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FEDERAL CLASS ACTIONS: A NEED FOR LEGISLATIVE REFORM *

by

*John E. Kennedy***

AS a procedural device, the class action has enjoyed continued use over the years because of the growing number of instances in which there are multiple parties to litigation, and correspondingly, because of the need to eliminate or reduce a multiplicity of suits. The impracticability of any other type of procedure gave impetus to the development of the forms of class actions currently embodied in rule 23 of the Federal Rules of Civil Procedure.¹

In 1966 rule 23 was completely revised along lines that were thought to be more pragmatic.² The 1966 rule required the presence of the familiar elements of numerosity,³ commonality,⁴ and adequacy of representation,⁵ and added the new requirement of typicality.⁶ In addition, the new rule provided that an action may be maintained as a class action only if it comes within any one of three categories now specified as a (b)(1), (b)(2), or (b)(3) class action. Relatively speaking, the first two categories have not caused unusual controversy. The (b)(1) action roughly equates to situa-

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1. 3B MOORE'S FEDERAL PRACTICE ¶ 23.02[1] (2d ed. 1978) [hereinafter cited as MOORE'S].

2. Rule 23, as originally promulgated in 1937, was a substantial restatement and clarification of Federal Equity Rule 38 of 1912, which simply provided that "[w]hen the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." Fed. Equity R. 38, 226 U.S. 627, 659 (1912). While the class action was originally devised for cases of compulsory joinder, original rule 23 expanded the equity rule to include cases of permissive joinder—situations in which there are merely common questions of law or fact.

3. FED. R. CIV. P. 23(a)(1) provides that a class action may be maintained only if "the class is so numerous that joinder of all members is impracticable."

4. FED. R. CIV. P. 23(a)(2) provides that a class action may be maintained only if "there are questions of law or fact common to the class."

5. FED. R. CIV. P. 23(a)(4) provides that a class action may be maintained only if "the representative parties will fairly and adequately protect the interests of the class."

6. FED. R. CIV. P. 23(a)(3) provides that a class action may be maintained only if "the claims or defenses of the representative parties are typical of the claims or defenses of the class."

tions in which there are multiple, indispensable, or necessary parties,⁷ while the (b)(2) action involves situations in which the predominant claims are for injunctions or declaratory judgments, as in civil rights suits.⁸ In brief, these actions cover situations in which it is clear there will be litigation over an underlying claim; the class action issue is thus predominantly procedural, that is, how to provide the most convenient, efficient vehicle for adjudication. The third category, the (b)(3) class action, which encompasses individual and several damage claims, has been the source of much dispute. In contrast to the (b)(1) and (b)(2) actions, the (b)(3) action is a procedural vehicle that provides an opportunity to institute an action when no claim might otherwise be brought to the courts.

The (b)(3) action is legally described as one in which the court finds that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."⁹ Hand-in-glove with the (b)(3) category came the new "opt-out" procedure provided in rule 23(c) under which notice must be given to class members, who must affirmatively opt-out prior to trial or else be included in the class, win or lose.¹⁰ This innovation was conceived in order to provide full mutuality of estoppel to class members who remained silent in response to notice; that is, the opt-out procedure was designed to eliminate the unfairness of fence-sitting and one-way intervention by silent class members who might intervene after a victorious judgment by a class representative but who would claim not to be bound in the event of a loss.¹¹

These amendments and the accompanying Advisory Committee comments, however, did not directly address the policy issues so forcefully presented in 1941 by Kalven and Rosenfield's classic article, "The Contemporary Function of the Class Suit."¹² The question raised in that article was whether the proper goal of the class action should be limited solely to providing a procedural short-cut in multi-party litigation or should instead be extended to the maximum substantive goal of opening the courts to small claims that otherwise would not be litigated at all. Kalven and Rosenfield urged the maximum goal for the class action: representation of certain types of claims that would not otherwise be brought because of

7. The (b)(1) class action is designed to avoid the risk that separate adjudications in separate actions would entail (a) to the party opposing the class, or (b) to the individual members of the class. See 3B MOORE'S, *supra* note 1, ¶ 23.35.

8. The (b)(2) type class action is authorized when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." 3B MOORE'S, *supra* note 1, ¶ 23.40[1].

9. FED. R. CIV. P. 23(b)(3); see 3B MOORE'S, *supra* note 1, ¶ 23.45.

10. FED. R. CIV. P. 23(c)(2), (3); see 3B MOORE'S, *supra* note 1, ¶ 23.60.

11. ADVISORY COMM. ON CIVIL RULES, NOTE TO RULE 23, PROPOSED RULES OF CIVIL PROCEDURE, 39 F.R.D. 95, 104-06 (1966).

12. Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

litigation economics and other factors.¹³

Although the Rule Committee Notes of 1966 reveal an awareness of this important policy issue,¹⁴ and the individual committee members may have had individual preferences, it is not at all clear whether the 1966 revision and its accompanying notes intended to incorporate the Kalven and Rosenfield goal.¹⁵ This ambiguity of purpose has manifested itself by presenting largely unanticipated problems and widely varied responses by the courts.¹⁶

In the context of this open-ended policy issue thrust upon the judiciary by rule 23(b)(3), it is not surprising that the Supreme Court first reacted by requiring that each claimant have a \$10,000 claim, thereby shutting out the small claims damage class action based on diversity jurisdiction.¹⁷ The Court in *Eisen v. Carlisle & Jacquelin (Eisen IV)*¹⁸ continued its reaction by cutting the heart out of small claims federal question cases under rule 23(b)(3) as well by (1) requiring individual pre-trial notice to class mem-

13. Kalven and Rosenfield stated: "It has also been seen that the individuals making up the group are usually in no position to act for themselves because of their lack of knowledge and the disproportion between the expense of seeking redress and their individual stake in the controversy." *Id.* at 714.

14. ADVISORY COMM. ON CIVIL RULES, *supra* note 11, at 105 (citing the Kalven and Rosenfield article in the discussion of one-way intervention).

15. The Advisory Committee's Note does not specifically address the small claims class action. Some of the Note appears to endorse a minimum policy of joining multiple actions that would be maintained in any event: "Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Id.* at 102-03. Yet other language acknowledged the possibility of serving the maximum policy goal:

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed.

Id. at 103.

16. In spite of the absence of direction, some lower federal courts have simply assumed the small claims, maximum policy goal, at least to the extent that rule 23 is combined with federal securities legislation to produce class securities suits. *See, e.g.,* *Escott v. Barchris Constr. Corp.*, 340 F.2d 731, 733 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965). *See also* 6 L. LOSS, *SECURITIES REGULATION* 3938 (2d ed. Supp. 1969), for an updated list of citations agreeing with this view. Professor Loss contends that "[t]he ultimate effectiveness of the federal [securities] remedies, when the defendants are not prone to settle, may depend in large measure on the applicability of the class action device." *Id.* *See generally* Kennedy, *Securities Class and Derivative Actions in the United States District Court for the Northern District of Texas: An Empirical Study*, 14 Hous. L. Rev. 769, 793 (1977). In an antitrust context, *see, e.g., In re Coordinated Pretrial Proceedings in Antibiotics Antitrust Actions*, 333 F. Supp. 267, 270-71 (S.D.N.Y. 1971), 410 F. Supp. 669, 679-80 (D. Minn. 1974).

17. *Zahn v. International Paper Co.*, 414 U.S. 291, 300-02 (1973); *Snyder v. Harris*, 394 U.S. 332, 338-42 (1969).

18. 417 U.S. 156 (1974).

bers,¹⁹ (2) requiring the plaintiff and the plaintiff's lawyer to finance the cost of that notice, (3) invalidating the cost evasive and cost shifting devices such as the mini-hearing on the merits,²⁰ and (4) indicating disapproval of the fluid recovery concept as a method to overcome manageability problems.²¹

These Supreme Court decisions, however, have not provided satisfactory answers to the policy questions concerning what is generally described as the "private attorney general" class action for small damage claims. Instead, the Court has gutted the (b)(3) class action and left it dependent upon limiting the class to a manageable size that will fit the pocket-book ability and willingness of the plaintiff and its lawyer to finance the costs of both discovery and individual notice to the class members.²² Thus, in the case in which violations of federal statutes cause small amounts of damages to numerous persons, the law enforcement goals of deterrence, disgorgement, and compensation are only haphazardly served by the present rule.²³ True, piecemeal congressional responses have been made in specific substantive areas,²⁴ but these efforts have not comprehensively or uniformly resolved the major policy issues generated by rule 23(b)(3). The time has come for comprehensive reform.

1. *The Proposed Public Action and Class Compensatory Action.*

Largely in response to the unanswered policy questions, and to the substantial discontent with the actual operation of rule 23(b)(3),²⁵ the Office

19. *Id.* at 173. See also *Oppenheimer Funds, Inc. v. Sanders*, 98 S. Ct. 2380, 2392-94, 57 L. Ed. 2d 253, 268-70 (1978) (costs in discovering names and addresses of class members also imposed on plaintiff).

20. 417 U.S. at 177-78. See notes 86-93 *infra* and accompanying text for a discussion of preliminary hearing on the merits.

21. 417 U.S. at 175-76. See notes 114-29 *infra* and accompanying text for a discussion of the fluid recovery concept.

22. That is, unless the plaintiff can fit one of the narrow exceptions mentioned in *Eisen IV*, 417 U.S. at 178-79, when it is permissible to impose the cost of notice on the defendant, or where individual notice is not required. Perhaps the notice requirement of *Eisen IV* may be partly avoided by allowing the class representative to define a class or subclass small enough so that the cost of notice will not be prohibitive. See the concurring dissent of Justice Douglas in *Eisen IV* urging that action by a smaller class should toll the statute of limitations as to a larger class. *Id.* at 181-82. See *P.D.Q. Inc. v. Nissan Motor Corp.*, 61 F.R.D. 372, 381 (S.D. Fla. 1973) (allowing smaller class to reduce cost of notice).

23. See Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47 (1975); DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience (II)*, 1976 AM. B. FOUNDATION RESEARCH J. 1273.

24. *E.g.*, Truth in Lending Act, amended to treat class actions by Pub. L. No. 93-495, § 408(a), 88 Stat. 1500 (1974) (codified at 15 U.S.C. § 1640(a) (1976)); Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, § 301, 90 Stat. 1394 (codified at 15 U.S.C. § 15c (1976)); Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 110(d), 88 Stat. 2183 (1975) (codified at 15 U.S.C. § 2310(d) (1976)); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 2, 81 Stat. 602 (codified at 29 U.S.C. §§ 621-33 (1976)); see *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir. 1975) (Age Discrimination in Employment Act requires opt-in).

25. It is widely assumed that a majority of judges are dissatisfied with rule 23(b)(3). See note 160 *infra*. Moreover, both plaintiff and defendant groups have voiced specific practical objections to the current rule 23(b)(3). Among the many objections presented to the drafters of S. 3475, 95th Cong., 2d Sess., 124 CONG. REC. S14,501 (daily ed. Aug. 25, 1978), plaintiffs

for Improvements in the Administration of Justice²⁶ has initiated, and the Senate has begun to consider, a bill that would dramatically revise class damage procedures. The original bill, Senate Bill 3475,²⁷ proposes to repeal rule 23(b)(3) and replace it with two statutory remedies known as the "public action" and the "class compensatory action."

Public Action. The provisions relating to the public action address the major policy question that arises when mass economic injury is spread over a large class. Somewhat similar to the goals of Kalven and Rosenfield, the bill makes its primary concern the prevention of unjust enrichment and the deterrence of others from similar conduct, rather than compensation for every small injury.²⁸ Although compensation is a goal, the action is conceived primarily as being of public, rather than private import.²⁹

The public action seeks to accomplish these goals by vesting a single claim in the United States against the wrongdoer. An action may be

have emphasized the following problems: (1) class damage actions are dismissed too early, when the defendant has far more relevant information than the plaintiff; (2) procedural leeway allowed by the rule encourages more affluent parties to file needless motions and to delay resolution in order to force an unfairly advantageous settlement; (3) more feasible means of determining aggregate damages are needed; (4) requiring notice to all injured persons unnecessarily creates an expense barrier that many plaintiffs cannot vault; (5) settlement management does not always protect the interests of class members; (6) distribution of recovery by the district court is cumbersome and essentially a nonjudicial task; and (7) executive agencies are too often inert, offering little assistance to advance, when appropriate, the public end of deterrence.

Defendants have noted other difficulties with the current rule: (1) when pervasive injury is frivolously alleged, business reputation and good will are eroded by baseless class damage "strike" suits unscrubbed by any executive agency; (2) litigation expense in some business budgets is escalating as much as 25% a year, while earnings increase at less than one-third that rate; as a consequence, settlement, rather than litigation of frivolous class damage claims, is required, *see* SENATE JUDICIARY COMM. MINORITY VIEW, THE ANTITRUST ENFORCEMENT ACT OF 1978, S. REP. NO. 95-934, Pt. 2, 95th Cong., 2d Sess.; (3) lax judicial management prevents effective adjudication on the merits and allows parties to go on a fishing expedition into defendants' files; (4) class damage suits consume too much business executive time, *see The Chilling Effect of Litigation*, BUS. WEEK, June 6, 1977, at 59, 62; Carrath, *The "Legal Explosion" Has Left Business Shell Shocked*, FORTUNE, April 1973, at 65, 66; (5) the plaintiff attorney compensation system encourages law suits that benefit these attorneys alone; and (6) individual compensation of large numbers of persons injured a few cents each often involves more expense than the claim is worth, *see* Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 COLUM. L. REV. 1 (1971). This list was prepared by the Office for Improvements in the Administration of Justice, U.S. DEP'T OF JUSTICE, INTRODUCTION TO BILL COMMENTARY (Aug. 25, 1978), *reprinted in* 124 CONG. REC. S14,502 (daily ed. Aug. 25, 1978) [hereinafter cited as BILL COMMENTARY]. *See generally* AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, CONSUMER CLASS ACTIONS (1977); *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318 (1976).

26. The Office is part of the United States Department of Justice.

27. S. 3475, 95th Cong., 2d Sess., 124 CONG. REC. S14,501 (daily ed. Aug. 25, 1978) [hereinafter cited as S. 3475]. The full text of the bill appears in the Appendix to this Article. The bill was drafted by Mr. Stephen Berry after extensive field and doctrinal research, and was introduced by Senators Kennedy and De Concini on Aug. 25, 1978.

28. BILL COMMENTARY, *supra* note 25.

29. U.S. DEP'T OF JUSTICE, SUMMARY OF DRAFT BILL TO REVISE CLASS DAMAGE PROCEDURES 2 (Aug. 25, 1978) [hereinafter referred to as SUMMARY OF DRAFT BILL].

brought either by the United States or on its behalf by one or more injured persons.³⁰ If the action is initiated by a private person, this "relator" is required to serve notice promptly on the United States Attorney General,³¹ who may then assume direct control of the action.³² Since the theory of the public action is that there is a single claim vested in the United States, which is assumed to be an adequate representative, there is no requirement for notice to class members. If liability is established, the defendant suffers a judgment equal to the total amount of small injury caused or the amount of unjust enrichment.³³ This amount is paid into the Administrative Office of the United States Courts,³⁴ which publishes suitable notice in order for class members to receive payment from the recovery.³⁵ Money remaining after payment of claims and expenses is eventually forwarded to the United States Treasury.³⁶

The proposed public action is limited to situations involving conduct by the defendant incident to the manufacture or sale of goods or services, including securities or realty,³⁷ and is limited to large class, small claims situations.³⁸ A public judgment against a defendant constitutes a bar to subsequent small-claim individual actions. Following such a judgment, a small claimant's exclusive avenue of redress is to file a claim with the Administrative Office.

