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Eisen v. Carlisle & Jacquelin

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EISEN v. CARLISLE & JACQUELIN


Fundamental jurisprudential questions concerning the class action reached the Supreme Court in the case of Eisen v. Carlisle & Jacquelin.¹ On May 28, 1974 the Court resolved them in a way that “dealt a lethal blow”² to the large class suit.³

The petitioner brought a class action on behalf of himself and all other odd-lot investors on the New York Stock Exchange during a four year period, seeking damages and injunctive relief against the defendant odd-lot brokerage firms for alleged violations of the antitrust laws, and against the defendant exchange for alleged violations of the federal securities laws. The district

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¹. ___ U.S. ___, 94 S.Ct. 2140 (1974) [hereinafter referred to as Eisen].
³. All federal class actions must be brought in accordance with rule 23 of the Federal Rules of Civil Procedure. See Appendix. An action must satisfy the prerequisites of subsection (a) and in addition the requirements of subsection (b)(1)(A) or (b)(1)(B) or (b)(2) or (b)(3).

Most large class suits — those with a class consisting of thousands or millions of claimants each with a claim too small to finance individual litigation — are brought under subsection (b)(3). These actions arise in such varied contexts as antitrust and securities fraud litigation, consumer protection (credit, fraud and warranty), civil rights, welfare rights and environmental protection. They are generated by the “mass production” events characteristic of modern American life. Hazard, The Effect of the Class Action Device Upon the Substantive Law, 58 F.R.D. 299, 308 (1972). They present unique administrative difficulties which are intensified by applying the rules of single plaintiff-single defendant litigation. Under traditional adversarial standards they raise issues of champerty, e.g., Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 571 (2d Cir. 1968) (Lumbard, C.J., dissenting) (“Obviously the only persons to gain from a class suit are not potential plaintiffs, but the attorneys who will represent them.”), solicitation, e.g., Cherner v. Transitron Elec. Corp., 201 F. Supp. 934 (D. Mass. 1962), and the court’s interest in avoiding burdensome litigation, e.g., H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 118-20 (1973) (Judge Friendly criticizes the use of rule 23(b)(3) to provide a forum for the redress of small claims as placing an impractical burden on the courts and suggests that injunctive relief is the proper remedy).

The difficulties are minimized if the class action is considered an exceptional procedure. See, e.g., Dolgow v. Anderson, 43 F.R.D. 472, 481 (E.D.N.Y. 1968), summary judgment rev’d, 438 F.2d 825 (2d Cir. 1970), on remand, 438 F.2d 833 (2d Cir. 1970), modified, 438 F.2d 837 (2d Cir. 1970), on rehearing, N.F. R.D. 664 (E.D.N.Y. 1971), aff’d per curiam, 664 F.2d 437 (2d Cir. 1972), quoting Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U. Cin. L. Rev. 684, 717 (1941) (“The rule 23 class action “as a way of redressing group wrongs is a semi-public remedy administered by the lawyer in private practice”—a cross between administrative action and private litigation.”). The procedure has been characterized as a corrective device to restore the balance between unevenly matched litigants. Homburger, State Class Actions and the Federal Rule, 71 COLUM. L. REV. 609, 641 (1971).
court initially determined that the suit could not be maintained as a class action. On appeal, the circuit court first held that the district court's decision was appealable as a final order. In a second decision, the court of appeals intimated that the petitioner's suit might satisfy the requirements of rule 23, and remanded for an evidentiary hearing. After conducting hearings, the district court certified the suit as a class action, and entered orders intended to fulfill the notice requirements of rule 23. On appeal, the circuit court reversed the grant of class action status.

4. The first decision of the district court dismissed the class action (under rule 23(c)(1)) after finding that the plaintiff could not adequately protect the interests of the class (rule 23(a)(4)), that the proposed notice did not meet the requirements of rule 23(c)(2) or of due process, that common questions did not predominate over questions affecting only individual members of the class (rule 23(b)(3)), and that there were in general almost insuperable difficulties in the management of the suit as a class action. Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147 (S.D.N.Y. 1966), rev'd, 391 F.2d 555 (2d Cir. 1968).

5. When his motion for interlocutory review was denied, plaintiff appealed as of right under 28 U.S.C. § 1291 (1970). On a motion to dismiss the appeal, the circuit court, finding that the order would for all practical purposes terminate the litigation (plaintiff's individual claim was for only $70), held that "[w]here the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed." Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 121 (2d Cir. 1966) [hereinafter referred to as Eisen I], cert denied, 386 U.S. 1035 (1967).

6. In a widely read opinion elucidating many aspects of the class action procedure, the court reversed the denial of class action status, retained jurisdiction and remanded for an evidentiary hearing on the questions of notice, adequate representation, effective administration of the action and any other matters which the district court considered pertinent and proper. Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968) [hereinafter referred to as Eisen II].

7. On remand the district court called on the parties to provide further information on the issues of manageability and notice, Eisen v. Carlisle & Jacquelin, 50 F.R.D. 471 (S.D.N.Y. 1970), and issued an order allowing the suit to be maintained as a class action, Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971), rev'd 479 F.2d 1005 (2d Cir. 1973). The district court reached this determination by finding that plaintiff was in fact an adequate representative, and that the suit was manageable as damages could be estimated without the filing of individual claims, the costs of administration would not be excessive, and once individual claims were satisfied to the extent they were filed, the unclaimed remainder might be distributed through a "fluid class recovery." See note 8 infra.

It also found that notice could be given through a scheme including publication and individual notice mailed to the 2,000 investors with the greatest number of transactions during the period in question and a random 5,000 of the 2,000,000 identifiable individuals (the total class was estimated at 6,000,000). In addition, Judge Tyler ruled that the costs of this initial notice would be apportioned between the plaintiff and the defendant following a preliminary hearing to determine the plaintiff's likelihood of success at trial on the merits. This hearing was held, and finding that the plaintiff was more than likely to prevail at trial or upon a motion for summary judgment, the court assessed the defendants 90% of the cost of notice ($19,548) pending the outcome of the trial. The plaintiff had to bear the remaining 10%. Eisen v. Carlisle & Jacquelin, 54 F.R.D. 565 (S.D.N.Y. 1972), vacated, 479 F.2d 1005 (2d Cir. 1973).

8. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir.) [hereinafter referred to as

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that the parties consider the question of circuit court jurisdiction.9

This casenote will deal with the following class action issues which the Court considered: the appealability of pre-trial rulings; the notice requirements of rule 23(c)(2); the propriety of initially apportioning the cost of notice between the plaintiff and the defendant; the use of preliminary hearings; and the availability of a subclass action alternative.

