FEDERAL CIVIL PROCEDURE—UNMANAGEABILITY OF ADMINISTRATION OF A SUIT AS A CLASS ACTION AND REFUSAL OF CLASS REPRESENTATIVE TO PAY OR POST BOND FOR REQUIRED INDIVIDUAL NOTICE ARE SUFFICIENT GROUNDS FOR DISMISSAL OF THE SUIT AS A CLASS ACTION. —*Eisen v. Carlisle & Jacquelin* (2d Cir. 1973).

A treble damage antitrust action was brought by an odd-lot investor against two brokerage firms and the New York Stock Exchange on behalf of himself and all other odd-lot investors during a four-year period. The lower court initially ruled that the action was not maintainable as a class action, but was reversed on appeal and the case was remanded for an evidentiary hearing. On remand the court found that the action was maintainable as a class action, that the defendant would be required to pay ninety percent of the cost of notice and that the calculation and distribution of damages could be accomplished using the fluid class recovery method. *Held,* reversed and dismissed. The class in this antitrust action consisted of approximately 6,000,000 persons of whom about 2,250,000 were easily identifiable. Since the fluid class recovery method is illegal, administration of proof of damages and distribution of the same is unmanageable. Also, the class representative has refused to pay or post bond for the cost of individual notice to the identifiable members of the class. Both of these defects are sufficient grounds for dismissal of the suit as a class action. *Eisen v. Carlisle & Jacquelin,* 479 F.2d 1005 (2d Cir. 1973).

If the pre-requisites to a class action are met,[1] it is still necessary to determine whether the action falls into one of the three categories for which a class suit is permissible. The scope of this Case Note is limited to that category delineated by subdivision (b)(3) of Federal Rule of Civil Procedure 23 into which *Eisen* fell.[2] It reads in part:

> (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.[3]

One of the matters pertinent to a finding that a class action is superior to other methods is the difficulties to be encountered in the management of

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1. These pre-requisites are set out in FED. R. CIV. P. 23(a)(1)-(4).

2. This is not to say that the discussions given *infra* do not apply in any manner to subdivisions (b)(1) or (b)(2) of Rule 23. Inevitably there is some overlap among the categories. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I),* 81 HARV. L. REV. 356, 390 n.130 (1967) [hereinafter cited as Kaplan].

3. A large majority of the class actions allowed are filed under Rule 23(b)(3). C. WRIGHT, LAW OF THE FEDERAL COURTS 312 (2d ed. 1970).

the suit as a class action.[4] Generally these difficulties arise in two areas—notice to the class members and administration and payment of damage claims.

Where a court permits a (b)(3) class action to be maintained, it must comply with the notice requirements of subdivision (c)(2) of Rule 23 which provides:

> (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 judgment rendered in a (b)(3) class action is binding on all those whom the court finds to be members of the class who have not opted out.[5] Thus the above mentioned notice has constitutional overtones. However, it has been recognized that a class action is an exception to the general rule that formal notice and an opportunity to be heard must be given to an individual before he can be subjected to binding adjudication.[6] Courts have generally not agreed on the actual type and extent of the notice required and, as a result, they have permitted notice by publication[7] or required individual notice[8] or suggested a combination of both.[9]

Relying upon *Mullane v. Central Hanover Bank & Trust Co.*[10] and the first *Eisen* decision by the court of appeals,[11] the lower court in *Eisen* found that the due process requirement is flexible and must be applied on a case-to-case basis. They stated that where a class consists of a large number of claimants with relatively small claims, notice to individual members becomes less important both as a practical and a legal matter and need not be unduly emphasized. They also expressed concern that stringent and expensive notice requirements could vitiate beneficial class actions.[12] In the end, they directed individual notice to approximately 2,000 persons who had ten or more odd-lot transactions within the requisite time period, to 5,000 other persons selected at random from those who were identifiable, to all member firms of the New York Stock Exchange and to all commercial banks with large trust departments. They also directed notice by publication in five metropolitan newspapers.[13]

The court of appeals in *Eisen* rejected this method of notification and held

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4. FED. R. CIV. P. 23(b)(3)(d).
5. FED. R. CIV. P. 23(c)(3). The notice sent under order of Rule 23(c)(2) must inform the absent members of the class that, if they desire, they may "opt" out of the class. If they do so by notifying the court they will not be included in the judgment.
6. *See, e.g.*, Hansberry v. Lee, 311 U.S. 32, 41 (1940).
7. *See, e.g.*, Booth v. General Dynamics Corp., 264 F. Supp. 465, 472 (N.D. Ill. 1967).
8. *See, e.g.*, Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636-37 (D. Kan. 1968).
9. *See, e.g.*, Dolgow v. Anderson, 43 F.R.D. 472, 497-501 (E.D.N.Y. 1968).
10. 339 U.S. 306 (1950).
11. Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968).
12. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 266 (S.D.N.Y. 1971).
13. *Id.* at 267-68.

that all members reasonably identifiable *must* be given individual notice.[14] They followed the rationale of the Advisory Committee on the Federal Rules of Civil Procedure, which, in calling the notice mandatory, said that no discretion existed here as it was designed to fulfill requirements of due process of law.[15] They also followed the Supreme Court decision of *Schroeder v. City of New York*,[16] where a constitutional obligation of notification was found which was discharged by the mailing of a letter when a person was easily identifiable.