Class Compensatory Action. The class compensatory action, on the other hand, is available for larger individual claims as a remedy against the same kind of conduct as covered by the public action and additional kinds of statutory violations.³⁹ In essence, the compensatory action attempts to take up where the public action leaves off. Most of the procedural aspects are borrowed from the present rule 23(b)(3) action, with the exception that the proposal provides limitations on discovery⁴⁰ and a mandatory mini-hearing on the merits⁴¹ as a condition to class certification, and most importantly, allows the judge discretion to order either opt-out or opt-in notice.⁴² In theory, the claims in the compensatory action are presumably substantial, and upon notice, the injured parties will have sufficient incentives to form a class and secure adequate and representative counsel.⁴³

30. S. 3475, § 3001(c).

31. *Id.* § 3002(a).

32. *Id.* § 3002(b)(1).

33. *Id.* § 3006(b)(1), (2).

34. *Id.* § 3006(e).

35. *Id.* § 3007(b).

36. *Id.* § 3007(a).

37. *Id.* § 3001(a).

38. *Id.* § 3001(a)(1). Two hundred or more persons must make claims for less than \$300 each, and the total claim must exceed \$60,000.

39. *Id.* § 3011(a)(1). Forty or more persons must make claims for more than \$300 each. A total damage amount is not required.

40. *Id.* § 3012; see notes 73-85 *infra* and accompanying text.

41. S. 3475, § 3013; see notes 86-93 *infra* and accompanying text.

42. *Id.* § 3013(e).

43. SUMMARY OF DRAFT BILL, *supra* note 29, at 8.

Legislative versus Judicial Revision. It is important to note that the Judicial Conference of the United States, prior to the introduction of the bill, adopted a resolution that "approve[d] in principle the revision of Rule 23 . . . by direct legislative enactment, rather than by the rule-making authority."⁴⁴ This is a practical realization by the Rules Committee that the possibility of modifying rule 23 solely within the framework of the federal rule-making process has reached a stalemate. Foremost, however, the resolution represents a realization that revision of class action damage procedures would raise serious questions as to whether such revision is appropriately within the scope of the rule-making authority granted by the Rules Enabling Act.⁴⁵ In fact, rhetorical arguments have been made that the 1966 amendment adding rule 23(b)(3) exceeded the power of the Court by creating new substantive rights and liabilities.⁴⁶ Justice Black in his dissent to the amendments to rule 23 in 1966 was perhaps concerned about the substantive implications contained in the 1966 amendment.⁴⁷

The substantive law objection has some color when the 1966 opt-out procedure⁴⁸ is considered in relation to the practical impact on the named plaintiff, the plaintiff's lawyer, and the defendant. In retrospect, as applied to claims for small amounts of damages that, realistically, would never otherwise be pursued in the court system, the 1966 rule for the first time gave the plaintiff and the plaintiff's lawyer power to represent claims of passive classes by what could be termed a constructive assignment by operation of law.⁴⁹ The defendants, who went to bed on the eve of the 1966

44. Letter from Hon. Roszel C. Thomsen, Standing Committee Chairman, Committee on Rules of Practice and Procedure, to Standing Committee (Mar. 14, 1978), *reprinted in* SUMMARY OF DRAFT BILL, *supra* note 29, at 7.

45. 28 U.S.C. § 2072 (1976).

46. *See, e.g.,* Hazard, *The Effect of the Class Action Device upon the Substantive Law*, 58 F.R.D. 307 (1973); Note, *The Impact of Class Actions on Rule 10b-5*, 38 U. CHI. L. REV. 337 (1971).

47. Amendments to the Rules of Civil Procedure for the United States District Courts, 383 U.S. 1032 (1966):

I particularly think that every member of the Court should examine with great care the amendments relating to class suits. It seems to me that they place too much power in the hands of the trial judges and that the rules might almost as well simply provide that "class suits can be maintained either for or against particular groups whenever in the discretion of a judge he thinks it is wise." The power given to the judge to dismiss such suits or to divide them up into groups at will subjects members of classes to dangers that could not follow from carefully prescribed legal standards enacted to control class suits.

Id. at 1035. The point about substantive law is generally made by Justice Black without specific reference to rule 23 at another place:

We believe that while some of the Rules of Civil Procedure are simply house-keeping details, many determine matters so substantially affecting the rights of litigants in lawsuits that in practical effect they are the equivalent of new legislation which, in our judgment, the Constitution requires to be initiated in and enacted by the Congress and approved by the President. The Constitution, as we read it, provides that all laws shall be enacted by the House, the Senate, and the President, not by the mere failure of Congress to reject proposals of an outside agency

Id. at 1033 (quoting 374 U.S. 865, 865-66 (1963)).

48. FED. R. CIV. P. 23(c)(2)(A); *see* 3B MOORE'S, *supra* note 1, ¶ 23.55.

49. The smaller the claim, the less likely it is the class member will opt-out or intervene

rule safe in a de facto immunity from private enforcement of small claims, awoke the day after the enactment of rule 23(b)(3) to face potentially enormous liability projected from the silent consent of the notified classes.⁵⁰ By any of the many legal tests distinguishing substance from procedure, it is hard to conceive of a more substantive impact than that brought about by the 1966 creation of the opt-out procedure.⁵¹ In any event, it now appears clear that a major policy question remains unanswered and calls for legislative response: Under what circumstances should the federal courts allow private attorneys general to bring class actions for small damage claims?

2. *Defining the Roles of Congress and the Courts in Reform.*

There is a genuine need for reform of the law governing class actions maintained under rule 23(b)(3). The source of that reform should have its roots in the legislative branch in order to establish the fundamental policy goals that are to be served by the class action procedure. Consequently, an overriding question is to decide how much of the reform should be undertaken by Congress and how much should be left to the Supreme Court under its rulemaking authority. Viewed from this perspective, the basic substantive remedy concepts of the public class action and the compensatory class action are sound innovations. Nevertheless, any proposal embodying these concepts should be carefully examined to determine the extent to which it attempts rigid regulation of aspects that may be better left to the Court.⁵²

In this light, it is questionable whether Congress should undertake total repeal of rule 23(b)(3) and (c),⁵³ lest it inadvertently create in replacement

in response to an initial notice, and thus the plaintiff and plaintiff's attorney at the point of certification exert great leverage power on behalf of the class.

50. The passivity of the class and other factors eliminating proof of claims, however, may substantially reduce the size of the class and the amount to be actually distributed in the end. Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123, 1162-64 (1974). See *Van Gemert v. Boeing Co.*, 553 F.2d 812, 815-16 (2d Cir. 1977), in which the defendant was found liable to the class for \$3,289,359, and the court would not allow unclaimed amounts to be redistributed pro rata to those class members who filed proof of claims as an indirect method of paying their legal fees and expenses.

51. The Supreme Court has not found it necessary to reach this abstract issue. For example, in *Snyder v. Harris*, 394 U.S. 332 (1969), the majority held that the new opt-out procedure in rule 23(c)(2) could not be used to change the prior jurisdictional rule forbidding aggregation of monetary claims in certain class actions; otherwise a change in a civil rule would impermissibly "expand" jurisdiction. Nevertheless, the majority apparently would not appear to go so far as to invalidate rule 23(c)(2) on the grounds it works a substantive change in the law of cases to which it is applied.

In further rebuttal, it should be noted that the theoretical impact on defendants has been blunted because of the plaintiff's burden to bear the cost of individualized notice. See note 19 *supra* and accompanying text. Indeed, as a result it might even be argued that, from the viewpoint of the plaintiff, the pre-1966 "one-way intervention" was superior to the new opt-out procedure. See *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 588-89 (10th Cir. 1961), *cert. dismissed*, 371 U.S. 801 (1963). See also note 46 *supra*.

52. Editors of the Harvard Law Review, after extensive analysis, concluded generally that judges should be given more, rather than less, discretion under rule 23. *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1319, 1623-31 (1976).

53. S. 3475, sec. 3 repeals rule 23(b)(3) by providing in part:

a greater monster than went before. Notwithstanding the question of the wisdom and historical precedent for congressional repeal of a twelve-year-old federal rule of civil procedure,⁵⁴ the total repeal might leave a significant void in the law, which might not be completely filled once special lobbying begins to nibble holes in its statutory replacement.

It is a difficult challenge to contrast and tabulate the scope of coverage under present rule 23(b)(3) with that under both the proposed public action and the compensatory action.⁵⁵ The existence of this challenge reveals that the approach of total repeal may be fundamentally overambitious. Repealing all of rule 23(b)(3) and replacing it with a two-part concept established by artificial bright lines⁵⁶ may generate complex decisional law on irrelevancies and may provide incomplete coverage for actions presently subject to class action treatment. In short, even if it is assumed that there are two major types of class actions now brought under rule 23(b)(3),⁵⁷ it does not necessarily follow from this premise that each of

SEC. 3. Rule 23 of the Federal Rules of Civil Procedure is amended by—
 (a) deleting subdivisions (b)(3) and (c)(2), and the last sentence of subdivision (c)(3); and
 (b) deleting the word “; or” at the end of subdivision (b)(2) and substituting a period.

54. See, e.g., Louisell, *Construing Rule 301: Instructing the Jury on Presumptions in Civil Actions and Proceedings*, 63 VA. L. REV. 281, 320 (1977); Moore & Bendix, *Congress, Evidence and Rulemaking*, 84 YALE L.J. 9 (1974).

55. This potential is demonstrated by contrasting the scope of S. 3475 with coverage under rule 23(b)(3):

(1) The new public action only covers “conduct in the manufacture, rental, distribution, or sale of realty, goods, or services, including securities.” S. 3475, § 3001(a). The background memorandum supporting S. 3475 does list the statutes purported to be covered by the language. BILL COMMENTARY, *supra* note 25, at 13 n.37. Nevertheless, will it be clear to the courts that all those statutes come within the language? Have any statutes been omitted?

(2) The new class compensatory action, however, more broadly covers “conduct [that] gives rise to a civil private right of action for damages under a statute of the United States.” S. 3475, § 3011(a).

(3) The new public action covers only classes of 200 or more with claims under \$300 each and a minimum total injury of \$60,000. S. 3475, § 3001(a)(1), (2).

(4) The new compensatory action, however, covers only cases involving classes of 40 or more with individual claims of \$300 or more. S. 3475, § 3011(a)(1).

Under this proposed coverage, what becomes of actions presently maintainable under rule 23(b)(3) when the following elements may be involved:

(1) the action does not involve “conduct in the manufacture, rental, distribution or sale of realty, goods or services, including securities”;

(2) the action is for monetary relief other than damages;

(3) the class numbers less than 200, with individual claims less than \$300 each, or the aggregate injury is not \$60,000.

(4) the class numbers less than 40, with individual claims in excess of \$300;

(5) the action does not fit the scope of the new coverage, but presents claims in the nature of a rule 23(b)(3) action that could have been pendented to a rule 23(b)(1) or (2) action. In employment discrimination cases, for example, the fact that the action was certified only as a 23(b)(2) action does not preclude a back pay award. See *Senter v. General Motors Corp.*, 532 F.2d 511, 525 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976). While employment discrimination cases are not subject to S. 3475, the same issue might arise as to other types of litigation in which the monetary relief might be pendented to a 23(b)(2) action and labeled an equitable, rather than a damage-type relief.

56. Will the requirements be considered jurisdictional, like amount in controversy and parties?

57. BILL COMMENTARY, *supra* note 25, at 9.

these types should be sharply defined by quantitative statutes into discrete remedial vehicles covering less than what was previously covered by a general rule of procedure.

Rather, something in the nature of the following approach might be more sound. Do not repeal rule 23(b)(3) and 23(c)(2).⁵⁸ Instead, rely upon the present provision in rule 23(b)(3), which requires that a class action be "superior to other available methods for the fair and efficient adjudication of the controversy," and by statute provide the judge with the flexible remedial power to declare that an action brought under rule 23(b)(3) shall proceed instead as a public class action under the provisions of section 3001. The statute should then state a series of fundamental, general criteria reflecting a rationale or policy for invoking the public action remedy as developed in the commentary supporting the bill.

To illustrate, Judge Hubert Will of the Northern District of Illinois in *King v. Kansas City Southern Industries, Inc.*⁵⁹ was faced with an action brought both as a shareholder derivative action under rule 23.1 and a shareholder class action under rule 23(b)(3). By reasoning that the rule 23.1 derivative action would in this case approximate the same objectives of deterrence and disgorgement of unjust enrichment to the corporation without the expense and complexity of individual shareholder identification, notice, and award distribution, Judge Will concluded that the shareholder derivative action was "superior" to the class action. By analogy, making the new statutory public action remedy available under the controlled discretion of the judge might be wiser than attempting to mandate the public action by the equivalent of jurisdictional concepts.

No doubt a good argument can be made, however, that Congress should throw out rule 23(b)(3) and replace it with a complete answer that everyone can understand. If it is necessary to repeal rule 23(b)(3), the coverage of both the public action and the compensatory action should be mutually comprehensive. Further, the dividing line between the two remedies should not be a mandatory, quantitative one,⁶⁰ but rather should be expressed as principled, guideline distinctions, giving rise to presumptions allowing the decision of the judge to dispatch the action to one statutory remedy or the other, according to the goals to be served by each remedy.

Again, no doubt it can be argued that there is a great need for specifying exactly when one remedy and not the other will apply. Nevertheless, if the bright-line approach is deemed necessary, the original limits suggested arbitrarily restrict the availability of the public action: the maximum claim should be larger, perhaps \$500;⁶¹ the minimum class size should be

58. At a minimum, for the sake of comprehensive procedural coverage, replace rule 23(b)(3) and 23(c)(2) with the rule existing prior to 1966.

59. 56 F.R.D. 96 (N.D. Ill. 1972), *appeal dismissed*, 479 F.2d 1259 (7th Cir. 1973).

60. For example, courts have wisely avoided any hard numerical rules in defining "numerosity," or in requiring any particular degree of representative interest of the plaintiff. See 3B MOORE'S, *supra* note 1, ¶¶ 23.05[1], 23.07[4].

61. In the study of securities class-derivative cases filed in the United States District Court in Dallas, of 25 settlements in which the plaintiffs' claims were reported, the lowest stake of a named plaintiff was \$855. Presumably, none of these cases would have been

smaller, perhaps twenty-five; and the scope of the public action should be the same as that for the compensatory action, that is, any civil, private right of action for damages (monetary relief) under a statute of the United States, unless otherwise expressly excluded from coverage.