Appealability

The Court, per Justice Powell, began consideration of the case by noting the basic proposition that: "[e]conomic reality dictates that petitioner's suit proceed as a class action or not at all." Turning to the threshold jurisdictional issue, the Court found that the district court's order imposing 90% of the notice costs on the respondents was appealable as a "final decision" Eisen III, rehearing and rehearing en banc denied, 479 F.2d 1020 (2d Cir. 1973), vacated and remanded, ___ U.S. ___, 94 S.Ct. 2140 (1974). The circuit court accepted the defendant's appeal of the class action determination on the ground that jurisdiction had been retained upon the prior remand to the district court, Eisen II, 391 F.2d 555, 570 (2d Cir. 1968), and as a "collateral order" under 28 U.S.C. § 1291. See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). In addition, the court explained that equality of treatment between plaintiffs and defendants mandated that the certification of a class action was appealable as an extension of the "death knell" doctrine of Eisen I. Eisen III, 479 F.2d 1005, 1007 n.1 (2d Cir. 1973), accord, Kor v. Franchard Corp., 443 F.2d 1301, 1307 (2d Cir. 1971) (Friendly, J., concurring). The "death knell" doctrine is explained at note 5 supra.

The court held that all readily identifiable absent class members must be given individual notice at the plaintiff's expense. Inability to finance this notice would result in the dismissal of the class action. Eisen III, supra at 1015. The cost of mailing notice to the 2,250,000 absent class members identified by the defendant would have been approximately $315,000. Eisen, ___ U.S. ___, ___, 94 S.Ct. 2140, 2147 (1974).

The court of appeals also held that a preliminary hearing on the merits for the purpose of apportioning notice costs was not authorized by rule 23 and was conducted in the district court without jurisdiction. Eisen III, supra at 1016. The class action was found to be unmanageable in light of the fact that "fluid class recovery" is not available under rule 23. Furthermore, such a remedy is an unconstitutional violation of due process of law. Id. at 1016-18. In a "fluid class recovery" damages are calculated for the entire class as an entity and unclaimed damages are formed into a fund for use in a manner having some relation to the compensation of the injured parties. See, e.g., Bebchick v. Public Util. Comm., 318 F.2d 187 (D.C. Cir.) (per curiam) (supplemental opinion), cert. denied, 373 U.S. 913 (1963); cf. West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir.), cert. denied, Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871 (1971) (states were allowed to recover through their attorneys general on behalf of individuals who had not filed any claims). In the district court, Judge Tyler discussed the possibility that the odd-lot differential might be reduced in futuro. Eisen v. Carlisle & Jacquelin 63 F.R.D. 263, 265 (S.D.N.Y. 1971).

under 28 U.S.C. § 1291 because it conclusively settled an important collateral question which would not merge with the cause of action on terminal review. The Court, which proceeded entirely by analogy to the decision in Cohen v. Beneficial Industrial Loan Corp., made no attempt to further elucidate the “practical” construction of finality first announced in that decision, or to set any limits on the vague “collateral order” doctrine. This is unfortunate, because the need for the doctrine has been questioned in light of the interlocutory review available since 1958 under § 1292(b), and because at least some circuits were anticipating “some measure of certainty” from this latest ruling.

The type of notice required under the rule was similarly held reviewable, apparently through discretionary application of pendent jurisdiction. The Court noted that it was not considering the issues of manageability and fluid class recovery, and therefore did not have to determine whether they were properly before the court of appeals under the theory of “retained jurisdiction.” Because the particular facts of the case presented only the issue of notice, and because the petitioners’ class action was not dismissed with prejudice, the decision did not determine on what facts, or whether at all, a class action determination may be considered so unconditional as to be appealable.

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11. 337 U.S. 541 (1949) (a derivative action in which the defendant corporation was allowed to appeal the denial of a motion to require the plaintiffs, pursuant to a state statute, to post security to assure their ability to pay taxable costs in the amount of $125,000).
12. The vague borders of the doctrine are exemplified by Gillespie v. United States Steel Corp., 379 U.S. 148 (1964), wherein it was candidly stated “that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the ‘twilight zone’ of finality.” Id. at 152.
15. Manageability is pertinent to the “superiority” finding required in a (b)(3) action. See rule 23 (b)(3)(D) in the Appendix.
16. See note 8 supra.
18. Justice Jackson, in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) included a qualification that “[t]he effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal.” Rule 23(c)(1) specifically states that “[a]n order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.”

Justice Jackson further stated this caveat: “But we do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security . . . appealability would present a
Interlocutory appeal, the product of a delicate balancing of fairness to a party and the conservation of judicial resources through avoidance of piecemeal review, serves to mark the bounds of district court discretion. The right has substantial impact on the flexibility of rule 23 in accommodating a variety of litigation and in evolving to meet the changing needs of society and the judiciary. An early commentary suggested that class action determinations should be certified under § 1292(b).10 The general forbearance from certifying appeals following class action determinations10 reflects the fact that rule 23 clearly vests discretion in the district court.

_Eisen I_ was the first case to announce a common sense exception, called the "death knell doctrine," to the "finality" rule for cases where the individual claim is so small that the plaintiff cannot proceed on it alone following an order that a class action may not be maintained.21 In _Eisen III_ the Second Circuit again broke new ground by allowing a defendant to appeal a class action certification.2 Subsequent decisions in the Second Circuit, however, indicate a difference of opinion within the panel as to the precise criteria for such an appeal.

In _Herbst v. International Telephone & Telegraph Corp._,23 for example, Judge Lumbard allowed a defendant to appeal from an order granting class standing on the ground that "judicial efficiency requires that appellate review be made before the parties and district courts have spent considerable time, effort, and money, on such action."24 In _Kohn v. Royall, Koegel & Wells_,25 different question." Id. at 547. In _Eisen_ the right of the district court to initially allocate notice costs to defendants in appropriate circumstances was uncontested. Only the application in the instant case was challenged. Reply Brief for Petitioner at 27, _Eisen_, U.S. ___, 94 S.Ct. 2140 (1974). Of course, orders requiring much greater expenditures have been considered interlocutory. Brief for the Petitioner at 24-25, n.8, _Eisen_, _supra_.


21. _Accord_, Shayne v. Madison Sq. Garden Corp., 491 F.2d 397 (2d Cir. 1974) (individual trebled damages claim of $7,482 too substantial for the denial of class action certification to sound the "death knell" of the action); Korn v. Franchard Corp., 443 F.2d 1301 (2d Cir. 1971) (denial appealable when individual claim was for $386). _Contra_, King v. Kansas City S. Indus., Inc., 479 F.2d 1259 (7th Cir. 1973) (per curiam); Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.), _cert. denied_, 407 U.S. 925 (1972).

22. _Contra_, Thill Sec. Corp. v. New York Stock Exch., 469 F.2d 14 (7th Cir. 1972); Walsh v. City of Detroit, 412 F.2d 226 (6th Cir. 1969) (per curiam).

23. 496 F.2d 1308 (2d Cir. 1974). Dannaher, J., concurring dubitante, _id_. at 1317, and Mulligan, J., concurring, expressed grave doubt that the order was appealable, _id_. at 1325.

24. _Id_. at 1313. The judge was also influenced by the possibility of a settlement foreclosing appellate review and thereby frustrating the exercise of the court's supervisory powers. _Id_.

