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Class Actions--Notice and Manageability (Eisen v. Carlisle & Jacquelin)

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CLASS ACTIONS — NOTICE AND MANAGEABILITY

Eisen v. Carlisle & Jacquelin

At the time of its promulgation in 1966, amended rule 23 was viewed as an invitation to the federal courts to use their ingenuity and discretion in implementing the class action for small consumers and investors.[1] Flexibility and liberality were to be the judicial guidelines under the rule.[2] Yet it was not to be treated as a panacea and in 1973, the Court of Appeals for the Second Circuit declared, in *Eisen v. Carlisle & Jacquelin (Eisen III)*,[3] that the limits of procedural innovation and imagination under rule 23 had been overstepped. The case had been in litigation since the 1966 amendment and its history reflected the developments, reactions, and frustrations associated with the class action device since its liberalization. In *Eisen III*, the potency of the class action, as an effective means for redress of "mass production"[4] wrongs, was dealt a serious blow.

In a decision which severely jeopardizes the viability of mass class actions under rule 23(b)(3),[5] the Second Circuit imposed a strict, and

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[1] *See* Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 501 (1969); Frankel, *Amended Rule 23 from a Judge's Point of View*, 32 ANTITRUST B.J. 295, 299 (1966).

[2] However, by 1967, concern over the restrictive interpretation of rule 23 was being expressed. *See* Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 52 (1967).

[3] 479 F.2d 1005 (2d Cir.), *en banc rehearing denied*, 479 F.2d 1020, *cert. granted*, 42 U.S.L.W. 3226 (U.S., Oct. 16, 1973) (No. 73-203).

[4] *See* remarks of Professor Geoffrey B. Hazard in *Class Actions, A Symposium before the Judicial Conference of the Fifth Judicial Circuit*, 58 F.R.D. 299, 307-12 (1972).

[5] FED. R. CIV. P. 23(b)(3):

> (b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> ....
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> (3) the court finds that 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. The matters pertinent to the finding include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

In the Advisory Committee's Note, *Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 69, 98-107 (1966), the scope of section (b)(3) is described in the following passage: "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. 39 F.R.D. at 102-03 [hereinafter cited as Advisory Committee Note].

perhaps often unattainable, notification requirement on the class plaintiff. The court found notice by publication inadequate and insisted upon individual notice to all readily identifiable class members, the entire cost to be borne by the plaintiff.[6] Failure to comply with the notice mandate was to result in a denial of certification.[7] Equally devastating to the maintenance of large scale class litigation, the court extended the scope of the "unmanageable" class prohibition,[8] declared illegal the concept of fluid class recovery,[9] and found the use of preliminary "mini-hearings" unauthorized.[10] As such, *Eisen III* may sound the death knell for future large-scale antitrust, consumer, environmental and securities class actions.

The background of the case is long and complex. In 1966, Morton Eisen, on behalf of himself and similarly situated buyers and sellers of odd-lots[11] on the New York Stock Exchange (NYSE), charged the two largest odd-lot brokerage houses on the Exchange, Carlisle & Jacquelin and De Coppet & Doremus, with combining and conspiring to monopolize trade, and with charging an excessive fee, known as the odd-lot differential, in violation of the Sherman Antitrust Act.[12] In a separate count, Eisen alleged that the NYSE had violated the Securities and Exchange Act of 1934,[13] in that it failed to adopt rules protecting odd-lot investors.

In the district court, Judge Tyler declined to certify the class action, noting, *inter alia*, that personal notice to all identifiable class members, seemingly required by rule 23(c)(2), could not be provided by the plaintiff.[14] In *Eisen I*, the Second Circuit granted permission for

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There are two other class action categories described in rule 23 under sections (b)(1) and (b)(2). The subsection (b)(1) action applies in situations where the parties have a degree of common interest such as to make joinder of all parties necessary were it not for their large numbers. *See* Advisory Committee Note at 100-01. The subsection (b)(2) action generally applies when the injured class seeks injunctive relief. *See* Advisory Committee Note at 102.

6 479 F.2d at 1009. This is not an absolute rule. The court recognizes that in certain cases the cost of notice could be apportioned. *Id.* at 1009 n.5.

7 *Id.* at 1020. *See* FED. R. CIV. P. 23(c)(1).

8 479 F.2d at 1016.

9 *Id.* at 1018.

10 *Id.* at 1015.

11 Eisen originally estimated that the class size was in the hundreds of thousands. 41 F.R.D. 147, 151 (S.D.N.Y. 1966). It was later estimated at 3.75 million, 391 F.2d 555, 562 (2d Cir. 1968), and by 1971 the estimated class size had grown to 6 million. 52 F.R.D. 253, 257 (S.D.N.Y. 1971).

12 15 U.S.C. §§ 1, 2 (1970).

13 15 U.S.C. §§ 78f(b), (d) & 78s(a) (1970).

14 41 F.R.D. 147 (S.D.N.Y. 1966). The court rejected the plaintiff's proposed system of notification consisting of publication in the press with individual notice to stock exchange firms. *Id.* at 152.

appeal of the order refusing certification as equivalent to a final order.[15] The appeal was subsequently heard by a different panel and a decision referred to as *Eisen II*[16] was rendered.

Speaking for a divided panel[17] in *Eisen II*, Judge Medina reversed, finding that the denial of certification had been ordered prematurely. The case was remanded for prompt evidentiary hearings on the issues of "notice, adequate representation, effective administration of the action and any other matter which the District Court may consider pertinent and proper."[18] Since notice was a key issue, the panel attempted to provide guidelines for the trial court.[19] Inasmuch as *Eisen II* purported to leave open the issues of notice by publication and the preservation of meritorious claims it was vague and contradictory.[20]

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15 370 F.2d 119, 120 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). Judge Kaufman reasoned that where the plaintiff's claim for individual relief was so small as to prohibit the continuation of the litigation in his own capacity, a dismissal of the class action count rang the "death knell" of the case. *Id.* at 121. Judge Kaufman cited the Supreme Court's holding in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), as allowing appeals from collateral orders in proper circumstances.