The premise of the congressional proposal is that current procedures have failed to differentiate the two types of cases that have arisen in a (b)(3) context. In codifying this premise into two discrete procedural vehicles, the proposal should not exchange the problems inherent in a vague (b)(3) scheme for a mechanistic approach, thereby necessitating complex provisions for combining or transferring the actions from one vehicle to the other.⁶²

3. *The Power of the Attorney General to Control the Public Action.*

One rationale supporting private rule 23(b)(3) actions for small damage claims is that the lawyer and client are essentially private attorneys general who, through the class action, supplement inadequate public law enforcement.⁶³ For this reason, it seems eminently sensible that as the size of individual damage claims decreases and the number in the class increases, the private action should be vested with a public interest, which calls for some form of public audit and participation.

Accordingly, the general concept of a public action in the name of the United States, brought by a private relator and attorney, but controlled by the Attorney General, is a legitimate attempt to answer the major substantive policy question generated by rule 23(b)(3). There are, however, some major reservations.

The proposal should be more flexible, permitting involvement of United States agencies other than the Attorney General. For example, a small claims securities class action might be better handled by the Securities Exchange Commission. Although no doubt it is contemplated that existing law allows the Attorney General to delegate the control of the action to other agencies, an important practical consideration in any statutory public action is where to locate the government legal staff and how to fund it in order to exercise the government's choices given in the statute.⁶⁴

eligible for treatment as a public action, but all potentially would have been compensatory actions. One attorney interviewed in the course of the study said that although each securities case varied widely with the degree of complexity and the nature of proof, a rough rule of thumb was that the typical plaintiff needed a minimum individual claim of \$2,000, and \$10,000 to go to trial. Kennedy, *Securities Class and Derivative Actions in the United States District Court for the Northern District of Texas: An Empirical Study*, 14 Hous. L. Rev. 769, 821-22, 827 n.199 (1977).

62. See S. 3475, §§ 3021, 3028. The courts have been able to distinguish or combine the (b)(2) and (b)(3) type suits without specific directions, 3B MOORE'S, *supra* note 1, ¶ 23.40[4], and to distinguish or combine class suits with stockholder derivative suits. 3B MOORE'S, *supra* note 1, ¶ 23.1.16[3].

63. See Dam, *supra* note 23; DuVal, *supra* note 4.

64. S. 3475, § 3002(b) gives the Attorney General four choices: (1) appear and assume control; (2) decline to appear and allow the action to be prosecuted by the relator; (3) decline to enter an appearance and refer the action to a state attorney general who is given a similar series of choices; or (4) decline to enter an appearance and file with the court a written

Clearly, the expertise and the enforcement posture of the government lawyers responsible for these statutory options should be coordinated with the relevant agency policy applicable to the substantive statute on which a public action is based.

Aside from the distribution of control of the action within the executive branch, however, the private party and the lawyer initiating the action should have more rights in relation to the Attorney General's representation of the class interest. The original proposal allows the Attorney General to "assume control of the action."⁶⁵ Assuming this literally means what it says, the statute contemplates that as a matter of law the Attorney General will adequately protect the public and the class interest. The rights of the relator should at least be strengthened to insure auditing of the Attorney General's function. To illustrate, in *Cascade National Gas Corp. v. El Paso Natural Gas Co.*⁶⁶ the Supreme Court allowed an intervention of right by a competitor under rule 24(a) to contest an antitrust divestiture decree that was consented to by the Attorney General. Under rule 24(a) intervention is not permissible unless the interest of the intervenor is not adequately represented by the existing parties. Although Justice Harlan dissented on the grounds that enforcement of the antitrust law was vested exclusively in the Justice Department, the majority held that adequacy of representation was an important question of fact to be left as a matter of inquiry in each case.⁶⁷

Accordingly, some expansion should be made as to the relator's rights upon assumption of control by the Attorney General.⁶⁸ In the alternative,

statement of reasons why the public interest would not be served by allowing the action to continue as a public action.

Professor Wolfram points out that the adequacy of representation of state consumers by various state attorney general's offices in the antibiotics antitrust class actions was somewhat variable, depending on the legal staff, political factors in each state, and delegation of representation to private lawyers under contingent fee contracts. Wolfram, *The Antibiotics Class Actions*, 1976 AM. B. FOUNDATION RESEARCH J. 251, 337-40, 360.

65. S. 3475, § 3002(b)(1).

66. 386 U.S. 129 (1967).

67. See *United States v. ITT*, 349 F. Supp. 22 (D. Conn. 1972), *aff'd sub nom. Nader v. United States*, 410 U.S. 919 (1973) (denying standing and intervention to Ralph Nader to challenge government consent decree).

68. Some analogy might be drawn to the Securities and Exchange Act of 1934, § 16(b), 15 U.S.C. § 78p(b) (1976), insider profit suit, which is not technically a class action, but allows a shareholder to intervene if the corporation does not diligently pursue the action. See 3B MOORE'S, *supra* note 1, ¶ 24.06[3.—11].

Also, some analogy might be drawn to the mix of private and agency enforcement power in various contexts such as the Equal Employment Opportunity Commission's power to pursue class remedies for race discrimination in employment. *E.E.O.C. v. D.H. Holmes Co.*, 556 F.2d 787 (5th Cir. 1977). Professor Brunet states that of the 349 cases in which the Equal Employment Opportunity Commission participated during fiscal 1976, the Commission entered 22 by way of intervention. Brunet, *A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 GA. L. REV. 701, 728 n.122 (1978). Similarly, the Administrator of the Environmental Protection Agency is permitted to intervene as a matter of right in suits brought by private citizens to require compliance with pollution standards, and in turn, some intervention as a matter of right is allowed to private citizens in suits brought by the EPA. *Id.* at 732.

Another model is provided in the division of power between the private litigant and the Secretary of Labor for enforcement of the Fair Labor Standards Act. Under the Act the

the plenary power of the Attorney General should be reduced, and instead, the Attorney General should be given notice of the public action and the right to intervene⁶⁹ and petition for liaison or lead counsel control under the discretion of the court. The Attorney General, however, should not be given the automatic right to assume full control of the action. In this context, the failure of the proposed statute to require any notice to class members and to deny all intervention is troublesome. At least some form of low cost, federal register class notice might be developed. Similarly, some provision might also be made for granting standing to organizations,⁷⁰ for recognizing public interest law firms, and for defining the role such firms and organizations might play in auditing the performance of the Attorney General and of the relator's attorney.

As a realistic matter, under the sections as proposed, if the Attorney General does not assume control, but decides instead to veto the action, the courts are not likely to resurrect the action. If this is so, the Attorney General has been given a power to defeat small claims class actions under standards even more vague than that presently exercised by the courts under the criteria of rule 23(b)(3).⁷¹

The proposal allows a public action to be referred to state attorneys general, who might in turn have power to engage private law firms to represent the state's legal business. The statutory public action should perhaps impose some restraints on this possibility. Otherwise it is conceivable that when a public action is started by one private lawyer, the United States might assume control, assign the case to a state attorney general, who might engage a second private lawyer in competition with the first. This result would not seem appropriate.⁷²

4. *Legislative and Judicial Regulation of Discovery.*

Under current practice, the management of discovery and of rule 23 are both vested in the sound discretion of the trial court. Although this combination presents a large and potentially troublesome pool of discretionary authority in the trial judge, the courts, through general guidelines contained in the discovery rules and the Manual for Complex Litigation, have demonstrated the capacity to establish workable discovery practices for

Secretary of Labor is authorized to sue for damages without first obtaining consent from the employees represented; this action terminates the right of the employees thereafter to bring private actions of their own unless the Secretary on his own motion obtains dismissal of his action without prejudice. See Foster, *Jurisdiction, Rights and Remedies For Group Wrongs Under the Fair Labor Standards Act: Special Federal Questions*, 1975 WIS. L. REV. 295, 337.

69. E.g., The Civil Rights Act of 1964 permits the Attorney General to intervene in civil actions "of general public importance" involving alleged discrimination in public accommodations. 42 U.S.C. § 2000a-3(a) (1976).

70. See 3B MOORE'S, *supra* note 1, ¶ 23.04[3].

71. Under the language of S. 3475, § 3002(b)(4), the Attorney General need only explain "why the public interest would not be served by allowing the action to continue as a public action."

72. See note 64 *supra*; *In re General Motors Corp. Engine Interchange Litigation*, No. 78-2036 (7th Cir. Feb. 26, 1979), summarized in 1 Nat'l L.J., Mar. 12, 1979, at 3, col. 2 (reversal of settlement negotiated by Illinois state attorney general).

class actions.⁷³

Under the proposed Senate Bill initial discovery is limited for both plaintiffs and defendants to the issues at the preliminary hearing,⁷⁴ allowing ten depositions per side, interrogatories to identify documents and locate persons to be deposed, and document production.⁷⁵ The discovery provisions and the proposed preliminary hearing are intended to protect the parties from over-discovery and undue motion practice before the court has made an evaluation of the case.

The discovery sections, as originally proposed, represent a wise attempt to provide answers to major questions, but an unwise attempt to regulate rigidly by statute some details that ought to be regulated flexibly by procedural rules and the decisional process of courts. If the proposed statutory public action and compensatory action were enacted, the best course would be simply to establish, for the sake of economy, the general principle that the first wave of discovery shall be limited to that necessary to determine the issues at the preliminary hearing,⁷⁶ and establish that initial discovery shall not be had from members of the class. The statute, however, should leave to the Court the implementation and detailing of this policy standard in relation to existing and new discovery rules.⁷⁷

The information that a party will need to discover in order to prepare for the preliminary hearing includes: (1) information relating to the number of plaintiffs and their damages;⁷⁸ (2) whether the action presents common questions of law or fact;⁷⁹ (3) whether there are "sufficiently serious questions going to the merits to make them fair grounds for litigation";⁸⁰ and (4) whether the relator and counsel are adequate

73. See 3B MOORE'S, *supra* note 1, ¶ 23.85. *But see* the criticisms stated in note 25 *supra*.

74. The preliminary hearing procedure is provided in S. 3475, § 3004. See notes 86-93 *infra* and accompanying text for a discussion of the proposed preliminary hearing on the merits. The bill also provides that "no motion, other than a discovery motion shall be heard or disposed of prior to the preliminary hearing." S. 3475, § 3004(a)(2).

75. S. 3475, §§ 3003, 3012. Under the proposed strict statutory scheme, after the preliminary hearing the court would presumably shift back to the general rules of discovery presently followed in class actions.

76. Limiting discovery in this manner, however, is subject to criticism in that costly depositions may be duplicated, once for the class determination question and once for the merits. See McElroy, *Federal Pre-Trial Procedure in an Antitrust Suit*, 31 Sw. L.J. 649, 685 (1977).

77. See Arizona State University Discovery Conference, Advisory Committee's Proposed Revision of the Rules of Civil Procedure (Discovery) (Nov. 1978), in which several distinguished members of the judiciary and the bar commented extensively upon the Advisory Committee's proposed revisions in the federal discovery rules.

78. That is, the prerequisites of S. 3475, § 3001(a).

79. The requirements of § 3001(a), which must be satisfied under § 3004(b), mirror substantially the requirements of present rule 23(a)(2).

80. S. 3475, § 3004(b)(2). The "serious question" language has its origins in *Jacobson & Co. v. Armstrong Cork Co.*, 548 F.2d 438 (2d Cir. 1977), in which it serves as a portion of the test for preliminary injunctions. This language appears to be less demanding than a "reasonable likelihood of success on the merits" standard and for this reason "serious question" could probably be met with more limited discovery. See notes 86-93 *infra* and accompanying text. It should be recalled that *Eisen IV* rejected the imposition of any standard at all under present rule 23(b)(3).

representatives.⁸¹

The policy of limiting discovery at this stage of the action is implicit in requiring that certain standards be met at a preliminary hearing. Armed with a preliminary hearing, the courts will be able to limit discovery to meet these purposes. The quantitative detail of the bill is unnecessary and perhaps unrealistic. Limiting all class discovery situations to just ten depositions and eliminating most interrogatories is somewhat arbitrary in view of the matters to be presented at the preliminary hearing. Discovery has ultimate and necessary boundaries, but these boundaries are not the same in each class case.⁸²

Court rule-making procedures have shown the ability to respond to discovery problems. The Manual for Complex Litigation is frequently being revised to restate the best discovery practice applied by federal judges who actively work with class actions. The Manual's guidelines are aimed at accomplishing goals similar to those goals supporting the proposal before the Senate.⁸³ Similarly, local federal court rules are now experimenting with general limitations on discovery, including limits on discovery in class actions.⁸⁴ Moreover, the Advisory Committee's proposed revision of the rules, which includes a right to a discovery conference, may have a significant impact on class action practice.⁸⁵

An additional reason for not rigidly codifying discovery is that, under the proposed bill, the plaintiff must show at the preliminary hearing that

81. The requirements of S. 3475, § 3022, which must be satisfied under S. 3475, § 3004(b)(4), substantially mirror the requirements of rule 23(a)(4).

82. Direct regulation of discovery costs may be more important than regulating discovery indirectly by limiting the quantity of discovery. Yet the prospect of legislatively allocating cost seems extraordinarily difficult. For example, in *Lamphere v. Brown Univ.*, 553 F.2d 714 (1st Cir. 1977), the certification of a university-wide sex discrimination class imposed on the defendant's lawyers the task of developing testimonial evidence about the tenure decision process in thirty-odd departments, at a cost estimated between \$150,000 to \$300,000. After a wide class certification ruling such as this, the pressure on the defendant to settle becomes acute. On the other hand, in *Oppenheimer Fund, Inc. v. Sanders*, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978), the Supreme Court reversed an order requiring an open-end investment company defendant to direct its transfer agent to compile a list of plaintiff class members from computerized records at an estimated cost of \$16,000 on grounds that the cost of identifying the class should be borne by the plaintiff representative. Under the proposed class compensatory action, *Oppenheimer* might still require the plaintiff to pay for the cost of identifying the class, but as in *Lamphere*, the cost of further discovery on the merits might be imposed on the defendant as routine litigation cost.

83. MANUAL FOR COMPLEX LITIGATION § 1.40 (1977). See also *id.* §§ 1.50, 2.10, .20, .30, .40.

84. FED. R. SERV., FEDERAL LOCAL RULES, rule 10.2(c) of the Northern District of Texas (1978), provides:

Discovery. After commencement of an alleged class action, discovery shall proceed only as to facts relevant to certification of the alleged class. Although discovery relative to class certification may overlap with discovery on the merits, discovery of facts relevant only to the merits of the lawsuit shall not begin until after the Court has ruled on the motion for certification.

85. See COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONF., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FED. RULES OF CIV. PROC., rule 26(f) (Mar. 1978); see also note 77 *supra* and accompanying text for a discussion of the Arizona State University Discovery Conference commentary on the proposed amendments to the federal rules of civil procedure.

there are fair grounds for litigation. The plaintiff, therefore, may need more opportunity for discovery on the merits under the proposed legislation than is presently needed to meet the class certification standards of rule 23(a) and (b)(3). Until some experience is developed with the proposed mini-hearing, it seems unwise to attempt statutory quantification of discovery.