25. 496 F.2d 1094 (2d Cir. 1974) (suit under Title VII of the Civil Rights Act of 1964
Chief Judge Kaufman observed that, in view of the court's "retained jurisdiction," the decision in Eisen III did not rest on a de novo determination of appealability. Three requirements were distilled from the Herbst decision which must be met for an immediate appeal under § 1291: (1) the class action determination must be "fundamental to the further conduct of the case" (a denial of class status would have satisfied the "death knell" doctrine of effective dismissal) (2) review of the order must be "separable from the merits" and (3) the order must cause "irreparable harm to the defendant in terms of time and money spent in defending a huge class action."

After the Supreme Court rendered its decision in Eisen, the Second Circuit in General Motors Corp. v. City of New York, again applied the Kohn-Herbst tripartite analysis to an appeal from an order granting class standing. In finding that the case failed to satisfy any of the three requirements for a § 1291 appeal, the court saw Eisen as "a reaffirmation of the exceptional circumstances required to justify departure from the 'final judgment' rule . . . ." Eisen reviewed a "finite and conclusive determination of judicial power" under rule 23(c)(2). In contrast, the court noted that a 23(c)(1) determination is a "discretionary decision, the propriety of which will necessarily vary from case to case."

Arguably, manageability problems, which call by necessity on judicial inventiveness for their solution, and the district court's determinations under 23(a) and (b) generally, which involve conditional decisions on questions of fact, should also be distinguished from the notice requirements found reviewable in Eisen.

The Notice Requirements of Rule 23(c)(2)

After accepting the appeal, the Court in Eisen turned to the notice requirements of rule 23(c)(2), which reads:

In any class action maintained under subdivision (b)(3), the

alleging sex discrimination in a law firm's hiring and internal employment policies).

26. Id. at 1098.
27. Id.
28. 501 F.2d 639 (2d Cir. 1974).
29. Id. at 646. The court noted the narrow application of the Cohen doctrine in Eisen which was limited to the notice question. Id. at 646 n.14.
30. Id. at 647.
31. Judge Kaufman, for example, considered that the burden of "complex, indeed often impressionistic, decisions" in the course of a class action "cannot serve as justification for immediate appellate review," Id. at 644 n.12.
32. The Advisory Committee Notes, Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 107 (1968) explains that the purpose of this mandatory notice is "to give the
court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

The Court held that the unambiguous language of the rule required that individual notice, as "the best notice practicable," must be mailed to all class members who could be identified through reasonable effort. Thus for the class action to proceed in this case, 2,250,000 absent class members would have had to be sent notice. As the Court's promulgation of the Federal Rules of Civil Procedure establishes neither their constitutionality nor their validity, it is not at all clear that the Court was bound to follow, as though it were a congressional statute, the exact wording of the rule. Regardless, it should be noted that the Court chose to emphasize the "best notice" language, and to ignore the qualifier "practicable under the circumstances."

Justice Powell summarily disposed of the three arguments the petitioner offered in favor of dispensing with individual notice and allowing published notice combined with random individual notice to be substituted in this type of case. The arguments were: first, that requiring individual notice was contrary to the public's interest in the enforcement of the antitrust and securities laws in that such a requirement would terminate the litigation; second, that individual notice is unnecessary because no absent class member has a large enough interest in the matter to justify separate litigation after opting-out of the action; and third, that adequate representation rather than notice is the hallmark of due process in a class action. Justice Powell side-stepped these practical considerations and relied on a strict reading of the rule itself.

members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This is to facilitate the chief innovation of the 1966 amendment which extended the judgment to include all members of the class. The committee aimed at minimizing instances of so-called "one-way" intervention in "spurious" actions in which plaintiffs were allowed by some courts to enter the action after decision on the merits, e.g., York v. Guaranty Trust Co., 143 F.2d 503 (2d Cir. 1944) (dicta), rev'd on other grounds, 326 U.S. 99 (1945).

— "[t]here is nothing in rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs."\(^4\) In response to the plaintiff's arguments he noted only that, upon notice, a class member might choose to participate in the management of the action.\(^5\) Justice Powell felt that, if adequacy of representation could substitute for individual notice, then by the same reasoning, it might also be substituted for publication, and in that case no notice would have to be provided at all.

The notice requirements of rule 23(c)(2) are only one part of the assurance of fairness to the absent class. Mandatory notice was designed to provide an opt-out election in 23(b)(3) actions, on the assumption that classes proceeding solely under this subdivision, rather than under (b)(1) or (b)(2), would be less cohesive and more difficult to represent adequately. Its purpose was to effectuate a judgment binding on all of the remaining class members.\(^3\) At the time of notice, when proceeding under 23(b)(3), it has already been determined that the members of the class do not have an important interest in individually controlling the prosecution of separate actions.\(^7\) Discretionary notice under rule 23

\(^34\) Eisen, ___ U.S. ___, 94 S.Ct. 2140, 2152 (1974).

\(^35\) Rule 23(c)(2) provides for such participation in that a class member is informed of his right to "enter an appearance through his counsel." Since the average claim was estimated at $3.90, Eisen III, 479 F.2d 1005, 1010 (2d Cir. 1973), the costs of counsel would be excessive even for this limited purpose.

\(^36\) See Advisory Committee Notes, Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 106-07 (1966). It is instructive to note an earlier draft of the amendment which was less inclusive in its notice provision: "To afford members of the class an opportunity to request exclusion, the court shall direct that reasonable notice be given to the class, including specific notice to each member known to be engaged in a separate suit on the same subject matter with the party opposed to the class." Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 34 F.R.D. 325, 386 (1964).

\(^37\) This determination is part of the superiority criterion, Fed. R. Civ. P. 23 (b)(3) (A). The rule also requires that common questions predominate over questions affecting individual members, id. at 23(b)(3), and that the claims of the representative who will fairly and adequately protect the interests of the class, rule 23(c)(4), are typical of those of the class, id. at 23(a)(3). In short, the 23(b)(3) action is not synonymous with the pre-amendment "spurious" class action which allowed for merely the equivalent of permissive joinder. Under the former rule there was merely a codification of the abstruse "privity" concept, Homburger, State Class Actions and the Federal Rule, 71 Colum. L. Rev. 609, 629 (1971). The new rule was intended to substitute functional considerations for the jural relations which were the formative elements of the class action under its predecessor. The 23(c)(2) section is inconsistent with that purpose: "an overly rigid scheme of notification" injecting "a disturbing mechanistic element into the functional approach of the rule." Id. at 630.

The 1966 amendment intends that all class members, excepting those who might choose to be excluded in some cases, will be bound by the decision, and that collateral
Within any time to keep the class informed and to encourage intervention if necessary. Finally, notice of any proposed compromise or settlement is mandatory under rule 23(e) and the res judicata effect of a judgment may be collaterally attacked on due process grounds in a subsequent action.