Two other circuits have followed the reasoning of the "death knell" approach. *See* Graci v. United States, 472 F.2d 124 (5th Cir. 1973); Falk v. Dempsey-Tegler, 472 F.2d 142 (9th Cir. 1972). *But see* Hackett v. General Host Corp., 455 F.2d 618 (3d Cir. 1972).

16 391 F.2d 555 (2d Cir. 1968).

17 Judges Medina and Hays constituted the majority while Chief Judge Lumbard dissented.

18 391 F.2d at 570.

19 *Id.* at 569-70, wherein Judge Medina stated:

> On remand the court may find that the names of certain class members, because of their widespread dealings in odd-lots may be readily ascertainable. Arguably these class members may possess enough of a stake in the proceedings to justify personal intervention. At this point the court will then have to consider once again the question of publication. Under certain circumstances published notice may amount to the "best notice practicable," particularly where requirement of a different form of notice would, in effect, prevent meritorious claims from being litigated. . . . Nevertheless, if the court finds that a considerable number of members of the class can be identified with reasonable effort, and financial considerations prevent the plaintiff from furnishing individual notice to these members, there may prove to be no alternative other than the dismissal of the class suit.

20 *Eisen II* purported to leave open the question of publication as a means of notifying the remaining members of the class where those individuals with a large interest in the proceedings were given personal notification. Notwithstanding this, the court then intimated that absent individual notice to *all* class members, the suit might have to be dismissed. *See id.* The confusion engendered by *Eisen II* is apparent from an examination of subsequent Second Circuit holdings. *See, e.g.*, West Virginia v. Charles Pfizer & Co., 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971) (the *Drug Cases*), where the court observed: "There are no precise rules as to what constitutes adequate notice, and the due process standards have been held to vary depending on the circumstances of each case." 440 F.2d at 1090. *See also* Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969), where Judge Mansfield noted:

> To overemphasize the notice requirement would be to stymie the purpose of the class action device as a means of privately requiring fiduciaries to toe the mark. . . . Rule 23 contemplates cooperative ingenuity on the part of counsel and the court in determining the most suitable notice in each case.

48 F.R.D. at 129.

Notwithstanding any inconsistencies presented by *Eisen II*, Judge Medina declared that rule 23 "should be given a liberal rather than a restrictive interpretation."[21]

At the evidentiary hearing on remand the issues were crystallized. From the submissions of the parties Judge Tyler synthesized the fact findings necessary to the determination of adequacy of representation, manageability of the class and sufficiency of notice. As to whether the plaintiff adequately represented the interests of the entire class, the court unhesitatingly ruled in the affirmative.[22] Turning to the manageability issue, Judge Tyler defined the class[23] and then considered the administration and recovery distribution problems. By estimating the damages, subtracting the costs of administration and anticipating a fluid class recovery the court concluded that a substantial award was likely.[24]

The court next considered the type of notice required. Judge Tyler examined this issue in light of both due process standards and rule 23(c)(2). Relying on the due process requirement set down in *Mullane v. Central Hanover Bank & Trust Co.*[25] and *Hansberry v. Lee*,[26] the court deemed sufficient "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[27] Moreover, the court felt that the adequacy of any particular notice procedure was to be determined on a case by case approach.

Did the notice requirement of rule 23(c)(2) mandate a more stringent procedure than the constitutionally permissible standards set down in *Mullane* and *Hansberry*? The district court concluded that rule 23(c)(2) was not a stricter formula but instead provided guidelines for a particular situation.[28] By construing "the best notice practicable under the circumstances, including individual notice to all

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21 391 F.2d at 563.

22 52 F.R.D. at 261. The court utilized a threefold inquiry: (1) that plaintiff's attorney had the experience and skill to conduct the litigation; (2) that the suit was not collusive; and (3) that plaintiff would be a forceful advocate. *Id.* Judge Tyler further posited that a substantially negative response to the notice that the suit was pending would indicate the plaintiff's inadequacy as class representative. *Id.* at 268. *See* note 51 *infra.*

23 "[T]he class . . . is composed of all public individuals, institutions and intermediaries who bought and/or sold odd-lots of shares of stock on the NYSE during the period from May 1, 1962 through June 30, 1966." *Id.* at 261.

24 *Id.* at 265.

25 339 U.S. 306 (1950).

26 311 U.S. 32 (1940).

27 52 F.R.D. at 266, *quoting* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

28 52 F.R.D. at 266.

members who can be identified through reasonable effort"[29] in light of public policy,[30] the flexibility inherent in rule 23,[31] and the teachings of *Eisen II*,[32] Judge Tyler held that individual notice was not mandated. The court adopted a comprehensive plan of notice by publication combined with selective personal notice.[33] Although the cost of the notice procedures adopted by Judge Tyler was about one-eighth that of sending two million personal letters, the expense still came to $21,720.[34] Recognizing this as both a prohibitive cost for the plaintiff and an unjust burden to impose on the defendant, the court held a preliminary hearing[35] on the merits for the purpose of allocating the cost of notice between the litigants. At this hearing Judge Tyler concluded that the plaintiffs were likely to succeed on the merits.[36] Therefore, he ordered the defendants to pay 90 percent of the cost of notice with the balance payable by plaintiff.[37] The defendants again appealed to the Second Circuit.

The *Eisen III* panel rejected both the system of notice and the preliminary hearing implemented by Judge Tyler. Judge Medina, writing the majority opinion, focused on the literal provisions of rule 23(c)(2).[38] He noted that the rule required "the best notice practicable under the circumstances, including individual notice to all members

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

30 52 F.R.D. at 266-67 (citations omitted), wherein the court stated:

> [E]xpensive and stringent notice requirements could vitiate the class action device in situations where application thereof as a matter of public policy can be important such as private antitrust, consumer and environmental litigation. Hence, the district court must strive to fashion notice which fairly and adequately protects all interests in the action without imposing what in effect amounts to an insuperable tariff on prosecution of the case.

31 52 F.R.D. at 267.

32 *Id.* Judge Tyler focused on the implication of *Eisen II*, that the magnitude of the class members' stake is related to the notice required; *see* 479 F.2d at 569-70. This interpretation accords with the Advisory Committee's position that notice is required to allow class members to opt out. *See* note 42 *infra*.