5. *The Preliminary Hearing on the Merits.*

Although present rule 23 does not expressly mandate a hearing on the class certification, the better practice is to hold one. The present standard in rule 23(c)(1) vaguely requires a class determination "as soon as practicable." This standard has the virtue of providing flexibility, but in some courts it has given rise to unjustified delays. A timely determination may be better served by setting a fixed time schedule for the hearing, which is then subject to modification in order to provide the necessary flexibility.⁸⁶

Senate Bill 3475 not only mandates a preliminary hearing on class certification, but also introduces a new standard as a condition to the continuance of a public or compensatory class action, namely that "there are sufficiently serious questions going to the merits to make them fair grounds for litigation."⁸⁷ This early determination is aimed at providing protection from extensive, unnecessary discovery and motion practice in frivolous cases, as well as providing the parties a tentative judicial determination of the merits.

Judge Weinstein of the Eastern District of New York apparently was the unsuccessful pioneer of the idea of a mini-hearing on the merits.⁸⁸ Reasoning by analogy to the equitable remedy principle governing preliminary injunctions, which mandates that the plaintiff must show initially a substantial likelihood of success on the merits, Judge Weinstein held that class certification ought to be governed by a standard similar to that used in preliminary injunctions because the consequence of class certification, like granting a preliminary injunction, ordinarily works hardship on the defendant. It should be recalled, however, that the Supreme Court rejected incorporation of a mini-hearing into rule 23 on the grounds that it was both unwise and unauthorized by the present rule.⁸⁹

The proposed "serious question" standard is taken from a preliminary injunction test employed in the Second Circuit, and is not considered as demanding as the traditional "reasonable likelihood of success" standard.⁹⁰ Whatever the final word formula, the serious impact of class

86. S. 3475, §§ 3004, 3013 provide that the hearing is to be held no later than 120 days from the commencement of the action.

87. *Id.* §§ 3004(b)(2), 3013(b)(2).

88. *Dolgow v. Anderson*, 43 F.R.D. 472, 501-02 (E.D.N.Y. 1968), subsequent history discussed in 3B MOORE'S, *supra* note 1, ¶ 23.45[4.—4].

89. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

90. In establishing this as the standard, the drafters of the bill relied upon *Jacobson & Co. v. Armstrong Cork Co.*, 548 F.2d 438 (2d Cir. 1977), in which the plaintiff was unable to demonstrate probable success on an antitrust claim, but was able to present serious questions going to whether the defendant terminated the plaintiff's distributorship because of its resist-

certification indicates that the essential concept of requiring some showing on the merits is a good one.

Assuming adoption of the preliminary hearing in some form, it should be recalled that the original concept of a mini-hearing was conceived as a two-edged sword. First, it was to protect defendants from frivolous class action claims, and secondly, if the standard was met, the initial notice cost was to be shifted from the plaintiff to the defendant. The proposed mini-hearing, therefore, should be considered in its relation to the cost of notice.

Because the proposed public action requires no notice and accordingly no cost of notice, the net position of the plaintiff will not be unfairly changed by the imposition of a showing on the merits. The failure to meet this standard with the limited discovery provided in the bill, will simply cause earlier forfeiture of costs and attorney's fees. Similarly, if the compensatory action provides that the notice costs will be substantially reduced, borne by the court, or shifted to the defendant,⁹¹ the plaintiff may be benefited substantially in comparison to present practice. Consequently, it may not be unfair to require the plaintiff to meet this new requirement as a condition to imposing the expense of further litigation on the defendant.

Moreover, the new "serious questions" requirement seems to approximate more closely the present practice in the federal courts. Although federal judges protest that under the standard of *Eisen IV* they are forbidden to take a sneak preview of the merits of the claim, the judges may make a sub silentio appraisal of the merits as a condition to class certification. Accordingly, the new statutory requirement may simply conform the rule to reality.

A reservation should be noted. Under present practice the courts have demonstrated a tendency to avoid certifying the class by proceeding first to deny the merits of the individual representative claim, and then to rule that the plaintiff is not a member of the class, has no standing, and cannot adequately represent the class.⁹² This type of avoidance would presumably be eliminated from the public action because of the role of the United States and representation by the Attorney General. Nevertheless, the problem could arise under the compensatory action.⁹³

ance to defendant's policies. The court in sustaining the injunction held that the "likelihood of success standard" would be abandoned if the other prong of the injunction test, the threat of irreparable harm, were met. The commentary notes that the "serious questions" test is not considered as demanding. BILL COMMENTARY, *supra* note 25, at 31.

91. The bill and its commentary are not clear on the cost of notice in the compensatory action. See notes 161-71 *infra* and accompanying text.

92. *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977); *Satterwhite v. City of Greenville*, 578 F.2d 987 (5th Cir. 1978).

93. S. 3475, § 3013(b)(3). Perhaps the statute expressly should negate the failure of the plaintiff's individual claim as a basis for dismissal of the class claim. Nevertheless, the fact that "no motion, other than a discovery motion, shall be heard or disposed of prior to the preliminary hearing" would seem to discourage this device for defeating the compensatory action. S. 3475, § 3004(a). Presently, a motion to dismiss or a motion for summary judgment may be used to avoid the class question., 3B MOORE'S, *supra* note 1, ¶ 23.02-2. In this connection it may be worthwhile to consult the emerging experience of the Houston

6. *Attorney's Fees.*

The heart of legitimate class action law enforcement is the judicial award of attorney's fees, particularly in settlements. The general rule in federal practice is that attorney's fees of the successful party may not be recovered from the losing party.⁹⁴ A primary judicial exception has been to award attorney's fees in any action in which the litigation has conferred a substantial monetary benefit on the members of an ascertainable class.⁹⁵ In those cases in which the plaintiff class has sought to effectuate a policy of public importance, although the class attorney has been deemed a "private attorney general," he is not able to extract compensation from the defendant, unless Congress has statutorily provided for the recovery of attorney's fees.⁹⁶ The main thrust of the proposed sections regulating the computation of attorney's fees is a good attempt to mandate neither too much nor too little. Nevertheless, any proposal regulating attorney's fees must be carefully appraised to test its ultimate impact.

Coverage. As to the public action, the "public recovery" originally proposed does not include any attorney's fees in the calculation of that amount.⁹⁷ Rather, the attorney's fees are provided "in addition . . . if such fees are otherwise allowed by law."⁹⁸ This coverage may adequately mesh with those types of actions in which statutes provide for recovery of attorney's fees over and above the damages recovered. These actions must meet the restrictive test set forth in *Alyeska Pipeline Service Co. v. Wilderness Society*,⁹⁹ which provides that Congress must expressly intend that a particular statute grant such fees. A problem presented by the proposed sections, however, is that in a great number of prior cases, class action attorney's fees have been taken out of the fund or benefit generated on behalf of the class on the theory that the class would be unjustly enriched at the plaintiff attorney's expense if a portion of the recovery were not allocated to the attorney.¹⁰⁰ If these cases are to be considered instances in which "such fees are otherwise allowed by law," while simultaneously under the proposal attorney's fees can no longer be included within or taxed against the "public recovery" fund, then the proposal is ambiguous as to whether attorney's fees in such cases are not recoverable at all, are recoverable out of the public recovery, or can be added on as "authorized

Division of the Southern District of Texas, which has instituted a standing local order requiring that "before any written motions are prepared and filed . . . , the attorneys will present them orally to the Court." HOUSTON JUNIOR B.A., WORKSHOP IN FEDERAL COURT PROCEDURE app. at 11 (Oct. 31, 1975).

94. 3B MOORE'S, *supra* note 1, ¶ 23.91.

95. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970).

96. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

97. S. 3475, § 3006.

98. *Id.* § 3005(a)(1).

99. 421 U.S. 240 (1975).

100. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Kahan v. Rosenstiel*, 424 F.2d 161 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970); Dawson, *Lawyers and Involuntary Clients: Attorneys Fees From Funds*, 87 HARV. L. REV. 1597 (1974); Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849 (1975).

by law." Since the proposed incentive fee¹⁰¹ may not be paid to the attorney, attorney's fees conceivably may not be recovered. The bill should therefore allow allocation of part of the public recovery to attorney's fees in order to incorporate the case law that permits attorney's fees to be assessed from the fund or benefit recovered for the class.¹⁰²

Bases and Rates. Assuming, however, that the bill is clarified and expanded as to the availability of attorney's fees,¹⁰³ the bill as proposed may be overambitious in attempting an exclusive and precise rate regulation.¹⁰⁴ The matter might better be treated in the form of general policy guidelines to the courts, with escape clauses allowing the courts to use alternative bases and factors when justice so requires.¹⁰⁵ The determination of appropriate attorney's fees is complex and sensitive in that such fees are an essential economic incentive to induce representation of successful as well as unsuccessful claims.¹⁰⁶ Thus, caution should be exercised in mandating too rigid an approach and overemphasizing hours of work as the controlling factor.¹⁰⁷

101. Under S. 3475, § 3005(a) a direct monetary incentive, beyond the maximum recovery of \$300, is provided for relators who detect and report violations of federal law.

102. The Second Circuit in *Van Gemert v. Boeing Co.*, [Current Binder] FED. SEC. L. REP. (CCH) ¶ 96,720 (2d Cir.) (en banc), *rev'g* 573 F.2d 733 (2d Cir. 1978), ruled that fees can be charged against the total amount awarded, approximately \$6.6 million in this particular case, rather than against the amount claimed by and distributed to class members, only \$1.3 million. The judgment against the defendant came within the common fund exception of *Alesky Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), which requires that expenses be assessed only against those who have "benefited" from the fruits of the litigation. The Second Circuit in *Van Gemert* held that every plaintiff class-member benefits by the litigation if he has a present vested interest in the class recovery and may receive a share of the recovery upon request. Chief Judge Irving Kaufman noted that limiting fees to a percentage of the judgment actually claimed would leave the lawyer "entirely dependent on the number of plaintiffs who came forward." [Current Binder] FED. SEC. L. REP. (CCH) ¶ 96,720, at 94,837.

103. In particular, S. 3475, §§ 3006, 3007.

104. S. 3475, § 3027, among other things, directs the courts (1) to allocate hours between counsel and administrative personnel; (2) to determine hourly compensation rates "commonly billed by the attorney for similar services at the time such services were provided"; and (3) account for the risks of proceeding with the case by factors that vary from 1.75 times to 3 times the commonly billed rate depending on the stage of the trial.

105. In the widely cited case, *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 166-67 (3d Cir. 1973), the Third Circuit set down a number of criteria to be considered in determining the size of an attorney's fee, but recognized that such a list of considerations is only a starting point in determining the appropriate award of attorney's fees. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 488 (2d Cir. 1974) (after calculating attorney's hours and typical hourly fees, court may consider other, less objective factors).

106. Analogy may be drawn to the requirements of fairness, wisdom, and restraint in attempting to recapture excess profits from government contractors. Determination of excess profits is normally done after the contract is completed, depending on all factors and performance. It seems unwise to define nonexcessive profits prospectively. *See* 9 J. McBRIDE & I. WASHTEL, *GOVERNMENT CONTRACTS* § 51.470 (1978).

107. *See* *Copeland v. Marshall*, No. 77-1351 (D.C. Cir. Oct. 30, 1978), in which Judge Malcolm Wilkey announced new guidelines for a trial court determination of attorney's fees awardable to the victorious plaintiff in a title VII sex discrimination suit against the Government. In the trial court the plaintiff's large law firm and the Government approached the problem as one of hours worked by various persons at "normal billing rates" (in Washington D.C., between \$50 and \$55 an hour for associates). Judge Wilkey, however, directed the trial court to consider the law firm's actual cost accounting figures to determine three ele-

Some Observations and Criticisms. First, the amount of attorney's fees and related litigation costs incurred in defending class actions, win or lose, are most often secret. Such costs are not subject to direct regulation, and may often be passed on through the corporate economic enterprise in indirect ways, such as indemnification, insurance, or settlement agreements. In the context of proposing a statute to control only the attorney's fees for the victorious plaintiff, fairness requires recognition of the contingent nature of plaintiff attorney's fees and the litigation expenses that must be advanced by the plaintiff's attorney, often in the face of highly paid and well funded opposition. Hence, the puritan work ethic and skepticism that might appropriately challenge a billing by defendants' attorneys should not automatically be imposed on the plaintiff's attorney.

Secondly, approval of fee awards has traditionally been found to lie within the discretion of the trial judge, dependent on a retrospective view of the facts of the case and the attorney's performance.¹⁰⁸ Repealing equitable discretion in favor of a statutory formula may give the illusion of certainty, but applied literally, the formula may produce bad results.

The first suggestion, then, is that the proposal's attorney's fees provisions be qualified at least by a clause providing that "unless the court finds that it would otherwise be unjust and another method would be superior." Alternatively, appropriate language might at other specific points allow consideration of "such other factors as may be just" in order to introduce some flexibility into the handling of unanticipated situations.

The bill clearly takes a position on the debate found within the case law, rejecting the traditional percentage of benefit theory, and adopting the trend that favors hours of time spent as the lodestar from which hourly rates and contingent risk factors are applied.¹⁰⁹ Apparently, the new approach tends to reduce the attorney's fee award in large recovery cases, although in many cases, either the old or the new approach may produce substantially the same result.¹¹⁰

Aside from possibly further deflating fee awards, the new statutory standard can be criticized for the following:

- (1) Imposing on plaintiff lawyers, who may traditionally work purely on a contingent fee basis, the cost of accounting for hours, and penalizing the ones who do not maintain hourly measurements.

ments of gross income: (1) salary paid to associates, (2) overhead costs, and (3) return of profit to the partnership. Working with this real data, the trial court was ordered to fashion hourly rates based upon the attorney's performance in the case.

It is too early to tell what the impact of *Copeland* will be and whether the decision will be expanded into other areas, or whether it will be narrowed or even reversed. Nevertheless, the decision should caution that using too rigid a formula may preclude day-to-day adjustments in the process of fee setting when adjustments may be needed in light of actual practices in law firms.

108. *Gerstle v. Gamble-Skogmo, Inc.*, 366 F. Supp. 638 (E.D.N.Y. 1973). See Mowrey, *Attorney Fees in Securities Class Action and Derivative Suits*, 3 J. CORP. L. 267 (1978).

109. S. 3475, § 3027.

110. See Mowrey, *supra* note 108, at 311-28.

- (2) Imposing on the courts' resources the necessity of auditing and applying a complex rate formula.
- (3) Encouraging the attorney to consume time, rather than to produce benefit to the class. For example, an attorney may forego an early and equitable settlement in order to run up hours justifying a larger fee.
- (4) Using benefit or size of recovery as a limit to reduce the size of the attorney's fee, but not to increase it.¹¹¹
- (5) Finally, the guidelines themselves are not self-evident in all cases.¹¹²

Assuming, however, that the factors could be made more flexible, on balance the proposal presents a reasonable initial attempt to set rational and certain principles to insure that the fees awarded are neither excessive nor inadequate.