In ruling that all readily identifiable class members must be given individual notice, Eisen is contrary to earlier authority which held that the manner of notice should only be decided on the circumstances of each case. Justice Powell reviewed Mullane v. Central Hanover Bank & Trust Co., the leading case on notice, and Schroeder v. City of New York, cases he cited for the general proposition that notice by publication will not suffice where names and addresses are available. Mullane makes it clear that due process requires “notice reasonably calculated, under all the circumstances, to apprise interested parties. . . . But if with due regard for the practicalities and peculiarities of the case these

attack will be minimized. In ignoring these purposes and the functional method of class formation outlined above, some courts have reached the extreme of requiring that class members opt-in to the class by filing proofs of claim, e.g., Brennan v. Midwestern United Life Ins. Co., 450 F. 2d 999 (7th Cir. 1971), cert. denied, Herriman v. Midwestern United Life Ins. Co., 405 U.S. 921 (1972); Philadelphia Elec. Co. v. Anaconda Amer. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1966). The opt-in alternative has been endorsed in the American College of Trial Lawyers Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure 2-3 (1972). To the extent that this has already been implemented “there appears to be a fundamental inconsistency in providing, on the one hand, that a member who fails to request exclusion shall be included in the class and, on the other hand, that a member who fails to file a proof of claim shall be excluded from any recovery.” Kom v. Franchard Corp., 50 F.R.D. 57, 60 (S.D.N.Y. 1970), motion to dismiss appeal denied, 443 F.2d 1079, 1090 (2d Cir.), cert. denied, Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871 (1971); Kaplan, A Prefatory Note, 10 B.C. Ind. & Com. L. Rev. 497, 499 (1969). But see, Comment, Can Due Process Be Satisfied by Discretionary Notice in Federal Class Actions?, 4 CREIGHTON L. REV. 269, 302-03 (1971) (suggesting a system of mandatory individual notice, intervention by right, and a bar to collateral attack as to adequacy of representation in all class actions).


39. 339 U.S. 306 (1950). “The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected [citation omitted], or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.” Id. at 315. The Court in Eisen distorted this passage by quoting only the portion preceding the citation. Eisen, — U.S. —, 94 S.Ct. 2140, 2151 (1974).

40. 371 U.S. 208 (1962). The case is easily distinguished from Eisen as Schroeder was one of a small group of property owners.
conditions are reasonably met, the constitutional requirements are satisfied."\textsuperscript{41} In view of this broad language, and as Mullane took into account the financial burden of the notice required, the Court could have liberally construed rule 23(c)(2) as merely suggesting that individual notice may be an appropriate method in some cases. This would have accorded with suggestions by commentators that the analysis focus on the rights of the parties rather than the facile "identified through reasonable effort" criteria.\textsuperscript{42} A strict construction of the rule results not in a reasoned analysis of due process rights, but in the primacy of the subsidiary consideration — the ease of identifying the class members.\textsuperscript{43} The Mullane decision specifically approved relaxing due process protection where the state has an interest in the action, even if that interest is less than compelling.\textsuperscript{44} Since the advent of the "fluid recovery" and the parens patriae suit, defendants have made much of the specific phrase in the Clayton Act which provides for a recovery by any injured person of "threefold the damages by him sustained."\textsuperscript{45} They assert that this provision is "essentially compensatory."\textsuperscript{46} The Court, however, explicitly held in...\textsuperscript{41} Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (emphasis added). The case also refers to "notice and opportunity for hearing appropriate to the nature of the case." Id. at 313 (emphasis added).


\textsuperscript{43} If only reasonable effort is required for identification, why should more be required to notify those identified? By the same token the strict interpretation illogically required individual notice to some, while no notice at all may suffice for others. In trying to resolve such patent inconsistency, notice by publication to a large unidentifiable class is likely to come under attack. See Eisen III, 479 F.2d 1005, 1017 (2d Cir. 1973); cf. Eisen, ___ U.S. ___, 94 S.Ct. 2140, 2151 n.12 (1974).

Another effect of the emphasis on ease of identifying class members may be the imposition of new limitations on the definition of an ascertainable class. In view of the Court's holding on early 23(c)(1) determinations, see note 87 infra, and the ban on preliminary hearings on the merits, there would be an especially effective argument to bar a suit in which the size of the class depended on factual determinations. See, e.g., Richland v. Cheatham, 272 F. Supp. 148 (S.D.N.Y. 1967) (the class consisted of purchasers of stock at an allegedly inflated price and the factual question presented was how long the allegedly manipulative activities affected the market price).

\textsuperscript{44} Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-14 (1950) (where the state's interest was in its fiduciaries getting to a final settlement).


\textsuperscript{46} Malina, Fluid Class Recovery as a Consumer Remedy in Antitrust Cases, 47 N.Y.U. L. Rev. 477, 491 (1972).
Fortner Enterprises, Inc. v. United States Steel Corp. 47 that the Clayton Act serves a deterrent as well as a compensatory function, and in a later case has endorsed the use of the class action to prevent unjust enrichment and to deter violations of the antitrust laws. 48 In Eisen the federal interests were the public policies expressed in the antitrust and securities laws, and Judge Tyler specifically considered these in his cost apportionment analysis in the district court. 49 In a time of great inflation these public interests weigh heavily against the individuals’ interest in notice. 50

Without individual notice it may be desirable to conduct a more careful inquiry into the adequacy of representation. 51 The Eisen Court, rejecting the petitioner’s argument that adequacy of representation can cure notice defects, 52 held that both are requirements of the class action. The Court made no mention of Hansberry v. Lee, 53 in which the Court said, one “is justified in

47. 394 U.S. 495 (1969). “As the special provision awarding treble damages to successful plaintiffs illustrates, Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition.” Id. at 502. The law contains prima facie and tolling provisions to facilitate this result.

48. Hawaii v. Standard Oil Co., 405 U.S. 251 (1972). “Rule 23 of the Federal Rules of Civil Procedure provides for class actions which may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.” Id. at 266. As to securities fraud actions, see 3 L. Loss, Securities Regulation 1819-24 (2d ed. 1961). “The ultimate effectiveness of the federal remedies, when the defendants are not prone to settle, may depend in large measure on the applicability of the class action device.” Id. at 1819. Contra, Handler, The Shift from Substantive to Procedural Innovations in Antitrust Suits—the Twenty-Third Annual Antitrust Review, 71 Colum. L. Rev. 1, 10 (1971) (emphasizing judicial efficiency, Professor Handler believes that “the rule becomes counter-productive whenever it serves to escalate the litigation process.”) See generally Blecher, Is the Class Action Rule Doing the Job? (Plaintiff’s Viewpoint), 55 F.R.D. 365 (1972) (asserting that the need for class actions as a deterrent is greatest when plaintiffs are unlikely to pursue their claims, and favoring the parens patriae device).


50. See Note, Managing the Large Class Action: Eisen v. Carlisle & Jacquelin, 87 Harv. L. Rev. 426, 433 (1973) (suggesting that the government has as well, a “general affirmative interest in providing a mechanism to resolve grievances involving large numbers of individually small claims.” Id. at 435); cf., Note, The Rule 23(b)(3) Class Action: An Empirical Study, 62 Geo. L.J. 1123, 1166-70 (1974) (suggesting a consumer protection statute dispensing with all notice requirements when proof of all individual damages and compensation for all class members is not feasible).


