear the cost of notice since to do so would frustrate the class action device.⁶⁰ The court in *Golgow* went so far as to impose the costs on the corporate defendant because (1) the defendant was better able to bear the costs of notice; (2) the defendant had an interest in giving notice since it would afford him the benefits of res judicata against the entire class; and (3) the plaintiffs were able to present a prima facie case of breach of fiduciary duty by the defendant corporation in a preliminary mini-trial.⁶¹

Eisen v. Carlisle & Jacquelin. In 1966 Morton Eisen instituted a class action under rule 23(b)(3) for alleged violation of the Securities Exchange Act and the Sherman Act by odd-lot dealers which brought the various notice issues into sharp focus.⁶² The class which Eisen sought to represent

54. 339 U.S. at 314. Ironically, in the mass class action these interests are not conflicting but rather congruent; if substantial obstacles are placed in the path of bringing the proceeding to finality, the class members will be unlikely to be heard at all. See *Gant v. City of Lincoln*, 193 Neb. 108, 225 N.W.2d 549 (1975), in which the court recognizes the critical distinction between the factual context of *Mullane* and that of the class action.

55. See, e.g., *Francis v. Davidson*, 340 F. Supp. 351 (D. Md.), *aff'd*, 409 U.S. 904 (1972), which adopted a balancing approach to the due process aspect of notice in rule 23(b)(2) actions.

56. 264 F. Supp. 465 (N.D. Ill. 1967).

57. Similarly, the court in *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968), concerned with encouraging the "therapeutic value" of the mass class action in the securities regulation field, paid particular attention to what form of notice would be reasonable in the particular suit. Notice by publication was considered to be reasonable in view of the cohesive financial community which regularly read the *Wall Street Journal*. *Id.* at 501.

58. *Herbst v. Able*, 47 F.R.D. 11 (S.D.N.Y. 1969); *Lesch v. Chicago & Eastern Ill. Ry.*, 279 F. Supp. 908 (N.D. Ill. 1968).

59. *Booth v. General Dynamics Corp.*, 264 F. Supp. 465 (N.D. Ill. 1967).

60. *Berland v. Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969).

61. 43 F.R.D. at 487-500.

62. *Eisen v. Carlisle & Jacquelin*, 41 F.R.D. 147 (S.D.N.Y.), *motion to dismiss appeal denied*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967), *rev'd and remanded*, 391 F.2d 555 (2d Cir. 1968), *on remand*, 50 F.R.D. 471 (S.D.N.Y. 1971), *decision withheld pending submission of further information*, 52 F.R.D. 253 (S.D.N.Y. 1971), *class action certified*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded*, 417 U.S. 156 (1974). Not surprisingly, one judge characterized the action as a "Frankenstein monster posing as a class action." 391 F.2d at 572 (Lumbard, J., dissenting). After eight years the case never reached trial on the merits. It stands as a paradigm of the extent to which procedural battles have obstructed utilization of the class action device.

was composed of six million members, of which two million could be individually identified with reasonable effort;⁶³ Eisen, himself, had a claim for only \$70.⁶⁴ If Eisen were required to mail individual notice to each of the identifiable class members, the cost would have been a prohibitive \$225,000;⁶⁵ on the other hand, due to his small claim Eisen was of necessity required to proceed through a class action if he was to retain competent counsel.

In the first proceeding, *Eisen I*, the district court held that due process and rule 23(c)(2) required individual notice to the identifiable class members and dismissed the case practical financial limitations rendered the plaintiff unable to comply.⁶⁶ In *Eisen II*,⁶⁷ a confusing and rather enigmatic decision, the Second Circuit stated that it was unable to arrive at any satisfactory conclusion as to the propriety of employing notice by publication. While stating that the cost of notice must rest on the plaintiff representative,⁶⁸ the court noted that in *Mullane* the party required to furnish individual notice had been a large banking institution rather than a small individual claimant. After underscoring both plaintiff's argument that publication was the best notice practical under the circumstances and defendant's contention that cost could not be a factor in considering due process or rule 23 requirements, the court remanded the case for further evidentiary hearings.⁶⁹

On remand the district court required individual notice to 2,000 large claimants, and similar notice to 5,000 randomly selected small claimants in addition to notice by publication and notice to brokers.⁷⁰ Neither due process nor rule 23 required individual notice for all reasonably identifiable class members. Instead the court stressed the adequacy of representation factor present when notice was structured so as to reach class members of all shades of opinion⁷¹ and the importance of the class action in implementing securities regulations. Thus, after conducting a mini-trial the court imposed ninety percent of the cost of notice on the defendant.⁷²

In *Eisen III*⁷³ the court of appeals again struck down the district court's decision, holding that rule 23(c)(2) required plaintiff to notify the two million identifiable class members individually without regard to any other considerations. The Supreme Court affirmed.⁷⁴ Individual notice under rule 23(c)(2) was held to be mandatory even though it would effectively frustrate the petitioner's attempt to vindicate securities law policy.⁷⁵ Rejecting the notion that a mini-trial could justify imposing the costs of the notice on the defendant, the Court found that when the relationship between plaintiff and

63. 52 F.R.D. at 257.

64. 417 U.S. at 156.

65. *Id.*

66. 41 F.R.D. at 147.

67. 391 F.2d at 569.

68. *Id.* at 570.

69. *Id.* at 569-70.

70. 52 F.R.D. at 267-68.

71. *Id.* at 266.

72. *Id.* at 272.

73. 479 F.2d 1005 (2d Cir. 1973).

74. 417 U.S. 156 (1974).

75. *Id.* at 175-76.

defendant was truly adversarial, the plaintiff must bear the cost of initial notice to the class.⁷⁶

The Effect of Eisen. The Court's ruling was clear on one point, namely that a rule 23(b)(3) suit is to be dismissed unless the plaintiff has the financial resources to fund initial individual notice to all reasonably identifiable class members. Thus, the class suit brought by large numbers of claimants with individually small but collectively substantial economic injuries has been effectively precluded in federal court.

The crucial question of whether due process itself required such notice was by no means so definitely settled. Although the Court in *Eisen IV* noted the advisory committee's underlying concern with due process in drafting rule 23(c)(2), and discussed extensively the holding in *Mullane*, it found that notice was required by the rule, "quite apart from what due process may require." While the Court intimated that adequacy of representation might not in itself satisfy due process requirements, it specifically held that the rule 23(c)(2) notice requirement did not by its terms apply to class actions for injunctive or declaratory relief under rule 23(b)(1) or (2).⁷⁷

Some courts, however, read *Eisen IV* to stand for the proposition that the notice requirements of rule 23(c)(2) were based on due process requirements and thus applied to (b)(1) and (2) actions as well.⁷⁸ To hold that due process itself requires individual notice is to hold that a state cannot adopt a less restrictive notice provision in its own class action rule. Recognizing the vitiating effect such a holding would have on the class action device, a number of courts soon refused to follow that interpretation of *Eisen IV*.⁷⁹ Recently, the Fifth Circuit Court of Appeals, in *United States v. Allegheny Ludlum Industries, Inc.*,⁸⁰ held that due process did not require individualized notice in rule 23(b)(2) actions. Subsequently, the Seventh Circuit⁸¹ indicated its concurrence in this conclusion.⁸² At least one state supreme court has followed this less restrictive reading.⁸³

76. *Id.* at 177-78.