33 Judge Tyler ordered written notice sent to individual member firms of the NYSE, commercial banks with large trust departments, class members who had 10 or more odd-lot transactions during the period in question (1962-66), and to 5000 randomly selected members from the more than 2 million identifiable. 52 F.R.D. at 267. To notify the remaining 1 million members, one-quarter page notices were ordered placed once a month for two consecutive months in the *Wall Street Journal* and the financial sections of the *New York Times*, *Los Angeles Times*, *San Francisco Chronicle* and *San Francisco Examiner*, the latter three being the papers of largest circulation in California, a state with a large percentage of the nation's investors. *Id.* at 268.

34 *Id.* at 263, 267-68.

35 *Id.* at 270-71. *See* notes 71-74 and accompanying text *infra*, for treatment of the preliminary hearing.

36 54 F.R.D. 565 (1972). Judge Tyler noted that these findings were not binding for any purpose other than the allocation of cost of notice. *Id.* at 567.

37 *Id.* at 573.

38 479 F.2d at 1015.

who can be identified through reasonable effort." In view of the fact that two million members of the class were identifiable, the court concluded that personal notice was mandated. Support for this position was claimed in the Notes of the Advisory Committee on Rules.[39] Judge Medina felt that Eisen's class action should be dismissed on this basis alone.[40]

A literal reading of rule 23 supports this holding. However, notwithstanding Judge Medina's disclaimer,[41] such a reading makes rule 23 more stringent than is constitutionally mandated. In view of the emasculating effects of this strict construction, a holding that rule 23 notice requirements are equivalent to the constitutional mandates may have been more efficacious.

The desire to apply rule 23 liberally, thereby effectuating its purposes and not frustrating meritorious claims, conflicts with due process principles requiring that the best practicable notice, including individual notice, be given. In order to resolve this dilemma it is necessary to examine both the Advisory Committee Note and the constitutional mandates.

The Advisory Committee was not precise in explaining rule 23(c)(2).[42] After reciting the requirements of the rule, the Committee observed that "notice" was mandatory, and that it was "designed"[43] after the constitutional requirements of *Mullane v. Central Hanover Bank & Trust Co.*[44] and *Hansberry v. Lee.*[45] Arguably, this could be taken to mean that while notice will always be mandatory, *individual* notice will be mandatory only when *Mullane* and *Hansberry* require

39 *Id., citing,* Advisory Committee Note, note 5 *supra,* at 106-07. The approach to the notice issue in *Eisen III* which emphasized the phraseology of the rule and the Advisory Committee Notes differed from the approach taken in *Eisen II* which was based on constitutional notice requirements.

40 479 F.2d at 1015.

41 *Id.* at 1009 n.5.

42 The Committee's comments under subsection (c)(2), Advisory Committee Note, *supra* note 5, at 104-05, are unenlightening since they merely repeat the language of rule 23(c)(2). In its discussion of supplemental orders in subsection (d)(2), the Committee dealt with the subsection (c)(2) requirements in the light of *Mullane* and *Hansberry. Id.* at 106-07. There the Committee stated:

> Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject. *See* Hansberry v. Lee . . . Mullane v. Central Hanover Bank & Trust Co. . . . .

43 *Id.*

44 339 U.S. 306 (1950).

45 311 U.S. 32 (1940). *Hansberry* was more concerned with representation than notice. The Court noted that there is "a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it." *Id.* at 42. *See* Dolgow v. Anderson, 43 F.R.D. 472, 501 (E.D.N.Y. 1968).

it.[46] It is submitted that the ambiguous directives in the Advisory Committee Note cannot be viewed as a clear command of absolute individual notice to all identifiable class members regardless of other circumstances.[47] Such a requirement seems "inconsistent with the spirit of Rule 23."[48]

If *Eisen III* notice requirements are so indispensable as to bar meritorious causes of action, their foundation must lie in something more compelling than doubtful conjecture that the Advisory Committee has implied extraconstitutional notice standards. It is paradoxical that a liberal remedial device must be withheld unless under the circumstances an important and otherwise inescapable requirement, *viz.*, that of individual notice, cannot be met.

Does due process prohibit alternative procedures to personal notice when multitudinous class members can be individually reached, but only at great expense? Relegating the treatment of this important question to a footnote, the *Eisen III* panel answered in the negative.[49] Judge Medina recognized that *Mullane* permitted notice by publication[50] but concluded that publication was not sufficient when names and addresses are known.[51] In *Mullane*, the Supreme Court invalidated

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[46] This position was espoused by Judge Oakes in his dissent to the denial of an en banc rehearing of *Eisen III*, wherein he stated:

> The Advisory Committee is a respectable body of procedural experts who did not consider individualized notice to all or a certain percentage of class members a prerequisite to the maintenance of a Rule 23 class action as a constitutional (or extraconstitutional) requirement. Advisory Committee Notes, 28 U.S.C.A., Rule 23 Supplementary Note at 302.

479 F.2d at 1024.

[47] The commentators are almost universally opposed to the notice requirements given in *Eisen III*. Wright and Miller state:

> This decision [the strict approach notice in *Eisen II* which was adopted in *Eisen III*] is unnecessarily restrictive and demands more than is traditionally required to satisfy due process and more than seems necessary in Rule 23 (b)(3) actions.

7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE 148 (1972). *See also* Note, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement*, 29 MD. L. REV. 139, 153-54 (1969); Comment, *Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by the Securities Laws*, 116 U. PA. L. REV. 889, 917 (1968), where the author concluded: "One thing seems clear—the ability to give individual notice to all absentees should not be a condition precedent to the maintenance of a class action." *See also* Dolgow v. Anderson, 43 F.R.D. 472, 497 (E.D.N.Y. 1968), wherein Judge Weinstein stated:

> In determining what constitutes "the best notice practicable under the circumstances," it is necessary to remember that the recent amendments were specifically designed to broaden the usefulness of the class action device . . . By overemphasizing the notice requirement that purpose may be defeated.