53. 311 U.S. 32 (1940) (where petitioner was successful in collateral attack of a class action judgment on due process grounds).
saying that there has been a failure of due process only in those
cases where it cannot be said that the procedure adopted, fairly
assures the protection of the interests of absent parties who are
to be bound to it."54 All members of the class are in fact before
the court in the person of the representative. The logic of
Hansberry was relied on in a series of decisions55 and in a recent
proposal for a functional due process approach which suggested
that inadequate notice should be discounted when a judge has not
abused his discretion in determining that representation is ade-
quate.56 The implication of the Hansberry decision, that notice is
not critical to a binding judgment in a class action, is now appar-
tently outdated.57

Mullane suggested still another principle which could have
provided justification for the limited notice scheme employed by
the district court.58 In cases where there are many individuals,
each with a small and similar interest, reaching most of those
with an interest in objecting to any aspect of the case will safe-
guard the interests of all.59 If each claim is too small to warrant
individual litigation and each raises precisely the same questions
of fact and law, there is simply no need, for example, to question
2,250,000 claimants to find out whether there are any who object.

The circuit court relied on the fact that individual claims
would not be financially practicable as a basis for rejecting the
petitioner’s claim in Eisen II that the suit could be maintained
under subsection 23 (b) (1) (A). The court reasoned that inconsis-
tent or varying adjudications, against which (b) (1) (A) safeguards,
could not arise without the possibility of individual suits.60 In

54. Id. at 42.
55. E.g., West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir.), cert. denied,
Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871 (1971); Booth v. General Dynamics
56. Note, Collateral Attack on the Binding Effect of Class Action Judgments, 87
Harv. L. Rev. 559, 604-05 (1974); cf., Katz v. Carte Blanche Corp., 496 F.2d 747, 766 (3d
Cir. 1974) (Seitz, C. J., dissenting) ("The district court must exercise its informed discre-
tion in making . . . rule 23(b)(3) . . . findings and can be reversed as to the propriety of
these findings only for abuses of discretion [citation omitted].").
57. It is improper to conclude that as a result of the individual notice required by
Eisen, a court can now dispense with adequacy of representation. The Tenth Circuit,
however, distinguished Eisen as speaking to the requirements of the rule, not the Constitu-
tion, and held that adequate representation is not a prerequisite for a binding judgment
where the party seeking collateral relief has received the notice required by rule 23(c)(2)
and an additional opportunity to opt out after notice of the terms of the settlement. In re
Four Seasons Sec. Laws Litig., 502 F.2d 834, 843 (10th Cir. 1974).
58. See note 7 supra.
60. Eisen II, 391 F.2d 555, 564 (2d Cir. 1968).
Eisen III, the court rejected the logical extension of this position and failed to find that individual notice for the purpose of allowing members of the class to opt-out and bring suit individually would be of little use in the case. The court thus entertained two totally inconsistent expectations of the absent class. Through notice requirements allegedly imposed for the protection of the class, the court by its own admission denied its members any redress.

If the due process rights of the plaintiffs were before the Court, the due process holdings of Mullane and Schroeder would nevertheless have been inapplicable to the procedural due process issue involved. The narrow concept of "jurisdictional due process that assures fairness in acquiring adjudicatory power over parties with adversarial interests" was at issue in the two cited cases. The default judgments at issue were judgments which bound a party whose interests had not been represented. The class action, on the other hand, is designed to be an exception to the principles of procedural law that hold that each individual is free to determine whether, when and how to enforce his substantive rights, and that each is entitled to a day in court before his rights are affected by a judgment. It provides representation and relies on notice merely to assure the adequacy of that representation.

If the Court has in fact ruled that due process requires individual notice, then the damage to the class action procedure is severe. Congress is foreclosed from enacting legislation which either changes the rule or creates exceptions for particular types of cases. Under a due process rule a strong case could be made for mandatory notice in (b)(1) and (b)(2) actions where there are in some cases advantages to an opt-out procedure. By comparison,
due to the inability of individual members in a massive (b)(3) action to pursue suits of their own, there is rarely a reason for any of them to opt-out of the class. Although the majority of jurisdictions had read rule 23 (d)(2) literally as requiring only discretionary notice in (b)(1) and (b)(2) cases, the Second Circuit in Eisen II announced a contrary position. The Supreme Court’s Eisen decision has already been cited as authority for a requirement of individual notice to identifiable class members in a rule 23 (b)(2) civil rights action. This is a dangerous misconstrual of the Court’s opinion. As the due process issues were not properly ex-

is likely to be more cohesive than a (b)(3) class. The (b)(3) action, on the other hand, was originally intended as a matter of judicial efficiency to “achieve economies of time, effort, and expense, and promote uniformity of decision.” Advisory Committee Notes, Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 102-03 (1966). In practice, however, the massive (b)(3) action often has maximal cohesiveness. On the other hand, class members may have compelling interests in being excluded from a judgment in which individual adjudications might establish incompatible standards to govern the opponent’s conduct (a (b)(1)(A) case), e.g., Hansberry v. Lee, 311 U.S. 32 (1940) (a classic case of class members with identical rights, but adverse interests), or where a decision might preclude other members as a practical matter (a (b)(1)(B) case), e.g., when claims are made by numerous persons against a fund insufficient to satisfy all claims, or where a party has taken action or refused to take action with respect to a class (a (b)(2) case).


67. 391 F.2d 555, 564-65 (2d Cir. 1968) (notice is required in all class actions as a matter of due process); accord, Zachary v. Chase Manhattan Bank, 52 F.R.D. 532 (S.D.N.Y. 1971) (requiring notice in a large (b)(1) consumer class action). The case, however, should be characterized as a “false” (b)(1) action because the finance charge exacted by defendant was either legal or illegal as to all members; the argument for (b)(1)(B) certification in such a case was rejected in Eisen II, and as to (b)(1)(A), which is analagous to joinder under rule 19 (a)(2)(ii), Advisory Committee Notes, Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 100 (1966), inconsistent adjudications would not lead to incompatible standards for the opponent, but merely to recoveries for only some of the equivalently situated class members. Contra, Kohn v. Royall, Koegel & Wells, 496 F.2d 1094, 1099 (2d Cir. 1974).

68. Cruz v. Estelle, 497 F.2d 496 (5th Cir. 1974) (case remanded for a preliminary evidentiary hearing on, inter alia, “whether or not funds are needed, and if so are available to provide individual notice to identifiable class members.” Id. at 499. This is especially disturbing as the case involved a prisoner who filed his original petition pro se, written on toilet tissue. Id. at 498. He sought to represent the class of Texas prisoners “who either are adherents to the Buddhist faith or who wish to explore the gospel of Buddhism.” Id. at 497 n.3). The case suggests the undecided question of whether a class representative proceeding in forma pauperis, could require the state to bear the cost of individual notice to identifiable class members.
plored in the opinion, the holding must be limited to (b)(3) actions. Thus the petitioner in *Eisen* might have gone to trial on the issue of liability as a (b)(1) class and would not have been subject to the notice burden. Then, if the respondents were found liable, the petitioner under rule 23 (c)(4)(A) could have proceeded to the issue of damages as a (b)(3) class. It is likely, however, that the Court intended to foreclose such use of rule 23(c)(4)(A) by establishing the requirement of early notification.