77. *Id.* at 177 n.14.

78. *See, e.g.*, *Ellison v. Rock Hill*, 64 F.R.D. 415 (D.S.C. 1974); *Alexander v. Avco Corp.*, 380 F. Supp. 1282 (M.D. Tenn. 1974).

79. *See Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975), for an excellent analysis of the problem.

80. 517 F.2d 826 (5th Cir. 1975). An ambiguous footnote in *Sosna v. Iowa*, 419 U.S. 393, 397 n.4 (1975), was cited as precedent.

81. *Bijeol v. Benson*, 513 F.2d 965 (7th Cir. 1975) (*Sosna* requires re-evaluation of the decision in *Schrader v. Selective Serv.*, 470 F.2d 73 (7th Cir.), *cert. denied*, 409 U.S. 1085 (1972), which held that due process requires notice in all class actions) (dictum).

82. Since a rule 23(b)(2) action may be brought not only for injunctive but also for monetary relief, if the principal objective of the suit is injunctive, this conclusion encourages a mechanistic rather than practical approach to notice requirements. Although intended originally to be merely descriptive of situations in which the class action was appropriate, the label attached to the suit now has drastic consequences for the viability of the action. In *Freeway v. Motor Convoy*, 19 F.R. Serv. 2d 650 (N.D. Ga. 1974), for example, the court sought to avoid the prohibitive costs of notice to the class by certifying the action under rule 23(b)(2). In doing so, the court focused on whether the relief sought was principally injunctive or monetary and not on the needs of class members.

83. *Gant v. City of Lincoln*, 193 Neb. 108, 225 N.W.2d 549 (1975). The court refused to read *Eisen IV* as relying on due process, distinguishing *Mullane* because no member of the

B. *The Damage Problems of Federal Rule 23*

Rule 23 provides no express guidelines for determining whether a class action is the superior means of adjudicating the damages aspects of numerous individual claims.⁸⁴ Yet in the mass class action, these problems can be acute. If each class member is required to prove damages individually, the burden on the court will be heavy.⁸⁵ Moreover, when individual recovery is small, many class members will be unlikely to do so in view of the expense involved. It might prove possible, however, to calculate damages solely on the basis of defendant's records.⁸⁶ If a defendant had uniformly overcharged consumers during a specified time period, for example, damages might be easily computed. But even when liability and damages can be calculated, numerous class members may be unidentified, and, thus, seeking out and distributing their share in the recovery can be an overwhelming task.⁸⁷ Yet to deny recovery when it proves infeasible for individual class members to prove their claims, or, alternatively, when distribution to a group of unidentified class members is impossible, would be to leave large sums of wrongfully acquired funds in the defendant's hands. The problem, then, is twofold: first computing damages of the class members, and secondly distributing damages to the class members.

Fluid Recovery Model. One hotly-disputed solution to these problems is the fluid-class recovery. Under this model the issue of the defendant's liability would first be litigated. Then, instead of requiring each class member to present a verified claim for his own damages in order to compute the extent of defendant's liability, the court would allow plaintiff to prove defendant's gross damage to the class as a whole. At this point, a damage fund would be established; after deducting administrative costs of managing the fund, each individual class member able to prove his own damages would be recompensed. Any amount remaining because class members did not prove damages or could not be found would be distributed in such a fashion as would substantially benefit the whole class.⁸⁸ Not every injured

interested class in that case was a party to the suit and their interests were adverse to the plaintiff bank. *Id.* at 111, 225 N.W.2d at 552. The court stated "we still adhere to the general rule which dispenses with such notice in representative actions." *Id.* at 112, 225 N.W.2d at 553.

84. FED. R. CIV. P. 23 does not discuss remedies except in rule 23(b)(2) to delineate situations in which injunctive or declaratory relief is proper. The *Advisory Note* pointed to situations in which use of the rule 23(b)(3) form of action would be improper because individual questions of damages and liability would cause the action to degenerate into multiple law suits (e.g., mass fraud or mass accident cases). *Advisory Note, supra* note 25, at 103.

85. See Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 377 (1973). One approach to the problem of calculating damages to individual class members has been to sever liability and damage issues with proof of damages to be determined at a later date by a special master. See, e.g., *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16 (5th Cir.), cert. dismissed, 419 U.S. 987 (1974).

86. See *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253, 262 (S.D.N.Y. 1971), in which the district court found that damages could be calculated from defendant's records without requiring individual proof of damage claims to be filed.

87. *Miller, supra* note 27, at 506.

88. This might include price reductions of the product or service involved in the suit, rebates to consumers, and funding of consumer or governmental agencies involved with the particular subject matter of the suit. For a more detailed outline of fluid recovery in practice see Comment, *The Cy Pres Solution to the Damage Distribution Problems of Mass Class Actions*, 9 GA. L. REV. 893, 904-05 (1975).

class member would necessarily recover his share of the damages and some nonclass members might receive benefits.⁸⁹

The feasibility of this procedure rests on two necessary components. It first requires that the court deal with the whole class as an entity entitled to recover its aggregate damages.⁹⁰ Traditionally, however, courts have treated the class action as a multi-party device in which each class member must step forward to claim his own damages and in which the defendant has the opportunity to contest each claim.⁹¹ It requires, secondly, that the court in distributing damages adopt an approach analogous to the *cy pres* doctrine.⁹² Courts, however, have generally viewed the class action for damages as a device to compensate individual class members.⁹³

Full compensation of individuals is a primary goal of the fluid recovery model. The creation of a fund which an efficient centralized claims administration may use to locate class members and assist in substantiating their claims can actually maximize individual recovery.⁹⁴ Yet a distribution system which contemplates that some class members will never recover and other nonclass members will receive "windfall" benefits clearly has other primary goals as well. In fact, the fluid recovery system is designed to prevent unjust enrichment.⁹⁵ Fluid recovery is justified by proponents as a deterrent to certain mass injuries, even when no compensation is possible.⁹⁶ The availability of such a procedure is said to make flexible solutions to class damages problems possible when the exact scope of the problem becomes clear.⁹⁷

Fluid recovery is not a panacea for all damage-related manageability problems in the mass class action. The plaintiff must still prove and calculate aggregate damages. This does not necessarily mean that defendant's records must affirmatively show the exact amount of damages; proponents of the fluid recovery have vigorously argued that computers, statistical techniques, and sampling methods may be used to prove damages.⁹⁸ Plaintiff must also show that distribution will in the main benefit injured class members. For example, if only limited numbers of class members can be

89. For example, if the court were to order a price reduction, consumers presently using the product which is the subject of litigation, who were not users at the time of injury, will receive an undeserved benefit. See Shlachter, *supra* note 36, at 73.

90. See McClellan, *Difficulties Likely to be Encountered in the Management of a Class Action: The Determination and Distribution of the Damage Award in Antitrust and Related Suits*, Feb. 22, 1974 (unpublished thesis in Underwood Law Library, Southern Methodist University).