[48] 479 F.2d at 1023 (Oakes, J., dissenting).

[49] *Id.* at 1017 n. 21.

[50] 339 U.S. at 317. In addressing itself to the adequacy of notice by publication the Court noted that it "has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible *or practicable* to give more adequate warning." *Id.* (emphasis added).

[51] 479 F.2d at 1015. Judge Medina, in *Eisen III*, considered the failure of other parties

a bank's system of notifying trust beneficiaries that an accounting of the trust funds was to take place. Most significant was the fact that the bank possessed the names and addresses of the beneficiaries and corresponded with them at least annually. In rejecting the bank's notice by publication, the Court held that it was not unduly burdensome under the circumstances to require individual notice.[52] In *Mullane*, the Court articulated a flexible standard of notice to satisfy the due process clause.[53] Essentially, *Mullane* notice is result oriented, *i.e.*, that reasonably calculated to inform those affected. The flexibility intended by the Court was illustrated when it stated: "[I]f with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied."[54]

In an effort to avoid the implication that the prohibitive cost of notice in *Eisen* was one of the "practicalities" with which the *Mullane* standard was concerned, the *Eisen III* panel asserted that there since has been a refinement of the test.[55] The panel implied that *Schroeder v. City of New York*,[56] had set down a hard and fast rule that once names and addresses are known, nothing short of individual notice will satisfy due process. It is submitted that *Schroeder* did not totally foreclose the use of publication where a list of the persons to be notified exists. Rather than departing from the flexible standard of *Mullane*, *Schroeder* appears to have reiterated the *Mullane* guidelines from a different prospective.

In *Schroeder*, the Supreme Court held "that the newspaper publications and posted notices *in the circumstances of this case* did not

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to join the plaintiff as indicative that notice by publication would fail to attract a large number of claimants. *Id.* at 1010. Interestingly, the same Judge had rejected this reasoning as unpersuasive in *Eisen II*, 391 F.2d at 563. Since both *Eisen II* and *Eisen III* involved pre-trial maneuvering, the reluctance of the small investor to become active in complicated litigation at this early stage is understandable. Thus, the *Eisen III* panel should have considered the failure of other parties to intervene irrelevant.

52 339 U.S. at 319. *See* Comment, *Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by the Securities Laws*, 116 U. PA. L. REV. 889, 912-15 (1968), where the circumstances in *Mullane* are distinguished from those in the usual rule 23(b)(3) class action.

53 339 U.S. at 314-15.

54 *Id.*

55 479 F.2d at 1017 n. 21.

56 371 U.S. 208 (1962). In *Schroeder* the notice given by the City consisted of publication in small town newspapers and posting of signs on trees and poles. The Supreme Court held that since Mrs. Schroeder's name and address were readily available in the deed records and the tax rolls, the procedures adopted were inadequate and violative of due process. 371 U.S. at 211. In addition to the unreasonableness of the City's notice, another distinction exists between *Schroeder* and *Eisen*, namely the relative resources of the parties. It would seem wholly inequitable to demand from an individual the expenditure deemed appropriate for a city. It was partly for this eventuality that rule 23 was amended. *See* note 1 *supra* and accompanying text; Green v. Wolf Corp., 406 F.2d 291, 298 (2d Cir. 1968).

measure up to the quality of notice which the Due Process Clause . . . requires."[57] Moreover, the *Schroeder* decision relied heavily on *Walker v. City of Hutchinson*,[58] a case not cited by the *Eisen III* panel. In *Walker*, the Supreme Court expressly refused to establish an unyielding notice formality: "We there [in *Mullane*] called attention to the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions."[59]

While the above authorities acknowledge a reasonable and practicable notice standard, the class plaintiff still bears a heavy burden in establishing the sufficiency of notice by publication. It is a judicial axiom that "publication is a poor and sometimes a hopeless substitute for actual service."[60] Furthermore, while *Mullane*, *Hansberry* and *Schroeder* have all spoken in terms of reasonableness, flexibility and practicality in the circumstances, they have uniformly invalidated notice by publication when there was available means for identifying intended recipients.

Recognizing this inherent conflict in *Eisen*, District Judge Tyler considered that a balancing of the equities would permit a compromise notice by publication combined with selected individual notice.[61] In declaring Judge Tyler's notification process a "farce"[62] it is unfortunate that the *Eisen III* panel did not comment on the exigencies of Eisen's "circumstances." Judge Weinstein, in *Dolgow v. Anderson*,[63] has viewed the particular circumstances of large class action notice problems with deep concern:

> In determining what constitutes "the best notice practicable under the circumstances," it is necessary to remember that the recent amendments were specifically designed to broaden the usefulness of the class action device . . . By overemphasizing the notice requirement that purpose may be defeated . . . To require the present

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57 371 U.S. at 211.

58 352 U.S. 112 (1956).

59 *Id.* at 115.

60 New York v. New York, N.H. & H.R. Co., 344 U.S. 293, 296 (1953).

61 *See* note 33 *supra*. Noting the particular exigencies of the large class action, Professor Kaplan, who was Reporter to the Advisory Committee, has written:

> [W]hen large numbers of people are dealt with, perfect notice . . . becomes . . . unnecessary because of the probability that some individuals who are representative of differing opinions within the group . . . will in fact be reached and speak up. Notice which is fair in the circumstances of the case is a constitutional requirement. We can therefore expect courts to work toward providing the best practicable notice, as indeed (c)(2) in terms requires.

Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 396 (1967).

62 479 F.2d at 1017.

63 43 F.R.D. 472 (S.D.N.Y. 1968).

> plaintiffs to provide immediate actual notice to each member of the classes involved would, for all practical purposes, spell the immediate end of this litigation.[64]

Eisen's exigent circumstances which militate against strict adherence to individual notice concern the prohibitive cost of such notice for a class plaintiff. Unlike the bank in *Mullane*, Eisen is not equipped for regular correspondence with his class by the mails. Unlike the City in *Schroeder*, Eisen is not supported by municipal funds in his effort to contact the parties. While a list of names theoretically is ascertainable, it is of no practical significance to the plaintiff who does not have the means to employ it.