*The Cost of Notice*

The Court's holding on who should bear the cost of providing notice was concise. With the possible exception of situations involving a preexisting fiduciary relationship between the parties, the plaintiff must pay for notice "as part of the ordinary burden of financing his own suit."

Rule 23 itself does not address the question of who should make the initial outlay for notice costs. Many courts had assumed that the class representative should pay. A number of others had deemed apportionment appropriate. Courts have more readily assigned the the whole or partial burden to a defendant who was a fiduciary, as in a stockholder's derivative suit, or where there were alleged violations of fundamental or civil rights.

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Note that rule 23 (c)(4)(A) permits a class action to be maintained with respect to particular issues.

70. See note 87 infra. The necessity for early notification, as a bar to the use of the preliminary hearing, would frustrate this bifurcated trial technique as well, and also bar deferment of (c)(1) determinations, e.g., in a "test case" procedure, and the various suggestions for the postponement of notice. E.g., *Alameda Oil Co. v. Ideal Basic Indus.,* 326 F. Supp. 98 (D. Colo. 1971), *dismissed,* 337 F. Supp. 194 (D. Colo. 1972).


75. E.g., *Ostapowicz v. Johnson Bronze Co.,* 54 F.R.D. 465 (W.D. Pa. 1972) (sex discrimination case where the court considered plaintiff's ability to pay and the likelihood of success on the merits and decided that where plaintiff established a prima facie case the costs should be shared equally between the plaintiff and the defendant); *Battle v. Municipal Housing Auth.,* 53 F.R.D. 423 (S.D.N.Y. 1971) (refusal to rent apartments as
If defendants are given a hearing on notice costs, then due process should not bar cost allocation, even though they may not succeed in recovering the costs should they prevail on the merits.\textsuperscript{6} Eisen, however, has established an inflexible rule declaring that allocation is impermissible when the action is truly adversarial. It is for this reason that the individual notice requirements will be so detrimental to large class actions. It is unfortunate that a rule of such significance has been adopted without a reasoned analysis and by relying simply on the single plaintiff-single defendant paradigm.\textsuperscript{7} Although cases involving a pre-existing fiduciary duty may be excepted,\textsuperscript{7} the decision apparently bars exceptions in furtherance of other legislative policies, such as in securities fraud, civil rights and treble damage actions.\textsuperscript{7}

Under the Eisen ruling, a plaintiff with insufficient funds should be dismissed as an inadequate representative.\textsuperscript{8} In some cases this action may lead to a denial of substantive due process, thus compelling courts to find alternative procedures.

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.\textsuperscript{81}

Some alternatives are: to allow the plaintiff to solicit class members under court supervision; to assure defendant of recovery by the posting of a security bond to cover the exceptional notice possible violation of due process and equal protection); Knight v. Board of Educ., 48 F.R.D. 108 (E.D.N.Y. 1969) (due process in school expulsion).


\textsuperscript{7}8. Id. at ----, 94 S.Ct. at 2153 n.15.

\textsuperscript{7}9. See Miller, Problems of Giving Notice in Class Actions, 58 F.R.D. 313, 323 (1972).

\textsuperscript{80}8. See National Auto Brokers Corp. v. General Motors Corp., 376 F. Supp. 620 (S.D.N.Y. 1974). In furtherance of rule 23(a)(4) some courts can now be expected to sanction broad discovery orders encompassing all of the plaintiff's financial affairs and including attorney-client arrangements. In Sayre v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 43 U.S.L.W. 2193 (E.D.Pa. October 11, 1974), the court rejected the defendant's interpretation of Eisen as implying that counsel should be disqualified when he does not actually expect reimbursement for costs advanced to the plaintiffs. Accordingly, the court disallowed discovery of the plaintiffs' financial assets when counsel had stated that he would advance the costs. On the other hand, the court allowed discovery of the plaintiffs' understanding of the fee arrangements, and particularly whether the plaintiffs were aware of their ultimate liability for all expenses should they lose the suit. The discovery was allowed subject to the attorney-client privilege.

costs; or to sanction donation of the notice costs by a charitable foundation or consumer group. Finally, it is perfectly proper to distinguish the plaintiff's obligation to bear initially the cost from the defendant's obligation to assist in the notification process. For example, in some cases, notice could be included in the defendant's regular mailings to the class.

The Preliminary Hearing on the Merits

By ruling that the plaintiff must pay the costs of notice, Eisen mooted all argument on the propriety of a cost allocation hearing. The Court, however, apparently misconstrued the district court's cost apportionment hearing "as a part of the determination whether . . . [the] . . . suit may be maintained as a class action." The Court rejected such preliminary inquiry into the merits of a suit, as had almost all other prior decisions. The earlier decisions, however, were concerned primarily with protecting the class from unauthorized attacks. The propriety of a class action is to be determined not on a motion to dismiss for failure to state a cause of action or on one for summary judgment, or on one on the merits, but rather on the express requirements of rule 23.

The Court in Eisen held that the hearing contravened rule 23 by securing for the plaintiff the benefits of a determination on

83. See, e.g., Zachary v. Chase Manhattan Bank, 52 F.R.D. 532, 536 (S.D.N.Y. 1971) (defendant was instructed to include the notice in his regular mailings while a hearing was scheduled to decide which party should bear the cost).
85. See Miller v. Mackey Int'l, Inc., 452 F.2d 424, 427 (6th Cir. 1971) (“In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of rule 23 are met.”) The court found no precedent for turning a rule 23 motion into a rule 12(b)(6) or rule 56 motion by allowing the district judge to evaluate the merits at this stage. Id. at 428.?; Kahn v. Rosentiel, 424 F.2d 161 (3d Cir. 1969); Shaw v. Mobil Oil Corp., BNA ANTITRUST & TRADE REG. REP., No. 641 at A-7-8 (D.N.H. 1973) (consideration of the merits is inappropriate in a class action determination, but the court must consider the issues and the nature of proof required at trial to determine whether there are common questions which predominate); Wolfson v. Solomon, 54 F.R.D. 584, 589-90 (S.D.N.Y. 1972) (evidentiary hearing is usually unnecessary in determination of class action status, normally pleadings and affidavits will suffice). But see, Milberg v. Western Pac. R.R., 51 F.R.D. 280 (S.D.N.Y. 1970); Dolgov v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968), summary judgment rev'd, 438 F.2d 825 (2d Cir.), modified, 438 F.2d 833 (2d Cir. 1970), on remand, 53 F.R.D. 684 (E.D.N.Y. 1971), aff'd, 464 F.2d 437 (2d Cir. 1972).
86. The district court purported to have determined the propriety of the class action prior to the preliminary hearing on precisely those requirements, Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 272 (S.D.N.Y. 1971), rev'd, 479 F.2d 1005 (2d Cir. 1973).
the merits without first establishing the class status of the action as required by rule 23 (c)(1) "as soon as practicable after the commencement of . . . [the] . . . action." The Court probably feared that the plaintiff might take advantage of the determination on the merits to force a settlement. The Court further feared unfairness resulting from pre-trial determinations if tentative prejudicial findings were made without the traditional rules and procedures applicable to civil trials. There is no reason, however, why a court could not or would not guard against such findings as might "color the subsequent proceedings."