91. See Moore, *supra* note 1, at 61.

92. The *cy pres* doctrine, originally developed in the law of trusts, was designed to allow the substitution of a charitable object approaching the original purpose as closely as possible when that purpose had become impossible to fulfill. G. BOGERT, *THE LAW OF TRUSTS & TRUSTEES* § 431 (2d ed. 1964). Under the fluid recovery model the damage fund would similarly be used for the "next best" purpose where returning damages to each individual class member would prove impossible.

93. See, e.g., *City of Philadelphia v. American Oil Co.*, 53 F.R.D. 45 (D.N.J. 1971).

94. *Federal Consumer Class Action Legislation*, 4 CLASS ACT. REP. 3, 18 (1975).

95. See Shlachter, *supra* note 36, at 70.

96. Note, *The Cost-Internalization Case for Class Actions*, 21 STAN. L. REV. 383, 419 (1969).

97. See *Kronisch v. Howard Sav. Inst.*, 133 N.J. Super. 124, 335 A.2d 587 (1975).

98. See Shlachter, *supra* note 36, at 74-75, for a description of the use of sophisticated techniques in proving damages to the class entity. These techniques are essential where overcharges are not uniform and the exact number of class members is not ascertainable.

located, the fluid recovery system may be inappropriate.⁹⁹ Moreover, the fluid recovery model may be most appropriate when its deterrent effects serve some clearly articulated public policy. Thus, the model has been thrust upon courts most strongly where it augments securities or antitrust laws which are clearly designed to deter violators.¹⁰⁰

Defendants have strenuously objected to the fluid recovery model on a number of grounds. First, they have argued that fluid recovery would deny them the opportunity to contest damage claims and would improperly distribute damages to those not actually harmed.¹⁰¹ Secondly, opponents of fluid recovery stress the added burdens of time and effort the model will impose on the court.¹⁰² Calculation of aggregate economic damage may be extremely difficult. In addition, the court must assume management of the damage fund. With no procedural guidelines and limited case precedent,¹⁰³ the court itself must develop some innovative form of cy pres distribution which will significantly benefit the class.¹⁰⁴ Finally, the court must oversee the process of identifying, locating, and notifying class members, and ensuring receipt of their proportionate share of the recovery.

Given the fact that mass class actions, even in the absence of fluid recovery, are often complex, protracted, and impose special burdens of supervision on the courts in order to protect absent class members,¹⁰⁵ courts have been particularly critical of procedures which would increase adminis-

99. Defense counsel Michael Melina has argued that the fluid recovery device would be of only limited utility if strict standards for proof of damages and class benefits are imposed. Melina, *The Search for the Pot of Gold, Fluid Class Recovery as a Consumer Remedy in Antitrust Cases*, 41 ANTITRUST L.J. 301 (1972).

100. See, e.g., Brief for Petitioner at 18, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), reprinted in LAW BRIEFS, BRIEFS AND PETITIONS, UNITED STATES SUPREME COURT, 1973-74 TERM, 7 TRADE REGULATION SERIES NO. 4, at 81, 100.

101. See, e.g., Brief for Respondents at 35, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), reprinted in LAW BRIEFS, *supra* note 100, at 149, 199. Proponents have countered that since the defendant has the opportunity to contest the amount of aggregate damages fully, adequate procedural safeguards are present. See, e.g., Brief for State of California, Amicus Curiae at 3, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), reprinted in LAW BRIEFS, *supra* note 100, at 423, 431. In addition, they have pointed to various procedural devices which by analogy support recovery of damages by those not actually injured. For example, FED. R. CIV. P. 23.1 permits derivative suits by shareholders which may benefit those who were not shareholders at the time of the injury. Thomas Barnard has pointed out that in some title VII actions involving back pay, the courts have come close to awarding fluid recovery rather than concentrating on injury to each class member. Barnard, *Title VII Class Actions: The Recovery State*, 16 WM. & MARY L. REV. 507 (1975). Agency actions also permit similar recovery devices. See, e.g., 29 U.S.C. § 216(c) (1970) (allowing unclaimed damages assessed for violation of the Fair Labor Standards Act to revert to the United States Treasury).

102. Even when no fluid recovery is contemplated, the class action device demands that the court abandon the traditionally passive judicial role for an active one designed to protect absent class members.

103. See notes 127-33 *infra* and accompanying text.

104. If, however, the subject of litigation is an expensive product not likely to be bought again soon (e.g., a car), the simple alternative of reducing the price for future consumers is unlikely to benefit those consumers originally injured. There may, in fact, be no "next best" class whose recovery will substantially benefit the class bringing suit. See *Federal Consumer Class Action Legislation*, *supra* note 94, at 23-24, for a discussion of possible approaches to this problem. Counsel may be of great assistance to the court by submitting a proposed distribution plan at the certification hearing. Indeed, it has been argued that the ultimate shape of recovery will depend heavily on the ingenuity of plaintiff's counsel in devising such a plan. Shlachter, *supra* note 36, at 74. The ultimate burden of weighing and approving the plan must, however, fall on the court and it has been questioned whether the traditional equity powers of the court go so far. See Rifkind, *Are We Asking Too Much of Our Courts*, 70 F.R.D. 96, 102 (1976).

105. See findings reported in AMERICAN COLLEGE OF TRIAL LAWYERS, *supra* note 1, at 13.

trative burdens.¹⁰⁶ Indeed, some courts have held that the small individual recoveries associated with the mass class action do not justify the burdens imposed on the court.¹⁰⁷

Thirdly, opponents of the fluid recovery device have pointed to its potentially devastating effects on the defendant. When the plaintiff class numbers in the millions, aggregate damages may exceed the defendant's net worth.¹⁰⁸ On the other hand, individual class members may be uninterested in the small recovery to which they are entitled.¹⁰⁹ Thus, when the mass class action permits an award which "shocks the conscience," some courts have held that the class action is per se not superior.¹¹⁰ For the same reasons class actions based on statutes which permit substantial minimum recovery have been consistently denied certification as carrying "to an absurd and stultifying extreme" the private enforcement device.¹¹¹

Fluid Recovery and the Courts. Courts have been reluctant to endorse the fluid recovery model. In *City of Philadelphia v. American Oil Co.*,¹¹² a price fixing suit brought on behalf of four classes, including one retail consumer class estimated to number from six to fifteen million members, the court expressly rejected the fluid recovery device, focusing primarily on the problem of distribution.¹¹³ Adopting the position that the function of the class suit is solely compensatory, the court pointed out that the proposed fluid recovery remedy of reducing the price of the gas at the pump for a specified period would provide a windfall benefit to those who had moved into the region after the over-charge occurred while denying rightful recovery to those who had since left.¹¹⁴ The fact that the defendant would retain its ill-gotten gains, although acknowledged,¹¹⁵ was considered irrelevant. For this reason the court refused to certify the action on behalf of the retail consumer class.¹¹⁶

Eisen III also considered and rejected the fluid recovery device.¹¹⁷ The Second Circuit, focusing on the legality of calculating aggregate class damages, held that fluid recovery violated due process.¹¹⁸ In addition, the court

106. The actual number and type of class actions as well as the administrative burden involved are the subject of considerable debate. Compare Kirkham, *supra* note 4, at 204-05, with Moore, *The A.B.A., The Congress and Class Actions: A Report*, 3 CLASS ACT. REP. 36, 38-39 (1974).