The most important problems with attorney fee awards arise in connection with settlement practice. Thus, an even more important goal is to insure that the substance of proposed settlements is fair, and that the settlement proposal for attorney's fees does not create a conflict of interest such that the attorney no longer in fact protects the interest of the class. Because there is often no effective adversary to the settlement, there is need for a critical and objective evaluation of the fairness and benefit produced by any proposed settlement. The judge is not necessarily equipped with the resources to perform this task. It was noted, for instance, in a study of securities class actions brought in the Northern District of Texas that securities settlements often involve complicated stock modifications, corporate restructuring, or stock exchanges, so that it is difficult to appraise exactly what the settlement is worth without hiring a court consultant in the nature of an auditor or appraiser.¹¹³ The same question may be present in other substantive areas in which money damages are not the primary recovery, but declaratory relief establishes a clearly tangible class benefit that is difficult to evaluate.

The proposed attorney's fee standards, therefore, must be carefully examined in relation to the settlement process. Without some procedure establishing a devil's advocate audit of the fairness, benefit, and attorney hours, statutory quantitative formulas may give illusory satisfaction of the reform goals. A low cost procedure aiding the judge in objective audit of proposed settlements might be more important than the particular limits proposed on attorney's fees. In this connection, perhaps the statutory provisions concerning settlements should be expanded to define the role of objectors and to require a hearing as to the settlement, followed by a separate hearing as to attorney's fees.

111. This could occur within the context of S. 3475, § 3027(e).

112. See *Fried v. Utilities Leasing Corp.*, [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,695 (E.D. Pa. 1976) (a fee amounting to four times hourly rate or 25% of the benefit obtained was considered well within the traditional percentage of recovery awarded as fees in class actions).

113. Kennedy, *supra* note 61, at 825.

7. *The Public Recovery of Damages, and Distribution Through the Administrative Office.*

Rule 23 does not supply any specific procedure by which damages are to be calculated or distributed; its only requirement is that the method selected be manageable.¹¹⁴ The apparent requirement that the court be able to adjudicate damages on behalf of the numerous class members suffering only small individual damages has justifiably troubled the courts. Obviously, distributing damages through a full evidentiary court hearing with each class member in attendance¹¹⁵ is not only an inefficient use of the courts' resources, but also is unlikely to provide any real benefit to the injured class since the cost of the procedure would eat away at the amount available for the ultimate recovery. Innovative damage assessment and distribution procedures have been suggested, but courts have been reluctant to adopt them without more authority for their use.¹¹⁶ Implicit in this need for more authority is the necessity for some clear expression of the basic substantive purpose of damages in class actions.

One such innovative method of establishing and distributing damages is presented in the Senate Bill. Damages in the public action are determined and distributed in a manner closely resembling what has become known as the fluid recovery device.¹¹⁷ Damages are determined in the aggregate and placed in a fund against which individual claims may be drawn; any remaining portion of the fund is devoted to a "next-best" use,¹¹⁸ rather than being returned to the defendant.¹¹⁹ Adoption of the fluid recovery tool is

114. FED. R. CIV. P. 23(b)(3)(D).

115. See, e.g., *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 448-49, 452-54 (5th Cir. 1973) (in a civil rights class action for back pay awards, any plaintiff earning money from moonlight jobs had that amount deducted from his award); *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969).

116. See *Eisen v. Carlisle & Jacqueline*, 479 F.2d 1005 (2d Cir. 1972), vacated, 417 U.S. 156 (1974), in which the court rejected the use of fluid recovery. This aspect of the court of appeals' decision was not considered by the Supreme Court on appeal. In post-*Eisen* cases, the difficulty in computing damages has been recognized as a factor in determining manageability. See *Al Barnett & Son, Inc. v. Outboard Marine Corp.*, 64 F.R.D. 43 (D. Del. 1974); cf. *Communications Workers of America, AFL-CIO v. New York Tel. Co.*, 19 Fed. R. Serv. 2d 60 (S.D.N.Y. 1974), in which damage computation difficulties were not considered insurmountable. But see *In re Memorex Sec. Cases*, 61 F.R.D. 88, 103 (N.D. Cal. 1973).

Some think such innovative methods would deprive the defendant of property without due process of law. *Eisen v. Carlisle & Jacqueline*, 479 F.2d 1005, 1012 (2d Cir. 1972), vacated, 417 U.S. 156 (1974); Comment, *Due Process and Fluid Class Recovery*, 53 ORE. L. REV. 225 (1974). The Uniform Class Actions Act, however, adopts the concept of fluid recovery. Comment, *Manageability Under the Proposed Uniform Class Actions Act*, 31 SW. L.J. 715, 733 (1977).

117. See S. 3475, §§ 3006, 3007. See generally Malina, *Fluid Class Recovery as a Consumer Remedy in Antitrust Cases*, 47 N.Y.U.L. REV. 477 (1972).

118. This notion of an indirect distribution of damages is similar to the cy pres doctrine of trusts designed to effectuate testamentary charitable gifts that would otherwise fail. In applying this doctrine, the court will strive to devote the trust fund to the next-best recipient in the face of some circumstance that makes strict compliance with the testator's wish impossible. Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448 (1972).

119. See *Van Gemert v. Boeing Co.*, 573 F.2d 733 (2d Cir.), rev'd on other grounds, [Current Binder] FED. SEC. L. REP. (CCH) ¶ 96,720 (2d Cir. 1978) (en banc) (recognizing the possibility that funds may be returned to the defendant).

an indication that individual compensation is not the real concern, and hence the court need not be tied to the traditional damage system. The fluid recovery device is consistent with the stated purpose of the bill, which is to prevent a defendant's unjust enrichment and to deter others from similar conduct.¹²⁰ In view of this express statutory policy, a large portion of the judicial reluctance should recede.¹²¹

The method of proof proposed does not present a judicially insurmountable task.¹²² As a practical matter, a defendant will have little to gain by cross-examining all the members of the class as a means to determine gross damages. Under the relevant substantive law in each action, the issue of general liability may not depend on testimony of injury from each class member, but instead the issue of liability may be resolved from other sources, including the defendant's own records.¹²³ As to the distribution of damages, the bill appropriately removes the administrative task from the court and entrusts it to the Administrative Office. Thus, the Administrative Office supervises notice to injured persons following a judgment¹²⁴ and processes claims filed against the fund.¹²⁵

The proposed public recovery may be criticized for not directing the unclaimed portion of the fund to a true next best use, that is, a use that will benefit as near as possible the class members. Instead, the proposal creates as the next best use, the full compensation of all persons adjudged injured in any other public action. Thus, when the amount recovered in a public action is insufficient to satisfy the full value of claims not exceeding \$300, payment may be made "from amounts remaining in the fund from previously unexpended recoveries."¹²⁶ Apparently, in an attempt to deliver

120. BILL COMMENTARY, *supra* note 25, at 9.

121. Congressional intent, however, must be clear or it may be rejected by the Supreme Court. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 733 n.14 (1977) (construing the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. §§ 15(d), 15(e) (1976)).

122. S. 3475, §§ 3006, 3007; see *In re Coordinated Pretrial Proceedings in Antibiotics Antitrust Actions*, 410 F. Supp. 669 (D. Minn. 1974) (using expert economic and statistical advice, extensive discovery of the defendant's records, computers, and masters).

123. See 3B MOORE'S, *supra* note 1, ¶ 23.46 (concerning proof of damages in antitrust and securities cases).

124. Under S. 3475, § 3007(b), notice of the recovery can be made in any manner "reasonably likely to inform" persons eligible for compensation. This is a lower notice standard than that of Eisen IV, 417 U.S. 156 (1974), which requires individual notice to the identifiable class members. But since this notice is financed out of the fund, the lower standard assures that a sizable portion of the fund will not be consumed by this administrative task. Arguably, this standard would not run afoul of the same due process concerns presented in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), since *Mullane* and *Eisen IV* sought to provide "a reliable means of acquainting interested parties of the fact that their rights are before the courts." Eisen IV, 417 U.S. 156, 174 (1950) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950)). The notice at the recovery distribution stage of the public action does not involve the similar concerns of an adequate representative and opt-out rights; it simply seeks to distribute a fund to a class whose rights have been adjudicated by the United States—which is apparently a *prima facie* adequate representative. See generally notes 63-72 *supra* and accompanying text.

125. The injured party need not present an actual sales or purchase receipt, but may claim a distribution based on business records or other similar records if these records permit "reasonably accurate" claim calculation. S. 3475, § 3007(c).

126. *Id.* § 3007(e)(2).

"rough" justice, the next best use for undistributed funds from one public action is the compensation of class members in other public actions.

The proposed bill further provides that after three years, unexpended amounts "shall be paid into the general treasury of the United States."¹²⁷ Thus, this alternative next best use is even broader than that which supports other public actions, since this use is for the benefit of United States citizens who benefit, albeit remotely, from funds in the United States Treasury.

These uses are far from exacting in that the injured class members who do not present their claims are not benefited directly to any greater extent than if they were general members of the public. That is, the statute does not attempt to apply the fund to a purpose that will benefit nonclaiming class members to the exclusion of other members of the public. Because alternative uses are difficult to establish, and because the director of the fund must render notice, and because the time to present a claim appears reasonable, the reversion of the fund to these next best uses does not seem highly objectionable.

Nevertheless, perhaps better uses can be created. For example, as originally drafted, attorney's fees are not recoverable out of the fund, and a good case can be made that they should be.¹²⁸ If attorney's fees were made recoverable from the public recovery fund produced in an original case, then, in turn, shortfalls on attorney's fees in any particular case might be made payable from the general fund. The general fund might also be used to finance the cost of notice in compensatory actions if it is made clear that the court is to bear the cost of notice under some circumstances.¹²⁹

8. *Judicial Authority to Limit and Allocate Liability.*

The public action as proposed would allow the judge to determine the aggregate "monetary damage" or "monetary benefit or profit realized by the defendant."¹³⁰ This vague standard is a welcome invitation to the courts to use good sense in fashioning the appropriate elements and proof of recovery,¹³¹ in distributing the recovery among various class members, and in allocating liability among different defendants. A number of instincts, however, caution that the proposed statute should set forth more expressly certain principles limiting and allocating the amount of total liability. These instincts arise from various sources: the jurisprudence of remedies, the de facto judicial reaction to "overkill," and the political compromises necessary in passing new remedial legislation.

Professor Dobbs states that a primary principle in the jurisprudence of

127. *Id.* § 3007(a).

128. See notes 97-102 *supra* and accompanying text.

129. See notes 161-63 *infra* and accompanying text.

130. S. 3475, § 3006(b).

131. The vagueness of the proof required is furthered by S. 3475, § 3006(c), which permits the public recovery to be calculated by "any reasonable means of ascertaining benefit, profit, or damage."

remedies is the "congruence of right and remedy."¹³² That is to say, "[t]he remedy is merely the means of carrying into effect a substantive principle or policy. Accordingly, it is a first principle that the remedy should be selected and measured to match that policy."¹³³ As we translate individual remedies into group remedies, however, the ideal congruence is not automatic, and is not satisfied by simple multiplication. For example, in the individual tort action, in addition to increasingly liberal bases for tort liability, substantial pain and suffering and punitive damage awards may be rationalized as substitutes for nonrecovery of attorney's fees under a contingent fee system.¹³⁴ The justice and congruence of allowing these substantial judgments in individual tort cases, however, may not legitimately transfer to a class action model, which delivers universal claim representation without the necessity of individual prosecution.¹³⁵ In other words, direct transference of those elements of recoverable damages or of unjust enrichment, which have come to be acceptable in the individual claim context, may produce in the class action context a punitive result disproportionate to the defendant's behavior.¹³⁶ Common sense and principles of insurance risk and cost allocation may require some form of discounting and adjustment in the mass remedies situations.¹³⁷ Relevant lessons can be extracted from the creation of workable remedies in no-fault automobile accident compensation systems¹³⁸ and from the recent emergence of

132. D. DOBBS, REMEDIES § 1.2, at 3 (1973).

133. *Id.*

134. *Id.* § 8.1, at 550, § 3.9 at 207.

135. The class action drastically changes the litigation economics of bringing individual claims. Dam, *supra* note 23, at 47.

136. *Cf. de Hass v. Empire Petroleum Co.*, 435 F.2d 1223 (10th Cir. 1971) (disallowing punitive damages in a securities fraud suit because of unfair cumulative effect); D. DOBBS, *supra* note 132, § 3.9, at 212 (discussing *Roginsky v. Richardson-Merrill*, 378 F.2d 832 (2d Cir. 1967) (eliminating punitive damages on individual claims for the same reason)). *See also Rheingold, The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116 (1968).

137. Professor Hazard makes a similar point:

The legislature often pitches legislation at a higher level of expectation than it really intends to require. It anticipates a kind of discount for nonenforceability, and thereby enjoys a pleasant moral luxury in proclaiming high expectations. But one can't indulge that luxury, or its judicial equivalent in the form of expansive dicta, when one has to face up to enforcing the proposed rule. And that, of course, is what is involved in the class suit. That is why the strict liability rules of the securities legislation, the consumer protection laws, and the nuisance and warranty doctrines present so much difficulty in the class suit: substantive legal aspiration becomes reality through the procedural transformation of Rule 23. The class action is thus unique, perhaps, in forcing us simultaneously to think precisely about the terms of the substantive law's boundary lines, and to think seriously about what is involved in actually enforcing the law. That, of course, is our ultimate responsibility as jurists.

Hazard, *The Effect of the Class Action Device Upon the Substantive Law*, 58 F.R.D. 307, 312 (1973).

138. Under the no-fault compensation systems, pain and suffering damages are eliminated, and collateral recovery sources are taken into account. *See generally* R. KEETON & J. O'CONNEL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965); U.S. DEP'T OF TRANSPORTATION, PUB. NO. 6100.2, STATE NO-FAULT AUTOMOBILE INSURANCE EXPERIENCE 1971-77 (1977).

limited medical malpractice liability schemes.¹³⁹

There are additional examples suggesting that modification of individual remedial rights may be legitimate in constructing effective group remedies. One is the admiralty limitation of liability proceeding, in which principles of economic utility, admiralty tradition, and statutory regulation combine to limit the owner's liability to the value of the interest in the ship when the ship meets disaster. The recoveries for individual losses in such instances are apportioned accordingly.¹⁴⁰ Bankruptcy remedies and reorganizations provide further examples. Here, the remedial rights of the individual creditors are modified according to equitable principles that benefit the creditors as a group.¹⁴¹ Environmental injunctions provide another example. In instances in which industries have clearly violated pollution laws, some courts have declined to issue an injunction shutting down the industry when the remedy would cause great economic harm to the community.¹⁴²

Since as yet there has been little experience with successful class action recoveries outside of settlement, it is difficult to generalize about principles favoring limitations of liability in the public class action. As shown in the following examples, however, a few notions and prejudices have surfaced in decided opinions, demonstrating that some judges think effective class remedies sometimes represent an overkill remedy not congruent with the substantive policy underlying the recognition of the individual right and

139. The Medical Liability and Insurance Improvement Act of Texas, TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02 (Vernon Supp. 1978-79), for instance, places limitations on the total dollar awards plaintiffs can receive for general damages, pain, or suffering. *But see* Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736 (Ill. 1976), in which an Illinois statute that limited malpractice recovery to \$500,000 was declared unconstitutional. The state supreme court found that the provision denied a full remedy for serious injuries on an arbitrary basis, despite defendant's position "that there is a societal *quid pro quo* in that the loss of recovery potential to some malpractice victims is offset by 'lower insurance premiums and lower medical care costs for all recipients of medical care.'" *Id.* at 742. In Jones v. State Bd. of Medicine, 555 P.2d 399 (Idaho 1976), however, the classification created by a similar medical liability limitation statute was held not to involve fundamental rights, and thus, did not have to survive a "strict scrutiny" test.