Despite Eisen's ban on all preliminary hearings on the merits of a class action, the plaintiff is not protected from early judgments on the merits of his individual claim. The representative is still subject to discovery followed by a motion to dismiss or a motion for summary judgment. It is also not clear that the Supreme Court would reverse were a court to dismiss a plaintiff as an inadequate representative on the basis of a factual finding on the merits of his personal claim made in the course of an evidentiary hearing.

The Availability of Subclass Action Alternatives

The majority decision in Eisen vacated the opinion below

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87. Eisen, ___ U.S. ___, 94 S.Ct. 2140, 2152 (1974). See American Pipe and Constr. Co. v. Utah, 414 U.S. 538, 549 (1974). "[P]otential class members retain the option to participate in or withdraw from the class action only until a point in the litigation 'as soon as practicable after the commencement' of the action when the suit is allowed to continue as a class action and they are sent notice of their inclusion within the confines of the class. Thereafter they are either nonparties . . . or else they are full members who must abide by the final judgment, whether favorable or adverse." (Emphasis added).

One district court in the Second Circuit did postpone the class action determination while deciding the merits in favor of the plaintiff—by summary judgment, Ratner v. Chemical Bank New York Trust Co., 329 F. Supp. 270 (S.D.N.Y. 1971). This was in the defendant's interest, however, as the class action was later denied in order to spare the defendant a great liability unrelated to the damage to the class or to any benefit to the defendant, Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972) (a Truth in Lending Act case where in view of the $100 minimum recovery, the defendant's potential liability was $13,000,000). The requirements of rule 23(c)(1) would usually present no problem in the Southern District of New York, where a rule of the court specifically allows only 60 days for the (c)(1) determination, S.D.N.Y. R. 11(A)(c).


89. See Huff v. N.D. Cass Co., 485 F.2d 710 (5th Cir. 1973) (en banc). A plaintiff might lose "on the merits" in a preliminary hearing and therefore be disqualified as a proper representative because "he lacked the nexus with the class and its interests and claims which is embraced in the various requirements of 23(a) and (b). It is inescapable that in some cases there will be overlap between the demands of 23(a) and (b) and the question of whether the plaintiff can succeed on the merits." Id. at 714.

90. Eisen, ___ U.S. ___, 94 S.Ct. 2140, 2154 (1974). By vacating the decision
and dismissed the class without prejudice to the plaintiff to petition the trial court for certification of a smaller class — a subclass.\footnote{\textit{Eisen III} the Court reopened the issues of manageability and "fluid recovery" which had been decided in favor of the defendant below. \textit{See note 8 supra.}} In the future, members of a large class of plaintiffs with small claims will have to seek "subclass" relief which is economically feasible in light of the notice requirements. A representative whose class suit is dismissed for inability to pay notice costs will have to limit the size of his class arbitrarily in order to conform to the size of his pocketbook. Within reasonable limits courts should find this arbitrarily limited class valid under rule 23 (c)(4)(B)\footnote{\textit{Cf. Illinois v. Harper & Row Publish., Inc.,} 301 F. Supp. 484, 494 (N.D. Ill. 1969) ("Although the restrictions on the classes' scope appears arbitrary, the enumerated members should not be penalized solely because the unrepresented libraries and schools will not receive redress for their overpayments.").} even though the subsection was originally intended to resolve problems of adverse or divergent interests within a class.\footnote{\textit{Advisory Committee Notes, Amendments to Rules of Civil Procedure,} 39 F.R.D. 69, 106. \textit{See, e.g.,} Carr v. Conoco Plastics, Inc., 423 F.2d 57 (5th Cir. 1970), \textit{cert. denied,} 400 U.S. 951 (1970).} A subclass will have to be small enough for the purpose of notice, but large enough to present a meaningful case. Possible definitional bases include: all plaintiffs within a specified geographical area, all plaintiffs whose cause of action arose between certain specified dates, all plaintiffs who have concluded over a specified number of transactions or whose claims are for over a specified amount,\footnote{The difficulty with this type of subclass is that the amount of damages cannot be contested until after a finding of liability.} and all plaintiffs distinguished by certain particular facts characteristic of their case, for example, purchasers of stock through a particular investment plan.

Plaintiffs not included in a subclass could bring a separate subclass action, if there is another economically feasible class, and the actions could then be consolidated under rule 42(a). While it is theoretically possible that those outside the litigating subclass could sit back and rely, through stare decisis or collateral estoppel, on a successful outcome of the subclass case, as a practical matter the statute of limitations will run for those outside the subclass before a decision on liability is reached. For the original class members in a case like \textit{Eisen}, where the initial action is for some reason dismissed, the statute of limitations, tolled since the
commencement of the action, begins to run again upon dismissal. In a large subclass action the trial will be of sufficient duration so that the defendants, desirous of ending any possible liability to those outside the subclass, will have no need to resort to dilatory tactics to insure that the statute of limitations will run out.

The essence of Justice Douglas' separate opinion, suggesting that the class action should not be dismissed, is that the statute of limitations might remain tolled for all original class members while a subclass proceeds to trial. He suggests that the district court may, pursuant to rule 23 (c)(1), reduce the class to a subclass under rule 23 (c)(4)(B), thus preserving the full class complaint as it was defined when the initial decision was made that the action did in fact meet the prerequisites of rule 23(a). This is the procedure formulated by Judge Oakes in the Second Circuit: “one subclass treated as a test case, with the other subclasses held in abeyance.” Justice Douglas noted that the rights of the members of the larger class, who were not parties to the subclass action, would present some as yet unanswered questions.

Some of these “unanswered questions” were dealt with by the Third Circuit sitting en banc in Katz v. Carte Blanche Corp. which approved the use of a “test case” procedure. Katz 95. See American Pipe and Constr. Co. v. Utah, 414 U.S. 538 (1974) (holding that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class for the reason that, inter alia, a contrary holding would encourage individual intervention, precisely the multiplicity of activity which rule 23 was designed to avoid). 96. Justice Douglas points out that the essential purpose of the statute of limitations is served since the defendants were put on notice within the statutory period. Eisen, U.S., 94 S.Ct. 2140, 2154 n.2 (1974) (Douglas, J., dissenting in part).

97. Rule 23(c)(1) allows the district court to alter its class action certification by reducing the larger class to a subclass without amendment of the complaint as filed. Id. at 2155.

98. Id. at 2156. “Not an iota of change is made in the cause of action by restricting it to a subclass” to prosecute the action. Douglas asserts that this is the case even if failure to meet the requirements of rule 23(c)(2) is classified as a problem of manageability under the superiority provisions of rule 23(b)(3)(D). Id.