107. See, e.g., *In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974).

108. See Kirkham, *supra* note 4, at 207.

109. This phenomenon has led to charges that the class action has been simply a means of stirring up litigation designed to benefit plaintiff attorneys rather than providing a forum for already existing claims. See Simon, *supra* note 85, at 377.

110. *Kline v. Caldwell, Banker & Co.*, 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Marks v. San Francisco Real Estate Bd.*, 69 F.R.D. 353 (N.D. Cal. 1975).

111. *Shields v. First Nat'l Bank*, 56 F.R.D. 442 (D. Ariz. 1972); *Ratner v. Chemical Bank N.Y. Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972).

112. 53 F.R.D. 45 (D.N.J. 1971).

113. *Id.* at 71-72.

114. *Id.* at 72.

115. *Id.* at 73.

116. Those classes allowed to proceed with the action under rule 23(b)(3), a class of taxicab companies (numbering 550), a class of bulk purchasers of gasoline (numbering 10,000), and a class of governmental entities, were not enormous, were stable, identifiable, and had kept accurate records of the transactions involved. *Id.* at 74.

117. 479 F.2d 1005 (2d Cir. 1973). See notes 62-77 *supra* and accompanying text for a discussion of the procedural background of the case.

118. *Id.* at 1018. Exactly why the aggregate damages method was violative of due process was never articulated by the court.

noted that calculation of damages under an aggregate method would be impermissible under rule 23. The precedents on which the court relied¹¹⁹ both acknowledge the usefulness of the class action device and are far from clear precedents for the disapproval of fluid recovery.¹²⁰ In deciding *Eisen IV*, moreover, the Supreme Court expressly reserved judgment on the questions of whether fluid recovery is constitutional, and whether it is permitted by rule 23.¹²¹

Since *Eisen III* no federal court has approved fluid recovery, but several cases have expressly disapproved the device. The Ninth Circuit in *In re Hotel Telephone Charges*¹²² held that fluid recovery violates the Rules Enabling Act¹²³ by altering the defendant's substantive rights. In addition, the court focused on the heavy burden which the mass class suit would impose on the court. Weighing that burden against the de minimis amount of each individual claim after administrative expenses were deducted, the court held the benefit to the class could not justify the class action form.¹²⁴ The court also found that the class members were unlikely to be interested in the small recovery; to allow the suit to proceed would be, in effect, to create an action where one had not actually existed.¹²⁵ The deterrent function of the suit was explicitly rejected.¹²⁶

The precedents favoring fluid recovery have been somewhat limited in scope. *Bebchick v. Public Utilities Commission*,¹²⁷ involving an illegal fare increase by a transit company, allowed computation of damages from defendant's records in order to establish a damage fund, but was not a class action. The court held that the total overcharge must be refunded even though returning the funds to individual consumers might be infeasible and relied upon a regulatory commission to carry out the distribution.¹²⁸ In suggesting that the fund be used to offset future increase requests or lower-

119. *Snyder v. Harris*, 394 U.S. 332 (1969), and *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972).

120. *Snyder* held that class members could not aggregate damages to achieve the \$10,000 amount in controversy required for federal jurisdiction. The Second Circuit evidently regarded the holding as a disapproval of aggregate damage computation in general. The holding has been more narrowly read by commentators as a jurisdictional decision based on the mandate of rule 82 that the federal rules cannot extend the jurisdiction of the federal courts. See Note, *supra* note 34, at 450. In *Hawaii*, an antitrust action brought by the state as *parens patriae* to recover for damages to the state economy in general, the Court denied recovery. Certain passages emphasizing the computation of antitrust damages on an individual basis were read by the Second Circuit to prohibit recovery of aggregate class damages. The decision, however, was based on the potential for double recovery which existed when a state recovered for injury to quasi-sovereign interests because the state was not required to distribute the recovery to its citizens and the judgment would not be *res judicata*. See Note, *supra* note 34, at 451.

121. 417 U.S. 156, 172 n.10 (1974).

122. 500 F.2d 86 (9th Cir. 1974). See also *Green v. Occidental Petroleum Corp.*, FED. SEC. L. REP. (CCH) ¶ 94,397 (C.D. Cal. 1974); *In re Memorex Security Cases*, 61 F.R.D. 88 (N.D. Cal. 1973).

123. 28 U.S.C. § 2072 (1970).

124. 500 F.2d at 91. But see *Cosgrove v. First & Merchant's Nat'l Bank*, 20 F.R. Serv. 2d 1230 (E.D. Va. 1975) (an individual can vindicate his rights at the expense of his pocketbook).

125. 500 F.2d at 91.

126. *Id.* at 92. The court insisted that although antitrust remedies were designed to deter violations, recovery was limited to compensating injured parties. See 3B MOORE'S FEDERAL PRACTICE ¶ 23.45, at 893 (Supp. 1976-77), commenting that the case reflects a belated recognition that initial manageability problems cannot be worked out in the course of the proceedings.

127. 318 F.2d 187 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963).

128. *Id.* at 204.

ing present rates, the court clearly endorsed a fluid recovery type of distribution.

In *Daar v. Yellow Cab Co.*,¹²⁹ a class action seeking recovery of taxi fare overcharges, the California Supreme Court allowed computation of aggregate damages from defendant's records but indicated that individual class members would have to prove their own damages. The case was eventually settled, the defendants agreeing to distribute the settlement fund in the form of fare reductions.¹³⁰ In approving the settlement agreement, the court also relied on the existence of a regulatory authority to ensure distribution.

*West Virginia v. Charles Pfizer & Co.*¹³¹ involved a settlement of a class action brought by the attorneys general of six states on behalf of retail purchasers, wholesalers, consumers, and governmental agencies. At the time the 39.6 million dollar damage fund was established no conclusive precedent existed to show that fluid distribution of damages by a court on a very large scale was manageable. Employing a special master and the intensive cooperation of plaintiff's counsel, the court, through a sophisticated utilization of data processing, advertising, and market testing techniques, successfully returned a substantial portion of the fund to individual consumers.¹³² Ultimately, total administrative fees were only slightly higher than the interest monies earned on the settlement fund.¹³³ The experience in *Pfizer* appears to support the observation of one commentator that it is only the rare case which is unmanageable as such;¹³⁴ it is, rather, the thought of adversely affecting judicial efficiency by undertaking such a complex and protracted task which judges have in mind when dismissing the class as unmanageable.

Like federal rule 23, the newly revised New York Class Action Act makes no mention of damages.¹³⁵ The practice commentary on the Act states, however, that the statute appears to sanction the so-called fluid recovery.¹³⁶ The federal consumer class action legislation currently pending in Congress¹³⁷ has been redrafted specifically to include the aggregate damages remedy. The federal bill expressly finds that the proposed remedy is necessary because (1) the protection of the FTC has proved inadequate,¹³⁸ and (2)

129. 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 729 (1967). The action had been brought under CAL. CIV. PROC. CODE § 382 (West 1972).