The cost factor should be recognized as a significant "particularity" or "circumstance" within the flexible standard of *Mullane*. Few would bring suit for a meager recovery, and, absent a plaintiff class representative, accumulated gains would remain in the hands of wrongdoers.[65] *Eisen III's* individual notice command effectively imposes a high tariff on the representative. As Mr. Justice Harlan noted in *Boddie v. Connecticut*: "Just as a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant, so too a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard."[66] Unfortunately, *Eisen III* will bar litigation of the meritorious claims of several million people because of the class representative's inability to pay for individual notice.

Giving a class adequate notice of an impending action is only the threshold of the procedural labyrinth underlying federal rule 23. The next stage is not a trial on the merits, but rather an involved inquiry into the mechanics of trial, damage assessment and recovery distribution. The issue of how to manage an enormous class action has posed difficult questions, but until *Eisen III* these problems were deemed solvable. The majority of courts and commentators, although differing in their approaches, nevertheless believed that in time judicial ingenuity would give the victims of large scale exploitation a day in court.[67]

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64 *Id.* at 497-98.

65 *But see* 479 F.2d at 1013.

66 401 U.S. 371, 380 (1971).

67 *See, e.g.*, California v. Frito-Lay, 474 F.2d 774 (5th Cir.), *cert. denied*, 412 U.S. 908 (1973). The Ninth Circuit, although it struck down a *parens patriae* suit, recognized its value in class actions: "It would indeed appear that the state is on the track of a suitable answer (perhaps the most suitable yet proposed) to problems bearing on antitrust deterrence and the class action as a means of consumer protection. We disclaim any intent to discourage the state in its search for a solution." 474 F.2d at 777.

See also In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 289 (S.D.N.Y. 1971);

In dismissing the class action in *Eisen III*, the Medina panel perceived the class action device as a vessel of limited capacity and ill-designed to serve "immense numbers of consumers . . . mulcted in various ways by illegal charges."[68] In reaching this conclusion, the court rejected two procedural innovations which had been adopted below by Judge Tyler: (1) a preliminary hearing on the merits to determine whether the plaintiff could show a reasonable probability of success,[69] and (2) an award of damages to the class as a whole by means of a device known as the "fluid class recovery."[70]

Judge Tyler used the preliminary hearing or "mini-hearing" to allocate the cost of notice.[71] He analogized the preliminary hearing to the procedure for a preliminary injunction, *i.e.*, the court looks to the plaintiffs' chance for success on the merits.[72] The value of this proce-

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Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 499, 500 (1969), wherein Professor Kaplan stated: "[I]magination and even daring may be required of counsel and courts in devising abbreviated but fair procedures leading to hand-tailored relief which may be quite novel in form."

68 479 F.2d at 1019. The remedy for large scale exploitation, according to the panel, was via the Congress: "Numerous administrative agencies protect consumers in various ways. It should, we think, be possible for the Congress to create some public body to do justice in the matter of consumer claims in such fashion as to afford compensation to the injured consumer." *Id.*

The suggestion drew criticism from Judge Oakes in his dissent from the denial of an en banc rehearing. He felt that it was an

> abdication of judicial responsibility. It is as much to say that the courts are insufficiently inventive to be capable of handling a matter — the distribution of unlawfully obtained money to a large number of people. I doubt this very much. I suspect that the courts can do the job.

Id. at 1024-25.

69 52 F.R.D. at 270-72.

70 *Id.* at 264.

71 *Id.* at 269. *Cf.* Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968), wherein the mini-hearing was used to avoid subjecting the defendants to unnecessary cost and publicity.

One commentator has suggested that the use of the preliminary hearing on the merits to allocate notice costs be reserved to actions furthering some legislative policy, such as civil rights, securities fraud or antitrust. Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 299, 323 (1972).

72 52 F.R.D. at 271. Judge Tyler, in seeking to avoid the twin evils of imposing a financial barrier on a potentially meritorious claim on the one hand, and the fear of opening a Pandora's box of frivolous harassment suits on the other, felt this preliminary hearing to be the best solution. He analogized this hearing to the procedure used in obtaining a preliminary injunction, FED. R. CIV. P. 65(a), noting: "A prime policy consideration underlying preliminary injunction relief may be applicable here, *viz.*, the need to create or preserve a state of affairs which will enable the court to render a meaningful decision." 52 F.R.D. at 270.

If Judge Tyler fully had followed this analogy he would have required security to be posted. FED. R. CIV. P. 65(c). However, after assessing the defendant with 90% of the cost of notice, he did not require a bond. On appeal, Judge Hays concurred with the majority because the district court failed to require security. 479 F.2d at 1020 (Hays, J., concurring).

For other cases using a preliminary hearing on the merits see Milberg v. Western

dure was expressed by Judge Weinstein in a symposium before the Fifth Circuit: "[A]lthough the merits hearing does not relieve class action defendants of substantial legal expense, it gives both parties and the court an early indication of the theory and strength of the case, perhaps encouraging more intelligent settlement discussions and more intelligent control of discovery."[73]

The Second Circuit rejected the preliminary hearing in *Eisen III*, observing that the results of these hearings could well be final. Without the procedural safeguards present at trial the potential for abuse of discretion could not be offset by the fact that the manageability issue had been simplified. Judge Medina felt that to permit such a procedure would, "be extremely prejudicial to one or the other of the parties who bear the brunt of such findings and conclusions, and such prejudice may well be irreparable."[74]

Admittedly the mini-hearing is susceptible to abuses of discretion. However, in the hands of a skillful district judge, the mini-hearing could become a sophisticated tool for promoting class actions. The dangers of prejudice which Judge Medina emphasized could be averted by less burdensome notice requirements, the use of sub-classes, test cases or motions for summary judgment. In view of the fact that efforts to detect frivolous plaintiffs and facilitate the management of class actions are to be encouraged the decision in *Eisen III* is unfortunate.