140. 46 U.S.C. §§ 181-189 (1976), discussed in G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 818-957 (2d ed. 1975); J. LUCAS, ADMIRALTY, CASES AND MATERIALS ch. 17 (1969).

141. This notion is reflected in the discussion of reorganization in the House Report on the amendments to the Bankruptcy Act:

The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. The premise of a business reorganization is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap. Often, the return on assets that a business can produce is inadequate to compensate those who have invested in the business. Cash flow problems may develop, and require creditors of the business, both trade creditors and long-term lenders, to wait for payment of their claims. If the business can extend or reduce its debts, it often can be returned to a viable state. It is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets.

H.R. REP. NO. 595, 95th Cong., 1st Sess. 220 (1977).

142. *See, e.g.*, Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

remedy.¹⁴³

Until amended in 1974, the Truth in Lending Act (TILA) contained no reference to class actions, but did provide for a \$100 minimum recovery. In *Ratner v. Chemical Bank New York Trust Co.*¹⁴⁴ an action was brought on behalf of a large class of credit card holders. The court concluded that to permit class action treatment would subject the defendant to "horrendous" or "annihilating" damages based upon a technical violation of the statute without a showing of actual damages.¹⁴⁵ The court concluded that the \$100 minimum recovery guaranteed the viability of individual enforcement and eliminated the need for class actions to enforce the TILA. The court might well have held to the contrary, reasoning like other courts that Congress intended both the \$100 minimum and the class remedy to apply, or that the \$100 minimum provision did not apply in class actions.¹⁴⁶ Whether the judge in *Ratner* is viewed as an ostrich or an owl, Congress in any event reacted by limiting damages in TILA class actions to \$500,000 or one percent of net worth of the creditor, whichever is smaller.¹⁴⁷ In addition, the TILA amendment commands the courts to consider a number of factors in determining the amount of the class action award.¹⁴⁸

A second example is illustrated in *Kline v. Coldwell, Banker & Co.*,¹⁴⁹ an antitrust, bilateral class action by 400,000 Los Angeles real estate purchasers against 2,000 real estate brokers for price-fixing real estate commissions. Noting that the damages as alleged, if trebled, would be in the neighborhood of \$750,000,000, the Ninth Circuit denied class action treatment on the grounds that individual defendants would be exposed to joint and several liability far out of proportion to any economic stake or profit derived from the individual real estate transactions in which they had participated. Again, while this judicial reasoning is clearly subject to criticism for failure to consider other alternatives,¹⁵⁰ it shows that legislation, to be effective, may have to authorize such alternatives.

A third example is shown by the congressional allowance of the state *parens patriae* antitrust suit and the negative reaction to this remedy by the Supreme Court. The Hart-Scott-Rodino Antitrust Improvement Act of 1976 provides that a state attorney general may bring a civil action as *parens patriae* on behalf of natural persons in that state, and damages may be proved and assessed in the aggregate in a form of fluid recovery.¹⁵¹ In

143. For additional, analogous examples, see note 136 *supra* and note 150 *infra*.

144. 54 F.R.D. 412 (S.D.N.Y. 1971).

145. *Id.* at 416.

146. *E.g.*, *Wilcox v. Commerce Bank*, 474 F.2d 336 (10th Cir. 1973).

147. 15 U.S.C. § 1640(a)(2)(B) (1976).

148. 15 U.S.C. § 1640 (1976). The factors are the number of people affected, the actual damages, the frequency and persistence of violations, and the intent and resources of the defendant. See 3B MOORE'S, *supra* note 1, ¶ 23.02[2.—26].

149. 508 F.2d 226 (9th Cir. 1974).

150. In a civil rights action for mass arrest of peaceful demonstrators, the court ordered the police inspector who ordered the arrests to pay \$500 personally, and the rest of the damages to be paid by the District of Columbia. *Tatum v. Morton*, 562 F.2d 1279, 1281 (D.C. Cir. 1977).

151. 15 U.S.C. §§ 15c-15d (1976).

Illinois Brick Co. v. Illinois,¹⁵² however, the Supreme Court dampened the effect of this amendment by holding that for recoverable damages to arise, contractual privity must exist between the plaintiff purchaser and the defendant price-fixer. Thus, the remote purchasers' action against the manufacturer price-fixers was rejected because it was thought unfair that the manufacturers could also be subject to a treble damage action by the direct purchasers who were not parties to the *Illinois Brick* litigation. The Court rejected as unworkable an invitation to combine the features of subclasses and statistical analysis in order to apportion damages to all potential plaintiff classes along the full chain of distribution.¹⁵³

Arguably, limitations of liability should be left to judicial discretion and to separate substantive legislation, and such concepts should not dilute or clutter a class action statute. Traditionally, the substantive law defining the size of an individual recovery and judgment is not concerned with whether other defendants and plaintiffs are involved, whether the judgment will be collectible, whether the judgment will throw the defendant into bankruptcy to the detriment of many other innocent people, or where the money will come from to fund the judgment. Again, however, these traditional assumptions about individual rights, remedies, and judgments may have to be modified in the face of the mass recovery represented by the public action.

In any event, whatever the jurisprudential and judicial limitations on imposing universal liability on defendants for small individual wrongs, the prospects for enacting the public action may be somewhat dim without express statutory recognition of limiting principles. As an example, one principle might allow elimination of the trebling factor in antitrust cases.¹⁵⁴ In deciding upon the total amount of recovery, the Court might also consider the following factors: (a) the substantive policy supporting the elements of recoverable damage or unjust enrichment in an individual action, in contrast to the class action; (b) the desirability of eliminating elements of double recovery; (c) the impact of the recovery on the economic resources of the defendants; (d) the apportionment of parts of the recovery to the defendants on a several and not a joint basis in relation to the defendants' contribution to the total damages, or participation in the unjust enrichment; (e) the practical availability of other remedies against the defendants; (f) the apportionment of parts of the recovery to various classes of plaintiffs; and (g) such other factors as will make the total amount of recovery fair, just, and effective under all the circumstances.

152. 431 U.S. 720 (1977).

153. *Id.* at 736-48. *But see* Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 COLUM. L. REV. 679, 726-27 (1977). Scher argues that it may be incorrect to interpret *Illinois Brick* as limiting § 4C *parens patriae* price-fixing suits to situations in which the consumers on whose behalf the suit has been instituted are in privity with the alleged price-fixer. Instead, the author carefully argues that because *Illinois Brick* was based on § 4, and not on § 4C, the Court deliberately left open the possibility that a *parens patriae* suit can be maintained on behalf of indirect purchaser-consumers.

154. *See* D. DOBBS, *supra* note 132, § 5.5, at 346.

9. *Judicial Discretion to Order Opt-Out or Opt-In Notice in the Class Compensatory Action.*

Perhaps the most important provision of the proposed class compensatory action is the section¹⁵⁵ that gives the judge discretionary power to order an opt-in or an opt-out notice procedure. The option to order opt-in notice is subject to two requirements: (1) the amount of individual injury must make it feasible for class members to pursue their interests separately; and (2) the class members must be capable of conducting their own litigation.¹⁵⁶ This provision is particularly important because, as to those substantive areas and types of litigation that will remain unaffected by the new public action,¹⁵⁷ the adoption of the bill will give the judge discretionary power to order opt-in notice, thus replacing the present mandatory duty under rule 23(c)(2) to order the opt-out notice.¹⁵⁸ In a nutshell, opt-in notice drastically reduces the litigating leverage of the plaintiff and his attorney, and correspondingly, enhances the settlement posture of the defendant since as a practical matter the plaintiff loses legal authority to represent passive members of the class.

The realistic question is whether, once this discretionary power is granted, the judges will automatically choose opt-in notice, or whether the two standards will lead the judges to produce principled distinctions as to situations in which opt-out notice remains appropriate and those in which opt-in notice will now be ordered instead.¹⁵⁹ While there is some risk that the proposed discretionary provision will prompt undeliberated use of the opt-in procedure, possibly reflecting the preference of the majority of judges,¹⁶⁰ the standards now stated nevertheless should be sufficient to control the trial court discretion and provide some degree of uniformity in the treatment of opt-in or opt-out notice.

Three very important questions closely related to the content of the opt-out or opt-in notice procedure are the method, the cost, and the timing of notice. Senate Bill 3475, for all its particularity in other areas, does not seem to answer these questions clearly or hint at general guidelines for their determination.

First, as to cost of notice, the proposal states that "[t]he court shall

155. S. 3475, § 3013(e).

156. *Id.* § 3013(e) provides that before ordering opt-in notice the court "shall consider," which ambiguously means that the court should find as to class members that: (1) the amount of their injury makes it feasible for them to pursue their interests separately; and (2) those persons have sufficient resources, experience, and sophistication in business affairs to conduct their own litigation.

157. *See* note 55 *supra*. S. 3475, § 3013(e) will be equally important if, in the alternative, the public action is not enacted, but the class compensatory action is enacted.

158. *But see* 3B MOORE'S, *supra* note 1, ¶ 23.55 n.46, for a discussion of cases avoiding the opt-out mandate of rule 23 by requiring proof of a claim in response to initial pre-trial notice.

159. BILL COMMENTARY, *supra* note 25, at 49, states: "Only individuals with large stakes, in the neighborhood of \$10,000 or unusual claims or defenses, should be required to opt-in."

160. *See* 6 CLASS ACTION REPORTS 2, 19 (1978) (of 148 United States District Judges responding to a questionnaire, 98, or 66%, favored replacing the opt-out provision of rule 23 with an opt-in requirement).

promptly thereafter give notice," whereas the present rule 23(c)(2) says that "[t]he court shall direct notice." This change could be interpreted to mean that the court shall bear the cost.¹⁶¹ Assuming, however, the proposed language does not mean that the court is to bear the cost of notice,¹⁶² then presumably the plaintiff must initially bear the cost, unless, in exceptional circumstances, it can be shifted to the defendant.¹⁶³

Second, as to the method of notice, the proposal does not expressly require individual notice, but only requires notice sufficient to assure "adequacy of representation" and "fairness to all such persons."¹⁶⁴ It seems that if the judge chooses opt-in notice, fairness would require individual notice, since presumably the potential class member's interest in individual control would be greater. If notice is ordered under the opt-out procedure, however, perhaps individual notice is not required.¹⁶⁵ On the other hand, the matter is not clear, and in each instance, arguments for individual or nonindividual notice could be made. Some clarification would be welcome, either in the bill itself or in the commentary, since the content, method, and cost of initial notice are crucial in defining the size of a class prior to trial.

Finally, the timing of the notice is not necessarily clear in relation to the trial on the merits.¹⁶⁶ True, in relation to the class certification, the bill does state that "the Court promptly thereafter shall give notice."¹⁶⁷ Somewhat inconsistently, however, it later provides that after a determination of liability, the defendant shall be ordered at its cost to identify the persons injured and to send them notice.¹⁶⁸

Perhaps the combined meaning of these two provisions is that in a compensatory action for small claims¹⁶⁹ the judge will be expected initially to order a nonindividual, low cost, opt-out notice, with the cost to be borne

161. See 3B MOORE'S, *supra* note 1, ¶ 23.55, at 443-47 nn.18-25.

162. BILL COMMENTARY, *supra* note 25, at 48 seems to treat the language as interchangeable: "If the action continues following the preliminary hearing, the court must direct the notice"

163. In *Eisen IV* the Court recognized a narrow exception where the notice cost could be shifted to the defendant because of a pre-existing fiduciary duty between the plaintiff and defendant, as in a shareholder derivative suit. 417 U.S. 156, 178 (1974).

164. S. 3475, § 3013(e).

165. In *Eisen v. Carlisle & Jacqueline*, 52 F.R.D. 253 (S.D.N.Y. 1971), *rev'd*, 479 F.2d 1005 (2d Cir. 1973) (if members of class can be readily identified, these members must be given individual notice), *vacated*, 417 U.S. 156 (1974) (Supreme Court affirmed the Second Circuit's notice holding), District Judge Tyler unsuccessfully designed a notice for a potential class of six million, which consisted of personal notice to persons who had relatively large interests, personal notice to a sample of others, and supplemental newspaper notice, the total cost of which was estimated to be \$21,750. See 3B MOORE'S, *supra* note 1, ¶ 23.45[4.—4].

The Uniform Class Action Act continues the opt-out notice, eliminates individual notice for claims under \$100, allows the court to consider cost in fashioning a reasonable notice, and continues to impose the cost on the plaintiff. Comment, *supra* note 116, at 730-33.

166. See *Katz v. Carte Blanche*, 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974) (allowing postponement of the notice), *discussed in* 3B MOORE'S, *supra* note 1, ¶ 23.50.

167. S. 3475, § 3013(e).

168. *Id.* § 3014(c).

169. For example, those claims in excess of \$300 and under \$10,000.

by the plaintiff, and after a determination of liability at trial, the defendant would bear the cost of identifying and notifying individual members of the class. If this is the bill's intent, it appears to be a reasonable approach. Such a procedure may be criticized, however, in that it will not provide sufficient *res judicata* protection to the defendant. Moreover, this procedure may be subject to the criticisms previously leveled at one-way intervention.¹⁷⁰

10. *Conclusion.*

There is a genuine need for a general statutory federal court remedy to accommodate the litigation of multiple claims for small amounts of individual damages caused by violations of federal statutes. The purpose of such a remedy is to provide deterrence, disgorgement of unjust enrichment, and victim compensation in accord with the policies of the substantive statutes to which the remedy attaches. The goal of minimizing the size of government lawyer staffs and maximizing their impact is a key consideration in making the selection of the best remedy. The best choice is to provide a public action in the name of the United States, brought by a private citizen who is compensated by an incentive fee, and who is represented by a private attorney who may earn attorney's fees subject to close regulation. The goal of individual notice to class members in such cases is realistically abandoned in favor of adequacy of representation and elimination of unnecessary cost. The goal of efficient judicial administration is served by adopting concepts of fluid recovery and by referral of claims administration to the Administrative Office of the United States Courts. The goal of due process and economic protection for defendants is satisfied by recognizing principles limiting and apportioning liability. Although a number of points in any proposal will be subject to valid criticism and subsequent modification, the essential concept is sound.