99. Eisen III, 479 F.2d 1005, 1023 (2d Cir. 1973) (Oakes, J., dissenting from the denial of rehearing en banc).


101. 496 F.2d 747 (3d Cir. 1974) (en banc). In this case the defendant sought a postponement of notice which he believed would seriously damage his business, and was willing to stipulate that members of the class would not be bound by a decision in his favor, although judgment for the plaintiff would bind the defendant as to the entire class. The court reversed the district court order permitting the case to be maintained as a class
is an unusual case in that the defendant was willing to stipulate that he would be collaterally estopped from denying liability to the as yet undetermined class following a decision in favor of the individual plaintiff, although he could rely only on stare decisis should he prove successful in the test case. The court was therefore able to postpone the class determination and the (c)(2) notice which rule 23 affords as protection against "one-way" intervention. "One-way intervention" by plaintiffs after a judgment adverse to the defendant is considered objectionable by many courts because it gives collateral estoppel effect to the judgment of liability, although the estoppel is not mutual. In Katz the court denominated the action a "test case," not a class action, and held that in light of the Supreme Court's decision in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, which cast serious doubt on the validity of the mutuality doctrine, the issues would not have to be relitigated in actions following the test case. The "test case" procedure if used without the defendant's consent would serve the same function as the Douglas alternative because the statute of limitations is tolled for the putative class. The "test case" plaintiff, however, lacks the financial advantage and negotiating strength that a representative gains from the class certification.

Although the majority decision in Eisen does not hold that any class which for some reason cannot proceed to trial must be dismissed, the "test case" and Justice Douglas' alternative clearly are unworkable under the Court's guidelines. If the "test case" proceeds in lieu of an early (c)(1) determination as the Katz

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102. 402 U.S. 313, 329-30 (1971) (holding that the doctrine of mutuality of estoppel does not prevent the defendant's use of a former judgment in a patent infringement suit and containing broad dicta on the decline of the mutuality requirement; the Court, however, pointed out that a plaintiff's offensive use of collateral estoppel raised somewhat different questions). See Zdanok v. Glidden Co., 327 F.2d 944, 953-56 (2d Cir. 1964) (action by employees on a collective bargaining agreement; doctrine of mutuality of estoppel held not a bar to the offensive use of collateral estoppel); United States v. United Airlines, 216 F. Supp. 709 (S.D. Cal. 1962), aff'd as to res judicata, sub nom., United Airlines v. Weiner, 335 F.2d 379, 404-05 (9th Cir. 1964) (defendant's liability for an air disaster was determined in a California judgment and the defendants were collaterally estopped from denying liability when other heirs brought suits in Washington and Nevada).

case suggests, it is contrary to the rule that class action status is to be determined “as soon as practicable.” It would be, in fact, an actual determination of liability before the class is established. If the class is “held in abeyance” following a (c)(1) determination, as Justice Douglas suggests, the procedure is contrary to the (c)(2) notice requirement which insures that all class members will be bound by the decision unless they request exclusion from the action. In either case the procedure is identical with the “one-way intervention” that the 1966 amendments were designed to avoid. In sum, the Eisen interpretation of rule 23(c)(2) makes the large consumer class action unworkable.

A bill104 has been introduced in the House in an attempt to restore flexibility to the class action and avoid the obstacles raised by Eisen.105 Unfortunately the bill, which intends a sub-class solution to manageability problems, is simply a restatement of rule 23(c)(4)(B). Effective legislation of this type would require specific provisions that the statute of limitations is to be tolled for plaintiffs outside the litigating subclass and that non-parties would not have to relitigate the issues after a successful subclass action. While the former is simply a change in statutory law, the latter modifies common law with a long judicial history. Any useful subclass action law in some way postpones notice until after a determination of liability. A law simply eliminating the (c)(2) mandatory notice requirement from rule 23 would be equally beneficial to the class action. Voiding this one subdivision in one subsection of one of the Federal Rules of Civil Procedure has the additional advantage of not unnecessarily complicating the class action procedure. As Eisen relied on the language of rule 23, and not on the due process clause, this revision should be fully constitutional.

The public interest mandates that Congress enact legislation in this area.105 As it now stands, Eisen, through the imposition of

104. H.R. 16153, 93d. Cong., 2d Sess. (1974). “In any class action, the trial court may make any order respecting the size of the class or the creation of a subclass as it determines — (1) is necessary to render such class action more manageable; (2) is compatible with the interests of justice; and (3) does not result in unnecessary subdivision of the class.” Id.


106. In terms of antitrust actions alone the stakes are very high. “Monopoly and oligopoly currently cost our country a minimum of 50 to 60 billion dollars each year in terms of lost output flowing from . . . inflated costs and prices.” Kohn & Kaplan, The Antitrust Class Suit: A Manageable Instrument for Social Justice, 41 ANTITRUST L.J. 292 (1972).
notice costs, effectively bars large consumer-type actions where the individual sums, though small, result in a severe aggregate injury. That the representative party may seek relief in a subclass action in no way lessens the injustice suffered by the balance of the class.

The resolution of the notice issues in *Eisen* is a clear example of the substantive impact of procedural change.\(^{107}\) The use of the class action to redress large groups of small claims has a respectable judicial history.\(^{108}\) The burden that the complex litigation involved imposes upon the courts pales in significance when there is no alternative relief.\(^{109}\) The *Eisen* decision will have a more detrimental effect on class actions than even the Court’s prior decisions barring the aggregation of claims to meet the “matter in controversy” requirement for diversity jurisdiction.\(^{110}\) *Eisen* effectively bars massive class actions even in cases where no minimum amount is required.\(^{111}\) It can also be anticipated that many state courts will follow the federal example, thereby barring relief in any forum, a fact which “will do no judicial system credit.”\(^{112}\)

*Morton Jeremiah Marshack*

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107. Judge Weinstein explains that there is usually a policy basis for procedural change. “As a general principle . . . procedural change has substantive impact. It makes litigation easier either for plaintiffs or defendants, thereby affecting the substantive balance between the two.” Weinstein, *Some Reflections on the “Abusiveness” of Class Actions*, 58 F.R.D. 299 (1972).

108. See, e.g., *Hohmann v. Packard Instr. Co.*, 399 F.2d 711, 714 (7th Cir. 1968); *Escott v. Barchris Constr. Corp.*, 340 F. 2d 731 (2d Cir. 1965), *cert. denied*, *Drexel & Co. v. Hall*, 382 U.S. 816 (1969); *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 90 (7th Cir. 1941). Even though some courts have held that difficulties of administration will bar a class action, the procedure is specifically intended to be used wherever there is no superior method for adjudicating the claims presented. Rule 23(b)(3) states that problems of manageability affect only the relative superiority of the class action procedure.


111. There will of course be random exceptions, as where a defendant who is a fiduciary of the class may be required to pay notice costs or where costs are minimal because mailings are made regularly in the course of business.

APPENDIX

Federal Rule of Civil Procedure 23

CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

   (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

   (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) 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; or

(3) 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. The matters pertinent to the findings 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 the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be
Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or
otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.