A "fluid recovery" involves two distinct steps.[75] First, the court must be able to assess the defendant's total liability to the class. Second, there must be a method available to distribute the damage award to the class as a whole, rather than to individual class members. This method must provide, with reasonable probability, that the injured members will recoup their losses.[76] In considering the fluid class re-

Pac. R.R., 51 F.R.D. 280 (S.D.N.Y. 1970), *appeal dismissed*, 444 F.2d 1301 (2d Cir. 1971); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968).

Cases rejecting the preliminary hearing in addition to *Eisen III* are: Miller v. Mackey Int'l, Inc., 452 F.2d 424, 427 (5th Cir. 1971); Mersay v. First Republic Corp. of America, 43 F.R.D. 465 (S.D.N.Y. 1968); Berland v. Mack, 48 F.R.D. 121, 132 (S.D.N.Y. 1969) (dictum).

[73] Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 229, 304 (1972).

Notwithstanding such progressive thinking, both the Second and Fifth Circuits have rejected the mini-hearing. *See Eisen III*, 479 F.2d at 1005; Miller v. Mackey Int'l, Inc., 452 F.2d 424, 428 (5th Cir. 1971).

[74] 479 F.2d at 1005. Judge Medina stated: "[N]either in amended Rule 23 nor in any other rule do we find provision for any tentative . . . makeshift determination of the issues of any case on the merits for the avowed purpose of deciding a collateral matter."

[75] For a thorough explanation of these steps see Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338, 363-65 (1971).

[76] *Compare* Judge Tyler's discussion of this procedure where he described fashioning "a procedure which will assure that the benefits of any recovery will flow in the main" to

covery as a means of achieving this difficult end, the *Eisen III* panel did not adequately treat the total liability aspect. The court focused primarily on the distribution of damages. Nevertheless the court's holding leaves little doubt that it viewed the assessment of class-wide damages as illegal.[77]

The panel felt their conclusion was justified by the Supreme Court's holding in *Snyder v. Harris*,[78] where the Court refused to allow the class representative to aggregate the damages of class members in order to satisfy the jurisdictional amount. The panel reasoned that if the Court were going to approve a fluid class recovery, it surely would have allowed the class as a whole to meet the jurisdictional amount.[79] However, it is submitted that *Snyder* should not be viewed as dispositive of the value of the fluid class recovery. In *Snyder*, the Court focused on the fact that the amount in controversy for jurisdiction traditionally had been the exclusive domain of Congress — to have allowed it to be met through aggregations would have been to exceed its authority. However, such deference to the domain of Congress should not be taken to preclude the fluid class recovery in all circumstances, especially where the jurisdictional amount is not involved.[80]

In assessing the manageability of a class action, the *Eisen III* panel felt that a vital consideration was the likelihood that the recovery would be efficiently distributed to the class members. After determining the potential total liability of the *Eisen* defendants, the district court had found sufficient repetitive activity within the class to fashion a fluid recovery which would most likely reach those actually injured.[81]

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those actually damaged by the defendant, 52 F.R.D. at 264, *with* the approach of Judge Angelli in Philadelphia v. American Oil Co., 53 F.R.D. 45, 72 (D.N.J. 1971), where a change in class composition was considered.

77 479 F.2d at 1014.

78 394 U.S. 332 (1969).

79 479 F.2d at 1014.

80 In *Snyder*, the Supreme Court took the position that procedural rules could not alter the judicial interpretation of congressional enactment. 394 U.S. at 338. In a recent decision, the Court adopted a similar approach in ruling that in a class action founded on diversity, each plaintiff, whether named or unnamed, must independently satisfy the jurisdictional amount. Zahn v. International Paper Co., 42 U.S.L.W. 4087 (U.S. Dec. 17, 1973), *aff'g* 469 F.2d 1033 (2d Cir. 1972), *discussed in Second Circuit Note*, 47 ST. JOHN'S L. REV. 339 (1972). Since Eisen was suing under the treble damage sections of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (1970), which do not involve a jurisdictional amount, his class action might evade the application of *Snyder* and *Zahn*.

The Court's disposition of *Eisen III* may well turn on whether it categorizes distribution of damages as an issue of substantive law. If the concept of a fluid class recovery is viewed as a procedural device for apportioning a recovery, it does not impermissibly conflict with any substantive rights of the defendants. On the other hand, *Snyder* may well represent a hostile judicial attitude towards class actions and the Court's recent decision in *Zahn* may forecast affirmance in *Eisen III*.

81 52 F.R.D. at 264. Judge Tyler was of the view that the uniformity of the alleged

In considering this procedure, Judge Tyler weighed the alternative approach of demanding individual proof of damages. This was deemed unrealistic because it would permit the avoidance of legal sanctions and the retention of illegal profits.[82] Moreover, to emphasize individual recovery at an early stage in an action with millions of small potential claimants would only serve to obscure the overriding issue of liability.[83]

The court of appeals considered this to be a "fantastic procedure," not only contrary to rule 23,[84] but also a violation of due process of law.[85] In words that leave little doubt of the court's strong position, the "fluid recovery" was declared to be "illegal, inadmissible as a solution to the manageability problems of class actions and wholly improper."[86] In reaching this conclusion, Judge Medina felt that the cases relied upon by the district court were readily distinguishable.[87] *Bebchick v. Public Utilities Commission*[88] was dismissed as inappli-

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overcharge allowed the court to look beyond individual claims. *Id. But cf.* Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971), wherein District Judge Angelli denied certification of a class action because the complexity of the pricing structure in the gasoline industry and the individual consumer's lack of records precluded an assessment of total or individual damages. Although citing no precedent, Judge Angelli stated that "no matter how easy it is to establish damages on a class level, if it is extremely difficult or almost impossible to distribute these sums to their rightful recipients, the class is unmanageable." *Id.* at 72. It is unclear what standard *Philadelphia* demands in the determination of "rightful recipients." If there must be 100% certainty, then its position apparently coincides with *Eisen III*; whereas if only a high degree of probability that the actual aggrieved parties will recoup is required, then *Philadelphia* is more in accord with District Judge Tyler's position. For a critical look at *Philadelphia* see Note, *Federal Rule 23(b)(3)(D): The Manageability Requirement in the Treble Damage Consumer Class Action*, 31 MD. L. REV. 354 (1971).