Once the issue of what type of notice is to be used is settled, it then must be decided who is to bear the expense of providing it. There have been courts and commentators who have assumed that the plaintiff always pays the cost of the initial notice.[17] Some have also been willing to admit the propriety of apportioning the burden in certain cases.[18] There are dual considerations at odds here. Where the expense is placed upon the plaintiff (individually or as a class), it could possibly be the end of a meritorious suit. On the other hand, if the costs of notice are arbitrarily imposed upon the defendant and the claim proves groundless, the defendant may have trouble recouping his payments from a large, diverse class.[19]

The New York district court in *Dolgow v. Anderson*[20] took the position that where notice is necessary the defendant might be required to provide it. They pointed out that subdivision (c)(2) of Rule 23 provides that notice shall be given as "the court directs"[21] and does not say that it must be given by the plaintiff.

After analyzing seven separate considerations[22] and going through a preliminary hearing on the merits, the lower court in *Eisen* decided that the defendent should bear ninety percent of the cost of the required notice.[23] The court of appeals disagreed and held that since they had previously determined the question it was not properly before the lower court. They stated in their

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14. 479 F.2d at 1015.
15. Advisory Committee's Note, FED. R. CIV. P. 23, 39 F.R.D. 98, 106-07 (1966).
16. 371 U.S. 208 (1962).
17. *See, e.g.*, Weiss v. Tenney Corp., 47 F.R.D. 283, 294 (S.D.N.Y. 1969); Richland v. Cheatham, 272 F. Supp. 148, 156 (S.D.N.Y. 1967); Kaplan, *supra* note 2, at 398 n.157.
18. *See, e.g.*, Herbst v. Able, 47 F.R.D. 11, 22 (S.D.N.Y. 1969); Dolgow v. Anderson, 43 F.R.D. 472, 498-500 (E.D.N.Y. 1968); *cf.* Note, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement*, 29 MD. L. REV. 139, 156 (1969) (defendant paying for the cost of notice is a possibility but notice requirement should be liberalized instead).
19. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 269 (S.D.N.Y. 1971).
20. 43 F.R.D. 472 (E.D.N.Y. 1968).
21. *Id.* at 498. *See also* School District of Philadelphia v. Harper & Row Publishers, Inc., 267 F. Supp. 1001 (E.D. Pa. 1967) (court declines plaintiff's offer to provide notice); *cf.* Note, *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 938 (1958) ("The court should be given the power to assign this burden (of giving notice) to the defendant in appropriate situations").
22. These seven were: (1) no binding rule as to who shall bear the expense of notice has been made yet; (2) the strong public policy behind antitrust laws and the fundamental role of treble damage suits; (3) the statute of limitation has run; (4) Rule 23 must be read liberally; (5) public interest in this case is theoretically great because of the large number of people involved; (6) the res judicata effect for the defendant; and (7) separate studies show plaintiff's claim to be non-frivolous. 52 F.R.D. at 269-70.
23. Eisen v. Jacquelin & Carlisle, 54 F.R.D. 565, 567 (S.D.N.Y. 1972).

first decision on *Eisen* that the plaintiff should pay for the cost of notice.[24] In their second decision on *Eisen,* they explained that they did so because "in such a case as this"[25] it was their interpretation of Rule 23 that the plaintiff should pay. They did not decide, nor intend to hold, that this was to be the rule for all cases. Thus, they allowed that in the future it was possible that a defendant might have to provide the notice. As possible examples they mentioned stockholder derivative suits or a case where a public utility corporation which regularly sends monthly bills to its customers has been found to have overcharged them and a class suit is brought to compel a refund.[26]

The court of appeals in *Eisen* held that the refusal of the class representative to provide the requisite individual notice was sufficient grounds to dismiss the case as a class action.[27] They also found that the case suffered from another infirmity as a class action—unmanageability of calculation and distribution of damages.[28]

The present calculation and distribution procedure is basically the same as that used in non-class actions.[29] Since this procedure was not designed for large numbers of people, problems are raised by its use. Ordinarily the claims must be accompanied by some type of proof. Inasmuch as the amounts recoverable in these actions are generally small[30] very few members of the class are likely to retain records sufficient to prove their claims. This is especially true when there is a substantial time lag involved from the initial injury until the liability is established.[31] Also, the sheer weight of numbers tends to unnecessarily burden a system which deals with each individual claim.

As a result of these problems some courts have formulated alternatives to the traditional methods. One such alternative is fluid class recovery.[32] Under it, the class as a whole is substituted for the individuals and a full scale trial is held to determine the liability of the defendant, if any. If such liability is found the damages are calculated and assessed considering the class as a whole. Real notices soliciting claims are then sent out and claims are received and processed. Any remaining money not used to settle individual claims is used for a purpose which generally benefits the whole class.

One problem which fluid class recovery has is the calculation of gross damages. In order to efficiently estimate gross damages there must be a common repetitive injury to the class or a repetitive action by the defendant.