130. Shlacter, *supra* note 36, at 71 n.20.

131. 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

132. See Lebedoff, *Operation Money Back*, 4 CLASS ACT. REP. 147 (1975), for the report of the special master appointed to distribute the settlement fund. Although the report indicates how complex the distribution process can be, it demonstrates that with ingenuity and vigorous assistance of counsel, the distribution is possible. The report also underscores the critical importance of the existence of an aggregate damage fund to pay for the large numbers of personnel and technical assistance necessary to accomplish the distribution.

133. *Id.* at 147.

134. Dam, *Class Actions: Efficiency, Compensation, Deterrence and Conflict of Interest*, 4 J. LEGAL STUD. 47, 53 (1975).

135. N.Y. CIV. PRAC. LAW §§ 901-909 (McKinney 1976).

136. McLaughlin, *Practice Commentary*, N.Y. CIV. PRAC. LAW § 905, at 343 (McKinney 1976).

137. Several bills relating to this subject have been introduced but as yet none have been reported out of committee. For the text of the most recent draft of the Senate version see *Proposed Federal Consumer Class Action Legislation-II*, 4 CLASS ACT. REP. 342 (1975).

138. The proposed bill would re-open the jurisdictional doors closed by *Snyder v. Harris*, 394 U.S. 332 (1969), and *Zahn v. International Paper*, 414 U.S. 29 (1973), by permitting

state laws have not kept pace with the "modern nature of injuries perpetuated through unfair or deceptive acts or practices, in that the aggregate magnitude of such injuries is large but the claims of individual consumers are typically too small to justify the cost of litigation."¹³⁹ Recently, New Jersey became the first state expressly to authorize the fluid recovery device.¹⁴⁰ Although no decisions utilizing the procedure have yet been handed down, the availability of fluid recovery has already been recognized as a means of overcoming initial manageability problems.¹⁴¹ Thus, fluid recovery has gained increasing legislative support.

III. THE SOLUTION UNDER THE UNIFORM CLASS ACTIONS ACT

A. Notice

As originally drafted,¹⁴² the UCAA was tailored to give the class action plaintiff representing large numbers of small claimants maximum access to the courts.¹⁴³ In certain instances the court would be permitted to waive the notice requirement altogether.¹⁴⁴ Thus, the court would also be given discretion as to whether a plaintiff class member could be allowed to request exclusion from the class.¹⁴⁵ Maximum flexibility would also be afforded the court in determining who should bear the cost of initial notice.¹⁴⁶ These provisions reflect the conclusion of the special committee that due process does not require personal mailed notice.

The final draft of the notice provision¹⁴⁷ significantly altered the original in

aggregation of class member's individual claims to reach a \$25,000 jurisdictional amount in controversy. Consumer Class Action Act of 1976 § 5(b); see note 137 *supra*.

139. *Id.* § 2(b)(1), (2).

140. N.J. CIV. PRAC. R. 4:32-2(c) provides: "In any class action, the judgment may, consistent with due process of law, confer benefits upon a fluid class whose members may be, but need not have been, members of the class in suit." Compare the more complicated guidelines for fluid recovery in U.C.A.A. § 15.

141. See *Kronisch v. Howard Sav. Inst.*, 133 N.J. Super. 124, 335 A.2d 587 (1975), *rev'd and remanded on other grounds*, 143 N.J. Super. 423, 363 A.2d 376 (1976).

142. The text of the third tentative draft is set out in *The Proposed Uniform Class Actions Act*, 4 CLASS ACT. REP. 181 (1975).

143. See *Prefatory Note of the Special Committee on Uniform Class Actions Act*, 4 CLASS ACT. REP. 181-82 (1975).

144. Proposed Uniform Class Actions Act, Third Draft, § 6.

145. *Id.* § 7(a).

146. *Id.* § 6(g).

147. U.C.A.A. § 7 provides:

Notice of Action

(a) Following certification, the court by order, after hearing, shall direct the giving of notice to the class.

(b) The notice, based on the certification order and any amendment of the order, shall include:

(1) a general description of the action, including the relief sought, and the names and addresses of the representative parties;

(2) a statement of the right under Section 8 of a member of the class to be excluded from the action by filing an election to be excluded, in the manner specified, by a certain date;

(3) a description of possible financial consequences on the class;

(4) a general description of any counterclaim being asserted by or against the class, including the relief sought;

(5) a statement that the judgment, whether favorable or not, will bind all members of the class who are not excluded from the action;

(6) a statement that any member of the class may enter an appearance either personally or through counsel;

(7) an address to which inquiries may be directed; and

(8) any other information the court deems appropriate.

several respects. In doing so, it limited, but by no means eliminated, access to the courts for the mass class action plaintiff. Under the present version of the Act the court has no discretion as to whether notice must be given;¹⁴⁸ initial notice to the class is required for any category of class action. Thus, a class representative could not avoid the notice requirement altogether merely by arguing that the relief sought is principally injunctive rather than monetary.¹⁴⁹

Depending on the nature of the claim asserted, however, the court would have flexibility in tailoring the form of notice to the particular case. Absent class members whose individual damage estimates exceed \$100 are required to be given personal and mailed notice if their identities can be ascertained with reasonable diligence.¹⁵⁰ This provision protects class members with substantial interests by allowing them to opt out of the class or participate in the action. Moreover, even if the action must be dismissed because the plaintiff cannot afford the cost of notice, the alleged wrong is theoretically less likely to languish for lack of a practical form if individual members will have enough at stake to protect their own interests. Class members whose claims are below \$100 or who seek only injunctive or declaratory relief need receive only notice reasonably calculated to apprise them of the pendency of the action.¹⁵¹

Under the Act the courts must consider other factors in determining the form of notice. Among these are the interests of the class, the nature of the relief requested, the cost of notifying the members of the class, and the possible prejudice to absent members who do not receive notice.¹⁵² Thus,

(c) The court's order shall prescribe the manner of notification to be used and specify the members to be notified. In determining the manner and form of the notice to be given, the court shall consider the interests of the class, the relief requested, the cost of notifying the members of the class, and the possible prejudice to members who do not receive notice.

(d) Each class member, not a representative party, whose potential monetary recovery or liability is estimated to exceed \$100 shall be given personal or mailed notice if his identity and whereabouts can be ascertained by the exercise of reasonable diligence.

(e) For class members not given personal or mailed notice under Subsection (d), the court shall provide, as a minimum, a means of notice reasonably calculated to apprise the members of the class of the pendency of the action. Techniques designed to assure effective communication of information concerning commencement of the action shall be used which may include personal or mailed notice, notification by means of newspaper, television, radio, posting in public or other places, and distribution through trade, union, public interest or other appropriate groups.

(f) The plaintiff shall advance the expense of notice under this section if there is no counterclaim asserted. If a counterclaim is asserted the expense of notice shall be allocated as the court orders in the interest of justice.

(g) The court may order that steps be taken to minimize the expense of notice.

148. U.C.A.A. § 7(a).

149. See note 82 *supra*.

150. U.C.A.A. § 7(d). For a discussion of what constitutes reasonable diligence see Dennis v. Saks & Co., 20 F.R. Serv. 2d 994 (S.D.N.Y. 1975).