82 52 F.R.D. at 264. *Accord, In re* Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971), wherein Judge Lord stated:

> If we assume that a price fixing conspiracy is proven at trial, however, the defendants will have no right to the "pot of gold" created by their illegal activities. And the success of their scheme and the size of the pot would certainly be no basis for leaving the money in their hands.

Id. at 287.

83 52 F.R.D. at 264. In so ruling, Judge Tyler did not prohibit the filing of individual claims, but rather deferred them until an adjudication of liability. The fluid class recovery would only be utilized in case these claims did not exhaust the assessed total liability of the defendants. *Id.*

84 479 F.2d at 1018. Judge Medina felt that the "fluid recovery" affected substantive rights of the parties. The court held that amended rule 23 was neither intended to, nor could be permitted to affect substantive rights. *Id.* at 1014. *But see* Hazard, *The Effect of the Class Action Device Upon the Substantive Law*, 58 F.R.D. 299, 307 (1972), wherein the author states that "the function of procedure would be unintelligible if it were not to have substantive consequences."

85 479 F.2d at 1018. Apparently the court felt that to establish liability without verified individual damage claims violated due process.

86 *Id.*

87 *Id.* at 1012.

88 318 F.2d 187, 203 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963), wherein the court directed that the amount collected through the illegal overcharge be entered into Transit's books to be applied for the riders' benefit in any future rate proceeding.

cable because it was not a class, notwithstanding the establishment of a fund from the illegal overcharges. The *Drug Cases*[89] were rejected by Judge Medina because they involved settlement and not judicial decision.[90] Finally *Daar v. Yellow Cab Co.*[91] was rejected because it involved a state class action statute which was considered "very different" from rule 23.[92]

In rejecting such judicial innovation, *Eisen III* gives wrongdoers high barriers to hide behind. If the defendant chooses to litigate, no matter how ascertainable the amount of his exploitation, he can insist on individually verifiable damages. Further, if he can show that the administration of the distribution will leave the class members with only a "negligible" recovery he can have the action dismissed and enjoy his ill-gotten gains.[93]

Underlying the *Eisen III* decision was the panel's view of the antitrust statutes as primarily compensatory.[94] Consequently, proof of

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89 West Virginia v. Charles Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y.), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971), wherein Judge Wyatt administered a $100 million settlement as a result of alleged price fixing in the sale of antibiotic drugs. $37 million was alloted to the class of retail consumers. The court authorized consumers with verifiable damages to submit their claims by a certain date. After this date, the court permitted the state attorney general to apply the remainder for specific, approved public health purposes. *Id.* at 728.

90 479 F.2d at 1012. The district court conceded that there were differences between a settlement and a case litigated to the bitter end, but concluded that the procedure utilized in the *Drug Cases* was applicable *after* an adjudication of liability. 52 F.R.D. at 262.

91 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

92 479 F.2d at 1012.

93 *Id.* at 1017.

A more preferable approach was taken in the *Drug Cases:* "The court would be hesitant to conclude that conspiring defendants may freely engage in predatory price practices to the detriment of millions of individual consumers and then claim to keep their ill-gotten gains . . . because [the mulcted consumers] are many and their individual claims small." 333 F. Supp. at 282-83.

94 At least one commentator is in accord with the panel on this point, noting:

> There is a significant difference between a statutory damage remedy designed to compensate injured parties and a procedure which requires wrongdoers to disgorge all their improperly obtained profits. Congress might well have the power to provide such an "unjust enrichment" remedy, but as of today it has not done so.

Malina, *Fluid Class Recovery as a Consumer Remedy in Antitrust Cases*, 47 N.Y.U.L. REV. 477, 493 (1972) [hereinafter cited as Malina]. The author also argued that most consumer class actions are barred by the Supreme Court's holding in Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968). In *Hanover* the Court rejected the defendant's claim that the plaintiff "passed on" the illegal overcharge. The Court reasoned that the higher price on resale could have been due to many economic factors besides the overcharge. Thus, Professor Malina contended that consumers who purchase down the chain of sale have no legally cognizable injury to assert against a manufacturer due to the merger of variables forming a retail price. Malina at 484-88. *But see* Alaska v. Standard Oil Co., 487 F.2d 191 (9th Cir. 1973), wherein the Ninth Circuit refused to interpret *Hanover* as establishing an impermeable "passing on" defense. "It appears obvious to us that the Supreme Court [in *Hanover*] was not enshrining privity as a requirement of the antitrust

actual damages is required thereby foreclosing the use of the fluid recovery. Exacting all of the defendants' illegal gains via a fluid recovery would be punitive in the absence of individual proof of injury.

Perhaps the court focused too narrowly on "compensation" to the exclusion of the injury to the small consumers. If the Clayton Act is to be a valuable tool for small consumers, it must provide a remedy where injury is shown, and resort to more generalized damage proof such as market studies or records of the defendants. Another factor which *Eisen III* did not sufficiently recognize was the deterrent aims of the antitrust laws. The individualized damage proofs demanded by *Eisen* result in little compensation and less effective deterrence. The Supreme Court has emphasized the deterrent effect of private enforcement of the antitrust laws and characterized it as the "best" and "ever present threat" against illegal business behavior.[95] Moreover, the Court has recognized that deterrence includes disgorging illegal gains from the wrongdoer.[96]

Finally, the panel's assertion that a fluid recovery cannot be justified under amended rule 23 is questionable. The rule begins: "One or more members of a class may sue . . . on behalf of all . . . ."[97] In a rule 23(b)(2) class action, the representative can obtain classwide injunctive relief.[98] The entire tenor of the rule seems oriented toward a classwide remedy. To read into rule 23 the possibility of an award of damages to the class as a whole is not as "fantastic" as Judge Medina would have it.

Developed carefully, on a case-by-case basis, the "fluid recovery" has much to recommend it. Admittedly, it is not a universal curative for social inequities and trial courts should utilize it within reasonable guidelines. These could take the form of requiring an accurate assessment of the total damages coupled with a distribution method likely to

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laws." *Id.* at 197. The court concluded that "to permit so large a fish to escape the net is unthinkable." *Id.* at 198.