Congressional enactment of a public action remedy makes good sense in order to fill the partial void presently existing under the Supreme Court interpretations of rule 23(b)(3). However, total congressional repeal of rule 23(b)(3) and further congressional action modifying present practice in nonpublic class actions are premature. Although the statutory proposals to provide a mini-hearing on the merits, limited discovery, and discretionary opt-in notice represent a number of welcome innovations, these changes should first be left to the Supreme Court and the Civil Rules Advisory Committee for adoption as changes to rule 23 in light of any new statutory public action. If Congress would respond to provide a statutory remedy for small claims, private attorney general actions, then the Civil Rules Committee and the Supreme Court should be able to agree on how to improve the procedure for class claims not within the coverage of the statutory public action. In conclusion, it is submitted that Congress should move first to enact some version of the public action, and then invite the

170. See note 11 *supra* and accompanying text.

Supreme Court to modify rule 23(b)(3) to treat those class actions not falling within the scope of the new public action.

Appendix

S. 3475

A bill to provide for the reform of class action litigation procedures.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the purpose of this Act, without affecting rights or liabilities under any statute of the United States, to improve class action procedures while preserving class relief provided in rules 23 (b)(1) and (b)(2) of the Federal Rules of Civil Procedure by—

- (a) creating a civil public action for redress of small monetary injuries to numerous members of the public;
- (b) creating a civil class compensatory action for redress of substantial monetary injuries to numerous members of the public; and
- (c) creating improved management procedures for public and class compensatory actions.

SEC. 2. (a) The following chapter is added to title 28 of the United States Code after chapter 175:

“Chapter 176.—PUBLIC AND CLASS COMPENSATORY ACTIONS

“Subchapter A—Public Action

“Sec.

- “3001. Public action; prerequisites; district court jurisdiction.
- “3002. Public action commenced by relator; assumption by the United States.
- “3003. Initial discovery.
- “3004. Preliminary hearing; scope of action; preliminary pretrial order.
- “3005. Costs; litigation expenses; incentive fee.
- “3006. Public recovery; judgment.
- “3007. Public recovery fund; payments to injured persons.

“Subchapter B—Class Compensatory Action

“Sec.

- “3011. Class compensatory action; prerequisites; district court jurisdiction.
- “3012. Initial discovery.
- “3013. Preliminary hearing; scope of action; preliminary pretrial order; notice.
- “3014. Proof of damages; separate determination of liability and damages; judgment.

“Subchapter C—Judicial Management of Public and Class Compensatory Actions

“Sec.

- “3021. Transfer and consolidation.
- “3022. Adequacy of representation.
- “3023. Effect of judgment.
- “3024. Litigation timetables.
- “3025. Expediting judicial rulings.

- “3026. Settlement.
- “3027. Calculation of attorney’s fees; examination of fee request.
- “3028. Applicability of civil procedure rules; separate actions.
- “3029. Adjustment of statutory monetary amounts.
- “3030. Definition; special provisions in other statutes; other class action rules.

“Subchapter A—Public Action

“§ 3001. Public action; prerequisites; district court jurisdiction

“(a) A person whose conduct in the manufacture, rental, distribution, or sale of realty, goods or services, including securities, gives rise to a civil private right of action for damages under a statute of the United States, other than a statute pertaining to wages, hours, other terms or conditions of employment or discrimination in employment, shall be liable to the United States in a public action if—

“(1) such conduct injures two hundred or more named or unnamed persons, each in an amount not exceeding \$300;

“(2) the combined amount of the injury to such persons exceeds \$60,000;

“(3) the injuries arise out of the same transaction or occurrence or series of transactions or occurrences; and

“(4) the action presents a substantial question of law or fact common to the injured persons.

“(b) The district courts of the United States shall have jurisdiction, exclusive of the courts of the States, of actions brought under this section, but such jurisdiction shall not extend to cross-claims, counterclaims, pendent claims based on State law, or actions removed from the State courts which do not meet the requirements of subsection (a).

“(c) A public action shall be brought in the name of the United States by the Attorney General of the United States or, on relation, by a person who has suffered injuries not in excess of \$300. A State or political subdivision of a State may not initiate a public action but a State may conduct a public action referred to it under section 3002(b)(3). A person who sustains injury not exceeding \$300 by conduct that is the subject of a public action may not intervene.

“(d) The complaint shall state with particularity the facts relied upon to satisfy the requirements of subsection (a).

“(e) If a public action is brought against the United States, the court may—

“(1) order that the action not be assumed by the Attorney General of the United States or referred to an attorney general of a State, as otherwise provided in section 3002(b);

“(2) order that the settlement of such case need not be approved by the Attorney General of the United States as otherwise provided in section 3026(b); and

“(3) issue any other order appropriate to assure that counsel defending the action against the United States will act independently of counsel prosecuting the action.

“§ 3002. Public action commenced by relator; assumption by the United States

“(a) A relator who commences a public action shall promptly thereafter serve upon the United States a copy of the summons and of the complaint, together with a written disclosure of all relevant information or material known to him, and may not withdraw or discontinue the action without the written consent of the Attorney General of the United States.

“(b) Except as provided in section 3001(e), when a public action is filed by a relator, the Attorney General of the United States, prior to or at the conclusion of the preliminary hearing provided for in section 3004, may—

“(1) enter an appearance and assume control of the action;

“(2) decline to enter an appearance and permit the action to be prosecuted by the relator;

“(3) decline to enter an appearance and refer the action to the attorney general of a State in which reside a substantial number of persons alleged to have been injured, if the Attorney General determines in his discretion that such State attorney general will represent adequately the interests of the United States. The attorney general of a State may—

“(A) assume control of the action by entering an appearance within sixty days from the date of reference and may petition the court to stay the action after the conclusion of the preliminary hearing pending his assumption decision;

“(B) decline to enter an appearance and permit the action to be prosecuted by the relator; or

“(C) file with the court a written statement of reasons why the public interest would not be served by allowing the action to continue as a public action. Upon the filing of such a statement, the action shall be dismissed as a public action unless the relator demonstrates to the court’s satisfaction that the public interest would be served by allowing the action to proceed as a public action; or

“(4) decline to enter an appearance and file with the court a written statement of reasons why the public interest would not be served by allowing the action to continue as a public action. Upon the filing of such a statement, the action shall be dismissed as a public action unless the relator demonstrates to the court’s satisfaction that the public interest would be served by allowing the action to continue as a public action.

The Attorney General of the United States shall promulgate regulations governing the exercise of his authority under this subsection.

“(c) If an attorney general assumes control of a public action, a relator, or any injured person whose participation will, in the judgment of such attorney general, measurably advance the effective prosecution of the action, may participate with his counsel in any capacity specified by that attorney general and receive costs and reasonable litigation expenses, including attorney’s fees, provided for in section 3005(a).

“§ 3003. Initial discovery

“(a) Prior to the preliminary hearing provided for in section 3004, discovery shall be limited to—

“(1) interrogatories submitted solely for the purpose of identifying and locating persons to be deposed and documents to be requested;

“(2) depositions of not more than 10 persons for each side; and

“(3) requests for production of documents.

For good cause shown, the court may expand or further limit the discovery prior to the preliminary hearing.

“(b) Before or after the preliminary hearing, no discovery of unnamed injured persons shall be undertaken without leave of court upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

“(c) Notice of discovery to be taken by a relator shall be served on the Attorney General of the United States who may examine material discovered by the relator.

“§ 3004. Preliminary hearing; scope of action; preliminary pretrial order

“(a) Within thirty days after a public action is commenced, the court shall give notice to the parties and to the relator, if any, of a preliminary hearing to be held to determine whether, and in what manner, the action shall proceed as a public action. The hearing shall be held no later than one hundred and twenty days from the date of the commencement of the action, but the court may, on the petition of the United States within sixty days of service upon it of the complaint and summons in an action brought on relation, grant a reasonable postponement of the hearing to permit the completion of a related Federal or State investigation in progress on the date of the commencement of the action. No motion, other than a discovery motion, shall be heard or disposed of prior to the preliminary hearing.

“(b) At or immediately after the preliminary hearing, the court shall make a preliminary determination on the basis of the pleadings, affidavits, material produced during discovery, any statement filed by an attorney general pursuant to section 3002(b)(3)(c) or 3002(b)(4), and any other matter presented at the hearing—

“(1) whether the action meets the prerequisites of section 3001(a);

“(2) whether there are sufficiently serious questions going to the merits to make them fair grounds for litigation;

“(3) whether the relator has demonstrated that the action should proceed as a public action, if an attorney general has filed a statement pursuant to section 3002(b)(3)(c) or 3004(b)(4); and

“(4) pursuant to the provisions of section 3022, whether the relator and his counsel will adequately protect the interests of the United States, if an attorney general has not brought or assumed control of the action.

“(c) If the court makes a negative determination at the preliminary hearing, or at any time prior to the entry of judgment, with respect to a matter listed in subsection (b), the court shall dismiss the action as a public action: *Provided*, That where the action is brought by a relator and meets the prerequisites of section 3011(a), the court shall permit amendment of the complaint by the relator to allow the action to proceed as a class compensatory action.

“(d) If the action is not dismissed as a public action, the court shall enter an order describing the scope of the action, including a description of

the transaction giving rise to the action and a statement of the substantial question of law or fact common to all injured persons. Such order shall be conditional and may be altered or amended before judgment is entered.

“§ 3005. Costs; litigation expenses; incentive fee

“(a) If the United States prevails or settles in a public action brought by a relator, the defendant shall be ordered to pay to the relator as a part of the judgment and in addition to the public recovery provided for in section 3006—

“(1) taxable costs and reasonable litigation expenses incurred by the relator prior to and after the commencement of the action, including attorney’s fees, as provided in section 3027, if such fees are otherwise allowed by law; and

“(2) an incentive fee equal to 20 per centum of the first \$25,000 of public recovery plus 10 per centum of the next \$50,000 of public recovery. Such fee shall be paid directly to the relator and may not be paid directly or indirectly to his attorney.

If the court finds that a person other than the relator has measurably advanced the effective prosecution of the action by the filing of an additional complaint on relation, or otherwise, the court may award costs and reasonable litigation expenses, including attorney’s fees, pursuant to paragraph (1) and a portion of the incentive fee calculated pursuant to paragraph (2) to such person.

“(b) If a public action brought by a relator is separated by the court pursuant to section 3028 into more than one public action, the sum of any incentive fees ordered in all such actions shall not exceed \$10,000.

“§ 3006. Public recovery; judgment

“(a) In a public action in which the defendant is found liable, unless the statute under which the action is brought specifically provides otherwise, the judgment shall include a public recovery in an amount to be determined under this section.

“(b) Except as provided in subsection (d), the public recovery shall be in an amount equal to—

“(1) the monetary benefit or profit realized by the defendant from the conduct for which he was found liable; or

“(2) the monetary damage caused by such conduct to persons whose individual damage did not exceed \$300.

If a judgment includes a public recovery calculated pursuant to this subsection, the court may also include in the judgment appropriate injunctive or declaratory relief.

“(c) A determination under subsection (b) shall be based upon any reasonable means of ascertaining benefit, profit, or damage, and separate proof of individual damage shall not be required.

“(d) If the statute under which the action was brought provides for an award of a multiple of the damage or recovery, the multiple shall be applied to the amount determined under subsection (b).

“(e) Within sixty days after entry of judgment against the defendant, or within such time as the court may otherwise order, the defendant shall

pay to the clerk of the court the amount of the judgment. The clerk shall promptly transmit the public recovery portion of the judgment to the Administrative Office of the United States Courts, where it shall be deposited into the Public Recovery Fund created under section 3007(a).

“§ 3007. Public recovery fund; payments to injured persons

“(a) There is established in the Administrative Office of the United States Courts a Public Recovery Fund, under the direction and control of the Director of that Office. Amounts deposited in the Fund as public recoveries shall remain in the Fund unless applied to administrative expenses incurred by the Administrative Office in carrying out the provisions of this section or to payments to injured persons under this section. Amounts not applied to expenses or payments after three years from the date they are deposited shall be paid into the general treasury of the United States.

“(b) Upon receipt of a public recovery, the Director shall promptly give notice of the recovery and specify the means by which injured persons may file claims. Notice may be by publication and such other means as the Director determines are “reasonably likely to inform” persons eligible to file a claim. The expense of such notice shall be paid out of the Fund.

“(c) A person injured in an amount exceeding \$15 but not exceeding \$300 by conduct giving rise to a public action in which the United States obtains a public recovery shall be eligible to receive payment from the fund if he would have had an action for damages for such injury prior to the entry of judgment in the public action. All claims for payment shall be made within one year after the date of notice. The Director may also utilize a payment procedure which will distribute payments in a reasonably accurate manner without requiring submission of claims.

“(d) Except as provided in subsection (e) or (g), the Director shall receive and pay claims on a public recovery obtained by settlement within a reasonable time after one year from the date of notice. Claims on other public recoveries shall be paid within a reasonable time from the receipt of the claim. If the amount of the public recovery is calculated pursuant to section 3006(d), the multiple shall not be applied to claims paid. The Director shall not pay a claim if he has reason to suspect fraud or other lack of basis. In such event, the Director may decline to make payment and shall transmit the claim, together with his reasons for nonpayment, to the clerk of the court which entered the judgment. Notice shall be given promptly by the clerk to the claimant of his opportunity to present evidence in support of his claim to the court. The court shall hear and determine the validity of the claim, and its determination shall be treated in all respects as a judgment in a civil action with the United States as party defendant.

“(e) When the amount of the public recovery is insufficient, after the payment of administrative expenses, to pay the full value of claims not exceeding \$300, such claims shall be paid—

“(1) pro rata if the public recovery was obtained in settlement of the action; or

“(2) from amounts remaining in the fund from previously unexpended public recoveries.

“(f) When the amount of a public recovery is greater than the total of administrative expenses and payments not exceeding \$300, the balance may be used to pay the claim of a person who would be eligible under subsection (c) but for the fact that his injury exceeds \$300: *Provided*, That the claimant execute a release in favor of the defendant of his right to bring a civil action for damages under a statute of the United States arising out of the same transaction that was the subject of the public action. Such release shall be filed with the Administrative Office.

“(g) If the Director finds that it is impracticable to determine with reasonable accuracy the identities of all or some of the injured persons or the amount of all or some of the individual damages, he may petition the court in which the judgment was entered for an order that payments not be made to such persons or for such damages.

“(h) The Director shall issue such regulations as are necessary and appropriate to insure the prompt, fair, and inexpensive implementation of the provisions of this section.

“Subchapter B—Class Compensatory Action

“§ 3011. Class compensatory action; prerequisites; district court jurisdiction

“(a) A person whose conduct gives rise to a civil private right of action for damages under a statute of the United States shall be liable individually or as a member of a class to the injured persons in a civil class compensatory action if—

“(1) such conduct injures forty or more named or unnamed persons each in an amount exceeding \$300, or creates liabilities for forty or more persons, each in an amount exceeding \$300;

“(2) the injuries or liabilities arise out of the same transaction or occurrence or series of transactions or occurrences; and

“(3) the action presents a substantial question of law or fact common to the injured or sued persons.

“(b) The district courts of the United States shall have jurisdiction, exclusive of the courts of the States, of actions brought under this section.

“§ 3012. Initial discovery

“(a) Prior to the preliminary hearing provided for in section 3014, discovery shall be limited to—

“(1) interrogatories submitted solely for the purpose of identifying and locating persons to be deposed, and documents to be requested;

“(2) depositions of not more than ten persons for each side; and

“(3) requests for production of documents.