151. Depending on the circumstances, effective notice may be had through a variety of methods, including newspaper, TV, or radio bulletins, posting in public places or distribution through groups whose communications might be expected to reach class members. Cf. *In re Arizona Dairy Prod. Litigation*, 1975 TRADE CAS. (CCH) ¶ 60,395 (D. Ariz. 1975) (publication of notice on defendant's milk cartons would prove more effective than mailed notice).

152. U.C.A.A. § 7(c). Section 7(e), however, speaks of "effective communication." To the extent that effective communication to each individual class member is required, the court's

the courts must balance the interests of the class members in receiving notice against their interest in having an action designed to vindicate their rights proceed to trial on the merits. When a class member's monetary claims are small, his interest in receiving notice is minimal since it is unlikely that he will exercise his right to retain counsel, intervene, or opt out.¹⁵³ When the nature of the claim is such that adequacy of representation is likely to be maximized¹⁵⁴ or the class member has no right to request exclusion from the class,¹⁵⁵ his interest in participating in the action is also likely to be minimal. Further, the Act specifically permits the court to consider the cost of the form of notice and, by implication, whether the form of notice proposed will bar the action at its inception; if so, the court apparently has discretion to order a less demanding form of notice.

The present draft, however, does not permit court discretion in allocating the cost of notice. In the absence of a counterclaim by the defendant, the claimant is required to advance the expense of notice. The deep-pocket rationale advanced in *Dolgow*¹⁵⁶ is correctly rejected. While the Commissioners recognized that the defendant's interest in a counterclaim may justify imposition of some or all of the burden of notice,¹⁵⁷ the notion that the defendant's interest in the res judicata benefit of the class action is great enough to produce the same result is not followed.¹⁵⁸

The Act expressly permits the court to order steps designed to minimize the expense of the notice.¹⁵⁹ In light of the general policy requiring plaintiffs to assume the costs of initial notice, the Act contemplates minimizing the expense of notice through strictly non-financial cooperation on the defendant's part. Since the court may tailor the form of notice with the cost of notice in mind, however, placing the expense of notice on the plaintiff is much less likely to emasculate the mass consumer class action at the outset.

flexibility in structuring notice will be restricted. Thus, the interaction between § 7(c) and § 7(e) is somewhat confused.

153. See Burman, *Class Actions in New York: A Terminal Case Gets Statutory Relief*, 4 CLASS ACT. REP. 281, 284 (1975). Even when individual notice to the entire class is given, less than 2% demand exclusion. See Pomerantz, *supra* note 53, at 41.

154. The very nature of the class in rule 23 (b)(1)- and (b)(2)-type actions is such that class members' interests tend to be very similar and thus adequacy of representation is more likely. See 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1786, at 143 (1972).

155. U.C.A.A. § 8(a) denies a class member the right to opt out if he is a representative, a counterclaim is pending against the class, or the action is of a type analogous to the federal rule 23(b)(1) or (2).

156. See note 61 *supra* and accompanying text.

157. *But see* Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 485 (S.D.N.Y. 1973), which held that counterclaims may not be asserted against absent class members because they are not parties under rule 13.

158. It seems probable, however, that if the defendant, in order to assure res judicata, demands a form of notice more expensive than that required by the court the cost of such notice would necessarily be borne by the defendant. See *Sanders v. Levy*, 20 F.R. Serv. 2d 1218 (S.D.N.Y. 1975).

159. U.C.A.A. § 7(g). Plaintiffs in the federal courts have unsuccessfully sought to have the courts minimize notice expenses by shifting part of the administrative costs to the defendant. One court has, however, held that *Eisen IV* applies only to postage and mailing, and that the costs of supplying the names and addresses of the class members may be allocated to the defendant. *Foster v. Maryland State Sav. & Loan Ass'n*, 369 F. Supp. 843 (D.D.C. 1974). Most federal courts consider the costs of identifying class members to be part of the expense which must be borne by the plaintiff under rule 23. See, e.g., *Popkin v. Wheelabrator-Frye, Inc.*, 20 F.R. Serv. 2d 125 (S.D.N.Y. 1975). Plaintiffs' requests to allow notice to be included in the defendant's regular statement mailings to customers who are also class members have been consistently rejected. See, e.g., *Dennis v. Saks & Co.*, 20 F.R. Serv. 2d 994 (S.D.N.Y. 1975).

The Act also permits class members to request exclusion if the action is not maintained under the situations described in federal rule 23(b)(1) or (2).¹⁶⁰ Unlike the original draft, the court cannot eliminate a class member's right to exclusion.¹⁶¹ Therefore, when the class member is entitled to request such exclusion, notice requirements should be, to some degree, stricter. If the interest of the class member in requesting exclusion is more theoretical than real, however, the court might not require more than a minimally effective type of notice.

Although the Act mandates some minimal form of notice in every class action, it adopts a more practical evaluation than federal rule 23 as to who must receive personal notice. In this respect the UCAA follows that portion of *Mullane* which held that the requirements of due process must inevitably depend upon the circumstances of the particular case.¹⁶²

The notice requirements of the Act are, however, significantly more restrictive than the recently revised New York Class Action Rule.¹⁶³ The New York rule requires only that notice be reasonable, in terms of its cost, the resources of the party, and the likelihood that class members will desire individual control of their own claims.¹⁶⁴ Moreover, the statute allows the courts discretion to allocate any or all of the notice costs to the defendant.¹⁶⁵ Nevertheless, the policy underlying the UCAA and the New York rule are essentially the same, namely to provide a means of adjudicating those typically modern claims involving individually small but collectively widespread injuries to consumer, environmental, and other collective interests.¹⁶⁶ That policy, embodied in the flexible notice provisions of the UCAA, does not permit the defendant to rely on the very extent of his wrong to defeat class certification.¹⁶⁷

B. Damages

The adoption of a procedural rule permitting fluid recovery involves several conscious decisions on the part of a legislative body. It implies a general recognition of the usefulness of the class action device above and beyond its potential for achieving economies of judicial time and effort. It signifies a decision that the nature of modern society necessitates an available judicial forum for the redress of small but extremely widespread wrongs. And, it requires the decision that the deterrent effect of the mass class action justifies the inherent deficiencies in achieving exact compensation which such an action involves. Moreover, this deterrent effect must be

160. U.C.A.A. § 8(a).

161. Proposed Uniform Class Actions Act, Third Draft, § 7(a).

162. See notes 54-55 *supra* and accompanying text.

163. N.Y. CIV. PRAC. LAW §§ 901-909 (McKinney 1976).

164. *Id.* §§ 904(b)-(c).

165. *Id.* § 904(d).

166. JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, REPORT TO THE 1973 LEGISLATURE 26 (Feb. 1973), cited in Burman, *supra* note 153, at 285.

167. See Pomerantz, *supra* note 53, at 40, for a discussion of the paradox resulting when the end of protecting the small claimant is defeated by the defendant's insistence on individual notice to each member of a large class.

viewed as overriding the added burdens on the courts which fluid recovery necessarily entails.¹⁶⁸

The proposed UCAA sets forth in explicit detail the nature and scope of relief which may be awarded a class and the procedure which the court must follow in so doing. Fluid recovery is expressly permitted.