95 Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968), wherein the Court noted that the doctrine of *pari delicto* had no place in the antitrust laws:

> The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant . . . . [A] more fortuitous regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement.

Id. at 139.

96 *See* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

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

98 FED. R. CIV. P. 23(b)(2) allows injunctive or declaratory relief "with respect to the class as a whole."

reach the injured members of the class.[99] In examining the class, the court should demand a relatively stable class composition and a reasonable quantum of repetitive activity. If the court finds any of these factors lacking, it would then be justified in refusing to apply the fluid class recovery.

The *Eisen III* panel could have granted certification along traditional lines. As Judge Oakes observed, the panel completely ignored the possibility of breaking down the odd-lot class into smaller subclasses with one sub-class serving as a test case.[100] To contend, as does *Eisen III,* that class size itself renders an action inherently unmanageable is an unprecedented position which unduly limits the ability of the judiciary to fashion remedies effectuating the goals of rule 23.[101]

Eisen III has struck a severe blow to many consumer plaintiffs seeking redress under rule 23. In dismissing *Eisen,* the Second Circuit intended to make the class action device an operable medium for parties with individually provable injuries. The court viewed actions such as *Eisen,* with classes ranging into the millions, as vehicles to bludgeon corporate defendants into lucrative settlements. Seeking to eradicate this "legalized blackmail,"[102] the court hoped that rule 23 would remain for smaller groups and that Congress would establish procedures for the massive consumer classes.[103] Such judicial fiat pragmatically has resulted in leaving the many, but small, consumers presently without effective recourse. Conceding the obvious potential for "legalized blackmail" in large class actions, the solution does not lie in destroying the consumer's vehicle. Rather, it is for the courts to assume the burdens of rule 23 and by judicial scrutiny and ingenuity segregate meritorious claims from the frivolous.

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99 If there was not a sufficient likelihood that the parties actually injured would be among those recovering, applications of the fluid class recovery would be an unauthorized punitive measure.

100 479 F.2d at 1023. These sub-classes could be based on geographical locations of the members, size of their transactions or dates of their purchases. Although this suggestion would not be workable where the sub-classes were not homogeneous, this was not a problem in *Eisen.*

101 Even the court in *Philadelphia,* 53 F.R.D. at 73, would not apply the broad prohibitions of *Eisen III:* "[E]ach case must turn on its own facts. Numbers alone would not necessarily be determinative as to whether a particular class should be certified. Methods of marketing, price structure, availability of records, economic data and other considerations enter into the picture."

102 Handler, *The Shift From Substantive to Procedural Innovation in Antitrust Suits — The 23rd Annual Antitrust Review,* 71 COLUM L. REV. 1, 9 (1971).

103 479 F.2d at 1019. *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.03, at 160-62 (1972), wherein Professor Davis distinguishes between legislative and adjudicative facts. Legislative facts concern questions of law and policy, while adjudicative facts relate particularly to the immediate parties. Perhaps the *Eisen III* court is saying that when millions of people are involved the resolution should be legislative.

Rule 23 inherently imposes difficulties upon the courts. The time and energy expended by the judicial process and the development of imaginative and flexible procedures will not be easy. But if consumers are to be afforded redress, if the poor class member is to be represented, if wrongdoers are to be deterred and if rule 23 is to succeed, courts cannot refuse their responsibilities.

Since the Supreme Court has granted certiorari in *Eisen* final resolution is on the horizon. By refusing to rehear en banc[104] the Second Circuit has deprived both the Supreme Court and the legal community of the full benefit of its expertise.[105] It is possible that *Eisen* will be returned by the Supreme Court for an en banc appraisal by the Second Circuit.[106] Also it is possible that the Supreme Court will find that the Second Circuit lacked jurisdiction in the first instance.[107] It is hoped that the Supreme Court will squarely face and definitely clarify some of the uncertainty that *Eisen III* has caused. Whether the Court will accept the emasculation of rule 23 as a flexible and imaginative judicial tool is a question of momentous importance to consumer, environmental and antitrust advocates. Hopefully the Court will cast a vote of confidence in the ingenuity of the federal courts and the viability of rule 23.[108]

DENIAL OF REHEARING EN BANC

Boraas v. Village of Belle Terre

The Second Circuit in *Boraas v. Village of Belle Terre*[1] declined to rehear en banc the decision rendered by a panel of the court. The

104 479 F.2d at 1020.

105 It was felt that rehearing would only generate "diverse views, necessitating ultimate resolution by the Supreme Court." *Id.* at 1021 (Mansfield, J., concurring).

106 In Western Pac. R.R. Corp. v. Western Pac. R.R. Co., 345 U.S. 247 (1953), the Court stated that en banc power is "a necessary and useful power — indeed too useful that we should ever permit a court to ignore the possibilities of its use in cases where its use might be appropriate." *Id.* at 260, *quoted in Eisen III*, 479 F.2d at 1025 (Oakes, J., dissenting from denial of rehearing en banc). *See* Civil Aeronautics Bd. v. American Air Transp., 344 U.S. 4, 5 (1952).

107 In granting certiorari the Supreme Court requested the parties to prepare and argue whether a district court's denial of class action status could be appealed under 28 U.S.C. § 1291 (1970). 42 U.S.L.W. 1053 (U.S. Oct. 16, 1973). An appeal is only permissible from a final order. *See* note 15 *supra*, where *Eisen I* and the "death knell" doctrine are treated.

Hopefully the Supreme Court on certiorari in *Eisen* will recognize the "death knell" doctrine as a proper jurisdictional basis for the Second Circuit's decision, and will go on to the merits of *Eisen III*, rather than leave rule 23 a hollow procedure. *See generally* Note, *Interlocutory Appeal from Order Striking Class Action Allegation*, 70 COLUM. L. REV. 1292 (1970).

108 *See* note 80 *supra*.

1 476 F.2d 806 (2d Cir.), *rehearing denied*, 476 F.2d 824, *prob. juris. noted*, 42 U.S.L.W. 3226 (U.S. Oct. 11, 1973) (No. 73-191).