For good cause shown, the court may expand or further limit the discovery prior to the preliminary hearing.

“(b) Before or after the preliminary hearing, no discovery of unnamed injured persons shall be undertaken without leave of court upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Failure

of an injured person to respond to such discovery shall not be grounds for excluding him from the class.

“§ 3013. Preliminary hearing; scope of action; preliminary pretrial order; notice.

“(a) Within thirty days after a class compensatory action is commenced, the court shall give notice to the parties of a preliminary hearing to be held to determine whether, and in what manner, the action shall proceed as a class compensatory action. The hearing shall be held no later than one hundred and twenty days from the commencement of the action. No motion, other than a discovery motion, shall be heard or disposed of prior to the preliminary hearing.

“(b) At or immediately after the preliminary hearing, the court shall make a preliminary determination on the basis of the pleadings, affidavits, material produced during discovery and any other matter presented at the hearing—

“(1) whether the action meets the prerequisites of section 3011(a);

“(2) whether there are sufficiently serious questions going to the merits to make them fair grounds for litigation; and

“(3) pursuant to the provisions of section 3022, whether the representative party and his counsel will adequately protect the interests of the class.

“(c) If the court makes a negative determination at the preliminary hearing, or at any time prior to the entry of judgment, with respect to a matter listed in subsection (b), the court shall dismiss the action as a class compensatory action: *Provided*, That where the action meets the requirements of section 3001(a), the court shall permit amendment of the complaint to allow the action to proceed as a public action brought by a relator and shall make orders necessary to permit the parties to comply with the provisions of section 3002.

“(d) If the action is not dismissed as a class compensatory action, the court shall enter an order describing the scope of the action, including a description of the transaction giving rise to the action and a statement of the substantial question of law or fact common to all class members. Such order shall be conditional and may be altered or amended before judgment is entered.

“(e) At or immediately after the preliminary hearing the court in its discretion shall determine whether some or all injured persons will be excluded from or included in the class only if they so request by a specified date. In determining whether persons shall be excluded from the class unless a specific request to be included is made, the court shall consider whether there is a substantial likelihood that—

“(1) the amount of their injury or liability makes it feasible for them to pursue their interests separately; and

“(2) those persons have sufficient resources, experience, and sophistication in business affairs to conduct their own litigation.

The court shall promptly thereafter give notice reasonably necessary to assure adequacy of representation of all persons included in the class and fairness to all such persons. Such notice shall describe the persons, if any,

by name or category who are to be excluded from the action unless a request to be included is made. The judgment, whether or not favorable to the class, will include all persons who remain in or enter the action pursuant to this subsection.

“§ 3014. Proof of damages; separate determination of liability and damages; judgment

“(a) The amount of injury to each person who remains in or enters a class compensatory action shall be proven by any method permitted or required by law.

“(b) If the court finds that the issue of damages cannot be resolved expeditiously, it shall first try and determine the issue of liability, unless to do so would violate a party’s rights under the Constitution of the United States.

“(c) A defendant found liable shall be ordered by the court, at his own expense, to—

“(1) make reasonable effort to identify from his records or other reasonably available sources the persons likely to have been injured by his conduct and the amount of individual injury;

“(2) give individual notice of the finding of liability to such persons; and

“(3) with respect to all other persons injured or likely to have been injured, give such notice as is reasonably calculated to assure that a substantial percentage of such persons is informed of the finding of liability.

“(d) The court may, in addition to an award of damages, order appropriate injunctive or declaratory relief.

“Subchapter C—Judicial Management of Public and Class Compensatory Actions

“§ 3021. Transfer and consolidation

“A district court shall promptly notify the judicial panel on multidistrict litigation of the commencement of a public action, of a class compensatory action, or of a civil action that the court believes could be consolidated with a public action or a class compensatory action. Notwithstanding the provisions of section 1407 of this title, to the extent feasible and consistent with the interests of justice, the panel shall transfer to and consolidate for all purposes in a single district court public actions, class compensatory actions, and other civil actions that arise out of the same transactions or occurrence, or series of transactions or occurrences, and that present a substantial question of law or fact common to the injured or sued persons. Such transfer may be to any district court.

“§ 3022. Adequacy of representation

“(a) In considering the adequacy of counsel for the relator to represent the interests of the United States in a public action prosecuted by a relator or the adequacy of the representative party and of his counsel to represent absent persons included within the class in a class compensatory action the court, without oral or written argument or motion by the parties, shall require counsel to file affidavits stating—

“(1) the extent of counsel’s experience with public actions and class or complex litigation;

“(2) the extent to which a party in a class compensatory action has interests common to those of the class or fundamental interests antagonistic to those of the class; and

“(3) any other information requested by the court.

In a class compensatory action the representative party or parties shall also be required to file affidavits setting forth the information in paragraphs (2) and (3).

“(b) After reviewing the affidavits submitted under subsection (a) the court may request oral or written argument or motion by the parties before making its determination regarding adequacy of representation.

“§ 3023. Effect of judgment

“(a) A judgment on the merits in a public action, unless otherwise limited by its term, shall be conclusive in any subsequent action arising out of the same transaction or occurrence, or series of transactions or occurrences, against—

“(1) a defendant for or against whom it was entered;

“(2) the United States;

“(3) a person injured in an amount not exceeding \$300; and

“(4) a person injured in an amount exceeding \$300 who, pursuant to section 3007(f), received payment, or whose claim was disallowed by the court or the Administrative Office for reasons other than the inadequacy of the fund to pay the claim.

“(b) A judgment on the merits in a class compensatory action, unless otherwise limited by its terms, shall be conclusive in any subsequent action arising out of the same transaction or occurrence, or series of transactions or occurrences, against—

“(1) a defendant for or against whom it was entered; and

“(2) an injured person who remained in or entered the action pursuant to section 3013(e).

“§ 3024. Litigation timetables

“Within ten days after the issuance of a conditional pretrial order, pursuant to section 3004(d) or 3013(d), the parties shall file suggested litigation timetables. Within thirty days thereafter, the court shall issue a litigation timetable which shall govern the conduct of the litigation unless modified by further order of the court.

“§ 3025. Expediting judicial rulings

“The Judicial Conference of the United States shall fix time limits within which the district courts shall make rulings and file opinions in public and class compensatory actions. Within ten days of the date by which a ruling should have been made or opinion filed, the clerk of the district court shall notify the judicial council of the circuit of the pendency of the ruling or opinion beyond the time limit. The circuit executive shall promptly inquire as to the causes for delay and report the response

promptly to the council, which shall provide such assistance as is available to expedite the ruling or the filing of the opinion in the district court.

“§ 3026. Settlement

“(a) Settlement of a public or class compensatory action shall become effective only with the approval of the court after hearing and upon the entry of a judgment stating the terms of a proposed settlement. The court may require or permit limited discovery on the merits supervised by the court, to determine the fairness of settlement. If a settlement is reached before the making of the determinations required by section 3004(d) or 3013(d), the court shall include in the judgment findings as to the scope of the action, including a description of the transaction giving rise to the action, and the substantial question of law or fact common to all injured or sued persons included within or represented by the action. The proponents of a settlement shall have the burden of demonstrating its fairness to the court.

“(b) In a public action brought on relation, notice of a proposed settlement and hearing shall be given to the United States, and the United States may participate in the hearing. The court may approve a proposed settlement and enter judgment only with the consent of the United States.

“(c) In a class compensatory action, notice of a proposed settlement and hearing shall be given to the members of the class at a time and in a manner found by the court to assure adequacy of representation and fairness.

“§ 3027. Calculation of attorney’s fees; examination of fee request

“If in a class compensatory action or a public action, the award of attorney’s fees is otherwise allowed by law and is ordered to be paid from a judgment or settlement fund, or by a party:

“(a) the attorney’s fees shall be based upon the time found by the court to have been reasonably spent on the action by the attorney and paralegal and other administrative or clerical personnel who have not been admitted to the practice of law, including time spent on the issue of attorney’s fees and on the administration of settlement or distribution of the judgment, except that—

“(1) the court shall disallow hours found unnecessary, or unrelated to the action, or to involve duplication of activity, and shall state in writing its reasons for disallowance; and

“(2) the court shall allocate hours to administrative personnel rather than counsel where the court finds that work performed by counsel could have been assigned to such personnel.

“(b) The rate of compensation for the services of an attorney and administrative personnel shall be compensated at the hourly rate most commonly billed by the attorney for similar services at the time such services were provided. If an attorney does not bill by the hour, he shall be compensated at the hourly fair market value for similar services provided by those with similar experience, professional background, reputation, and skill in the community where his office, partnership, or corporation is located.

“(c) Except as provided in subsection (d), the rate of compensation determined under subsection (b) shall be increased for risk—

“(1) by multiplying that rate by up to 1.75 in any action in which the attorney relied to a substantial extent upon a judgment, upon the product of a civil action, or upon the product of an investigation, grand jury proceeding, or criminal prosecution conducted by a State or by the United States; or

“(2) in any other action, by multiplying that rate—

“(A) by no less than 2 and no more than 3 if the time spent occurred prior to the conclusion of the preliminary hearing; or

“(B) by no less than 1.75 and no more than 2.5 if the time spent occurred after the conclusion of the preliminary hearing.

“(d) No increase for risk under subsection (c) shall be made with respect to time spent on the issue of attorney’s fees or on settlement administration. No increase in the rate of compensation shall be made other than as specified in subsection (c).

“(e) When making a fee award under this section the court shall reduce such award to the extent necessary to assure that the total compensation received by the attorney from all sources does not exceed the amount calculated pursuant to this section. The court may reduce the amount of a fee award if it finds the amount calculated pursuant to this section unreasonably large relative to the size of recovery, if any.

“§ 3028. Applicability of civil procedure rules; separate actions

“(a) Public actions and class compensatory actions brought pursuant to this chapter are civil actions and shall be governed by the Federal Rules of Civil Procedure except as provided in this chapter or other statute of the United States.

“(b) The district court may order that a public or class compensatory action be divided into two or more separate actions if each separate action meets the prerequisites of section 3001(a) or 3011(a). Each separate action shall proceed as though it had been filed independently, except as provided in section 3005(b). The district court may order separate trials of liability and damage issues and make all orders, not otherwise prohibited by law, reasonably necessary to the efficient and fair management of public and class compensatory actions.

“(c) The court may dismiss a public or class compensatory action if the court determines that full utilization of all the provisions of this chapter and the Federal Rules of Civil Procedure will not enable the court adequately to manage the proceeding: *Provided*, That the court has first allowed amendment of the complaint to permit a manageable action to proceed.

“§ 3029. Adjustment of statutory monetary amounts

“The monetary amounts specified in sections 3001(a); 3005(a)(2), (b); 3006(2); 3007(c), (e), (f); 3011(a); and 3023(a) shall be adjusted for inflation or deflation every two years pursuant to regulations issued by the Attorney General of the United States after consultation with the Secretary of Commerce. The Attorney General shall make such adjustments as are neces-

sary to maintain the amount of individual injury required under sections 3001 and 3011 equal to approximately 2.4 percent of the most recent year's median family income, as defined by the Secretary of Commerce. The adjustments of other amounts shall be made relative to adjusted individual injury. Adjustments made under this section shall apply only to actions brought after the date of the adjustment.

“§ 3030. Definition; special provisions in other statutes; other class action rules

“(a) For purposes of this chapter, ‘person’ means an individual, corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, estate, society, union, club, church, or other association of persons, and, except under section 3001(c), includes a State or political subdivision of a State. The United States is deemed to be a person for purposes of an action against the United States pursuant to section 3001 or 3011 and for purposes of sections 3006, 3007, and 3014.

“(b) If a public action or a class compensatory action is based upon sections 110(d)(3) and 110(e) of the Magnuson-Moss-Warranty—Federal Trade Commission Improvement Act (15 U.S.C. 2310(d)(3) and 2310(e)), the requirements of that Act concerning cure of illegal conduct, aggregate claims and minimum individual harm apply to the extent that they are inconsistent with the chapter.

“(c) If a recovery under a public action or a class compensatory action is based upon section 130(a)(2)(B) of the Truth-in-Lending Act, as amended (15 U.S.C. 1640(a)(2)(B)), section 813(a)(2)(B) of the Fair Debt Collections Practices Act (15 U.S.C. 1692k(a)(2)(B)) or section 706(b) of the Equal Credit Opportunity Act, as amended (15 U.S.C. 1691e(b)), the limitations on aggregate liability specified in those Acts shall apply to all judgments levied pursuant to this chapter.

“(d) Except as provided in section 3023, nothing herein shall affect the right of an attorney general of a State to bring a *parens patriae* action under section 4C of the Clayton Act, as added by section 301 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. 15c). The provisions of sections 3003(a), (b); 3004(a), (b)(2); 3012(a), (b); 3013(a), (b)(2); 3014; 3021; 3024; 3025; 3026(a); and 3027 of this chapter apply to regulate the procedures of these actions to the extent not inconsistent with that Act.

“(e) If a class compensatory action is brought pursuant to section 16(b) of the Fair Labor Standards Act, as amended (29 U.S.C. 216(b)), the consent of unnamed parties plaintiff shall not be required.

“(f) Nothing in section 18(i) of the Deepwater Port Act of 1974 (33 U.S.C. 1517(i)) shall affect the right of a relator to bring a public action when a private action is permitted pursuant to that subsection. Subsection (i)(2) of that section shall define notice requirements to the extent inconsistent with section 3013(e) of this chapter.

“(g) Nothing in this chapter shall affect any existing right to secure damages under the provisions of rule 23 of the Federal Rules of Civil Procedure remaining in force.”.

(b) The analysis at the beginning of title 28 of the United States Code is amended by adding after the item relating to chapter 175 the following:

"176. Public and Class Compensatory Actions..... 3001".

(c) The analysis at the beginning of part VI of title 28, United States Code, is amended by adding the following after the item relating to chapter 175:

"176. Public and Class Compensatory Actions..... 3001."

SEC. 3. Rule 23 of the Federal Rules of Civil Procedure is amended by—

(a) deleting subdivisions (b)(3) and (c)(2), and the last sentence of subdivision (c)(3); and

(b) deleting the word "; or" at the end of subdivision (b)(2) and substituting a period.

SEC. 4. Section 1292 of title 28, United States Code, is amended by adding a new subsection (c) after subsection (b) as follows:

"(c) The courts of appeals shall have jurisdiction to review in their discretion orders of the district courts dismissing or allowing actions to be maintained as public actions or class compensatory actions pursuant to section 3004(c) or 3013(c). A person seeking review shall file a petition for leave to appeal with the court of appeals within twenty days of the entry of the order dismissing or allowing an action as a public action or a class compensatory action."

SEC. 5. The last sentence of section 18(i)(2) of the Deepwater Port Act of 1974 (33 U.S.C. 1517(i)(2)) is amended by deleting "rule 23(b)(2) of the Federal Rules of Civil Procedure" and substituting "section 3013 (e) of title 28, United States Code".

SEC. 6. This Act shall apply to civil actions commenced on or after the date of enactment.