Section 15 of the Act¹⁶⁹ permits the court to award any form of relief consistent with the order of class certification. Thus, in considering whether to grant certification, the court may consider whether aggregate damage calculation and distribution makes the class action an efficient method of adjudication.¹⁷⁰ Requiring the named representative to present a plan detailing the feasibility of such a procedure should allow the court to avert much

168. See *Kronisch v. Howard Sav. Inst.*, 133 N.J. Super. 124, 335 A.2d 587, 596 (1975), in which the court remarked that the class action's "savings of time, effort and expense will be at the cost of an additional burden upon the court." This view reflects a marked deviation from the conclusion arrived at in the federal courts that the "saving of time, effort, and expense" which a rule 23(b)(3) action should achieve are economies of court time and effort rather than those of the plaintiff class. See, e.g., *In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974); *Berley Drefus & Co.*, 43 F.R.D. 397 (S.D.N.Y. 1967).

169. U.C.A.A. § 15 provides:

Relief Afforded

(a) The court may award any form of relief consistent with the order of certification including, but not limited to, equitable, declaratory, or monetary relief to individual class members or the class in a lump sum or installments, to which the party in whose favor it is rendered is entitled.

(b) Damages fixed by a minimum measure of recovery provided by any statute cannot be recovered in a class action.

(c) If a class is awarded a monetary judgment, the distribution shall be determined as follows:

(1) the parties shall list as expeditiously as possible all members of the class whose identity can be determined without expending a disproportionate share of the recovery; (2) the reasonable expense of identification and distribution shall be paid, with the court's approval, from the funds to be distributed; (3) the court may order steps taken to minimize the expense of identification; (4) the court shall supervise, and may grant or stay the whole or any portion of, the execution of the judgment and the collection and distribution of funds to the members of the class as their interests warrant; (5)(A) The court shall determine what amount of the funds available for the payment of the judgment cannot be distributed to members of the class individually because they have not been identified or located or because they do not claim or prove the right to money apportioned to them. That amount shall be distributed in whole or in part by the court after hearing to one or more states as unclaimed property or to the defendant. The court shall consider the following criteria in determining the amount, if any, to be distributed to a state, and, if any, to the defendant: (i) any unjust enrichment of the defendant; (ii) the willfulness or lack of willfulness on the part of the defendant; (iii) the impact of the relief granted on the defendant; (iv) the pendency of other claims against the defendant; (v) any criminal sanction imposed on the defendant; and (vi) the loss suffered by the plaintiff class.

(B) The court may impose conditions on the defendant with regard to the use of the money distributed to the defendant to remedy or alleviate the harm done.

(C) The amount to be distributed to a state shall be distributed as unclaimed property to any state in which is located the last known addresses of the members of the class to whom distribution cannot be made. If the last known addresses cannot be ascertained with reasonable diligence the court may determine by other means what portion of the unidentified or unlocated members of the class were residents of a state. A state shall receive that portion of the distribution that its residents would have received had they been identified and located. Before entering an order distributing any part of the amount to a state the court shall give written notice of its intention to make distribution to the attorney general of each state if any of its residents were given notice under Section 7 or 12 and shall afford the attorney general an opportunity to move for an order requiring payment to the state.

170. Efficiency of adjudication is a necessary condition to the certification of the action. U.C.A.A. § 2(b)(2); see notes 201-02 *infra* and accompanying text.

of the skirmishing over the preliminary manageability issue which has plagued the federal courts.¹⁷¹

Section 15 permits awarding monetary relief to the class in a lump sum or installments, thereby adopting the concept of calculating gross damages for the class as an entity.¹⁷² The Act does not, however, outline any procedures to be followed in computing such damages. It is not clear, then, whether such a calculation is limited to exact proof drawn from the defendant's records alone, or whether a more uncertain method involving statistical sampling and economic techniques is permissible.¹⁷³ If calculation of gross damages must depend on the ability to prove that each class member was injured in identical measure, either in terms of dollars or by percentage, the flexibility of fluid recovery will be unnecessarily curtailed.¹⁷⁴

The thrust of section 15 is directed toward the distribution of the lump sum monetary recovery.¹⁷⁵ The parites are required to list all individual class member claimants whose identities can be determined without expending a disproportionate share of the recovery¹⁷⁶ since cost of identification and distribution must be subtracted before the funds can be distributed.¹⁷⁷ The court may also order necessary steps to minimize the expense.¹⁷⁸ Such provisions do not negate the possibility of extensive advertising campaigns to locate class members where the income from the damage fund itself will be substantial.

Next, the court is authorized to distribute the funds to class members as their interests warrant. Before the monies apportioned to identifiable class members are distributed, however, they are expected to claim and prove their right to recovery.¹⁷⁹ The court must supervise the distribution during this phase. While assistance of counsel may be invaluable, careful judicial supervision is necessary since the process of distribution will obviously not be adversarial in the true sense.¹⁸⁰ Where fluid recovery is contemplated,

171. Section 15 does not, however, require the submission of such a plan.

172. U.C.A.A. § 15(a).

173. In antitrust cases, for example, wide latitude may be allowed in proving the amount of damage as a matter of public policy. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931). Thus, where the class action promotes such a public policy, a more flexible level of proof may be appropriate.

174. See *Melina*, *supra* note 99, at 308.

175. U.C.A.A. § 15(c).

176. *Id.* § 15(c)(1). The Act, however, gives no guidance as to what constitutes a disproportionate share.

177. *Id.* § 15(c)(2).

178. *Id.* § 15(c)(3).

179. Presumably, this would involve the use of standardized proof of claim forms which would be sent to identifiable class members. For a sample form see *Lebedoff*, *supra* note 130, at 168-69. At what point such forms may be sent and the results of the failure of a class member to respond have raised problems in the federal courts under rule 23(b)(3). Some federal courts have required that such forms be sent with the initial notice in order to help litigants assess the scope of damages. See *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452 (E.D. Pa. 1968). Other courts, in apparent contradiction to the opt-out provisions of rule 23, have barred the claims of class members who failed to return the proof of claim forms at the outset of the suit. See *Lamb v. United Sec. Life Co.*, 59 F.R.D. 25 (S.D. Iowa 1972). Under the UCAA such a procedure would appear to be improper where fluid recovery is contemplated since the scope of damages to the class as a whole does not depend on proof of damages by each individual class member.

180. See *Miller*, *supra* note 26, at 508.

therefore, the standards for adequacy of counsel may be heightened.¹⁸¹ Court supervision should entail some effort to minimize fraudulent claims for recovery,¹⁸² where an exceptionally large class is involved, such a procedure might be modeled upon the *Pfizer* settlement.¹⁸³

Those funds which cannot be distributed to individual class members may, after a hearing, be distributed in whole or in part by the court in one of three ways.¹⁸⁴ First, the fund may be turned over to a state as unclaimed property in proportion to the number of unlocated class members whose last known address was within that state.¹⁸⁵ Where class members are unidentified, the court may determine "by other means" what proportion of unidentified class members were residents of that state.¹⁸⁶ Notice is to be given to attorneys general of any state in which notice was given to the class members, allowing such officials to move for an order directing payment to the state.¹⁸⁷ This particular provision allows the court to avoid the burden of developing an innovative "next best" distribution model for which its resources or competence is not adequate. Such a means of distributing the unclaimed portion of the fund is analogous to the proceedings in *Bebchick*¹⁸⁸ whereby an already extant regulatory authority was given management of the fund. The Act does not provide for any particular utilization of the funds by the state, but such monies could be used to assist consumer protection agencies, agencies which deal with the regulation of the subject matter of the suit, or even to augment the resources of the courts which handle mass class actions.¹⁸⁹

The court may also return the whole or any part of the unclaimed damage fund to the defendant.¹⁹⁰ In doing so, it may require the defendant to use the monies to remedy or alleviate the harm done.¹⁹¹ This provision apparently authorizes the court to require price reductions or rebates to consumers as well as more innovative cy pres remedies. Such a procedure may be most appropriate where the class members can be expected to continue use or consumption of the defendant's services. Such a procedure will demand more of the court in terms of fashioning the conditions imposed on the defendant and supervising the ultimate disposition of the fund.

181. The importance of vigorous and committed assistance of counsel was emphasized by the special master overseeing the *Pfizer* settlement distribution. Lebedoff, *supra* note 132, at 152.

182. Effective claim verification procedures have been advanced as one means of minimizing the risks of eliminating the jury trial as to each claim. Miller, *supra* note 27, at 508.

183. Those procedures included: (1) a study by a research firm to determine how claimants arrived at their claims; (2) probability samples; (3) auditing of claim forms above \$50; and (4) checks by a medical expert of antibiotics claimed to have been used for specific diseases. See Lebedoff, *supra* note 132, at 163.

184. U.C.A.A. § 15(c)(5)(A)-(C).

185. The extent to which such a procedure achieves the cy pres goal of benefiting a "next best class" is questionable. When deterrence is considered important, however, it is not unprecedented. See 29 U.S.C. § 216(c) (1970).

186. Apparently this permits the court to rely on statistical analysis of the defendant's records.

187. Distribution of the fund to the state rather than to the defendant will be most appropriate where the nature of the defendant's wrong violates clearly established public policy or the extent of the wrong suffered is widespread.

188. 318 F.2d 187 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963).

189. See *Federal Consumer Class Action Legislation*, *supra* note 94, at 24.

190. U.C.A.A. § 15(c)(5)(A).

191. *Id.* § 15(c)(5)(B).

Alternatively, the court may simply return the unclaimed portion of the damages to the defendant without any conditions.¹⁹² In determining whether and in what amount the fund is to be returned the court is required to consider any unjust enrichment of the defendant¹⁹³ and any criminal sanction imposed on the defendant.¹⁹⁴ Thus, the court may appropriately consider the nature of the harm committed by the defendant and whether the deterrent effect of withholding the unclaimed damage fund is needed. The court is also to consider the loss suffered by the plaintiff class as a whole, apparently both in amount and in nature, in determining whether such deterrent function is proper.¹⁹⁵

The court must also consider the willfulness or lack of willfulness of the defendant's action.¹⁹⁶ This underscores the quasi-penal nature of fluid recovery. Defendants who unintentionally injure a class, however widespread the injury, may thus be able to avoid the potentially severe consequences of fluid recovery.¹⁹⁷ Moreover, the court is required to evaluate the very harshness of such consequences on the particular defendant. Section 15 instructs the court to consider the impact of the relief to be granted on the defendant and the pendency of other claims against the defendant in deciding whether to return any portion of the fund.¹⁹⁸ Where the aggregate damages might be expected to cripple the defendant, return of the unclaimed funds may be appropriate. In keeping with this rationale, the Act specifically prohibits class action recovery under any statute which fixes a minimum measure of recovery for violations.¹⁹⁹

One commentator has suggested that such a model may be applied in either of two ways: first, full liability would be the norm with mitigation reserved for relatively exceptional circumstances; or secondly, full liability would be reserved for the worst offenders with reduction of liability for most other defendants.²⁰⁰ Neither model appears appropriate as a standard, however, since the enumerated factors which a court must consider underscore the need to decide each particular case on the facts. Undoubtedly, a potential for inconsistent decisions exists where such broad discretion is vested in the trial court. Nevertheless, the Act clearly seeks to balance the policy of preventing unjust enrichment and promoting maximum deterrence with the policy against using the class action for harshly punitive ends.

In certifying a class action, a court following the procedures outlined in the proposed UCAA need not find the class action device is "superior" but must find that it will promote "the fair and efficient adjudication of the controversy."²⁰¹ The factors which the court must consider in making such a

192. *Id.* § 15(c)(5)(A).

193. *Id.* § 15(c)(5)(A)(i).

194. *Id.* § 15(c)(5)(A)(v).

195. *Id.* § 15(c)(5)(A)(vi).

196. *Id.* § 15(c)(5)(A)(ii).

197. The court must, however, balance this factor against the loss suffered by the plaintiff class.

198. U.C.A.A. §§ 15(c)(5)(A)(iii), (iv).

199. *Id.* § 15(b). See notes 110-11 *supra* and accompanying text for a similar judicial approach to class actions brought pursuant to such statutes.

200. See *Comments on The Proposed Uniform Class Actions Act*, 4 CLASS ACT. REP. 181, 187 (1975).

201. U.C.A.A. § 2(b)(2).

determination include "whether the management of the class action poses unusual difficulties" and "whether the claims of individual class members are sufficient in the amounts or interests involved, in view of the complexities and expenses of the litigation, to afford significant relief to the members of the class."²⁰² The former factor is somewhat confusing since the court is apparently not required to find affirmatively that the class action is manageable, but only that it is not unusually unmanageable. Given the scarce case precedent for the actual conduct of mass class actions, it is not clear what "unusual difficulties" means. Since the Act expressly allows fluid recovery, however, "unusual difficulties" would seem to imply problems beyond those of relatively simple damage calculations and distribution.

The latter factor clearly adopts that portion of *In re Hotel Telephone Charges*²⁰³ which weighs the burdens placed on the court by the proposed litigation against the ultimate potential benefit to the individual class members. Thus, where individual recovery is likely to be eaten up by administrative costs of distribution, the class action is not appropriate, even if litigants are willing to vindicate their principles at the expense of their pocketbooks. Moreover, if individual claims are de minimis from the outset and the litigation is likely to be complex and time consuming, certification is apparently improper. The Act clearly does not contemplate that the deterrent effect of the mass class action, in itself, apart from compensation of individual class members, will justify significant burdens on judicial resources. To the extent that emphasis is placed on individual recovery and administrative burdens, the availability of the fluid recovery device to justify a finding of efficiency will be limited.

IV. CONCLUSION

Under the UCAA the emphasis has clearly shifted away from the mere achieving of time, expense, and administrative economies which underlay the structure of federal rule 23. Instead, the potential of the class action to provide a forum for vindication of small but widespread claims and to deter modern mass wrongs has been facilitated. In actual practice the class action may not live up to that promise. Serious questions concerning the ability of the court to manage the increased burden and of defendants to protect themselves from disastrous liabilities without stricter procedural protections are evident. Nevertheless, the UCAA has at least provided the judicial tools to attempt solutions to those questions in order to realize that promise.

202. *Id.* §§ 3(11), (13).

203. 500 F.2d 86, 91 (9th Cir. 1974).