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24. 391 F.2d at 568.
25. 479 F.2d at 1009 n.5.
26. *Id.*
27. *Id.* at 1015.
28. *Id.* at 1017-18.
29. Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338, 361 (1971).
30. Kalvin and Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684-85 (1941).
31. *See* City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 72-73 (D.N.J. 1971).
32. This method was described by Judge Weinstein in his series of opinions in Dolgow v. Anderson, E.D.N.Y., 43 F.R.D. 21 (1967); 43 F.R.D. 472 (1968); 45 F.R.D. 470 (1968); 53 F.R.D. 661 (1971); 53 F.R.D. 664 (1971).

If the estimate must involve calculating damages on an individual basis, the effectiveness of the method is lost. Another serious limitation of the method is the administration of the residual fund left after the individual claimants are paid. Few class representatives are fully capable to handle these funds. Usually the presence of a government regulatory agency is very advantageous.[33]

The significance of fluid class recovery is not that it is a panacea for all the ills associated with large class actions, but rather it shows that the court is willing to experiment with non-traditional methods to achieve a desired result. Although it has been used in a few cases,[34] many more cases involving millions of diverse and unidentifiable members of an alleged class have been dismissed as unmanageable or altered in composition.[35]

The lower court in *Eisen* found that gross damages could be justly and reasonably estimated from the defendant's records, a special study by the Security Exchange Commission, and from records of a special committee of the New York Stock Exchange.[36] Therefore, fluid class recovery was to be used and the residual fund left after paying individual claims was to be used to reduce the odd-lot differential in a reasonable amount until the fund was depleted.[37] It was conceded by the class representative that unless fluid class recovery or something similar was used the administration costs would overwhelm the refund.[38]

The court of appeals in *Eisen* held that fluid class recovery was an unconstitutional violation of due process of law as it subjected the defendant to gross damages involving millions of unasserted and unidentifiable claims. The court pointed out that the cases in which the method had been used were consensual affairs,[39] or not class actions,[40] or brought under state statutes differ-

33. Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338, 373 (1971).

34. *See* West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971); Bebchick v. Public Utilities Commission, 318 F.2d 187 (D.C. Cir. 1963), *cert. denied*, 373 U.S. 913 (1963); Daar v. Yellow Cab Co., 67 Cal. 2d 695, 63 Cal. Rptr. 724, 433 P.2d 732 (1967).

35. *E.g.*, City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971); United Egg Producers v. Bauer International Corp., 312 F. Supp. 319 (S.D.N.Y. 1970); Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968).

36. 52 F.R.D. at 262.

37. *Id.* at 265.

38. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1017 (2d Cir. 1973). The average treble damages due to the individual is about $3.90. 479 F.2d at 1010. The cost of administration was estimated at $500,000 without individual notice as required by the appellate court. Individual notice would cost $218,750. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 263 (S.D.N.Y. 1971). Thus, the total costs would run about $720,000. This means that almost 185,000 people would have to submit claims to have the class break even under the normal calculation method. Would 185,000 people consider it worth the bother to submit and verify a claim for only $3.90?

39. West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971) (settlement between the parties with an agreement to the assumption of the district court of jurisdiction to accept and administer the fund).

40. Bebchick v. Public Utilities Commission, 318 F.2d 187 (D.C. Cir. 1963), *cert. denied*, 373 U.S. 913 (1963) (amended Rule 23 not involved).

ing from Rule 23.[41] They also stated that Rule 23 in no way contemplates or provides for such a procedure. They buried any possibility of its use by stating: "We hold the 'fluid recovery' concept and practice to be illegal, inadmissable as a solution of the manageability problems of class actions and wholly improper."[42]

The 1966 amendment of Rule 23 was designed in large measure to fulfill the "historic mission of taking care of the smaller guy."[43] In considering large class actions wherein the assertable claims are relatively small two views exist as to what is the best method of achieving this purpose. One is that it is best accomplished by the deterrent effect of a possible large class action judgment[44] and the other is that the actual recovery of losses by the individual members of the class best protects the "smaller guy."[45]

Adherents to the first view hold that it is the prophylactic effect of Rule 23 that is most important, not the recovery by the individual of a small claim. They feel that the courts should be free to experiment with Rule 23 and, except in unusually difficult cases, they should react with flexibility and imagination in the use of the numerous tools believed to be available within the Rule.

The followers of the second view feel that to pursue a course of action which in the end produces nothing for the individual is to distort the function of the class suit. They assert that to obtain the proper results one must operate within the proper procedural safeguards. Any innovation which accomplishes its desired results through the threat of unmanageable and prohibitively expensive litigation is nothing more than "legalized blackmail."[46] As is apparent, the *Eisen* court is a proponent of this second view. They sought to maintain procedural safeguards by holding that individual notice must be given where class members are reasonably identifiable. They attempted to stop the extension of "legalized blackmail" by finding fluid class recovery illegal. By their decision they have given defendants to class actions another tool to use. This tool is the procedural requirements put forth in *Eisen* which can be asserted by defendants as a reason to dismiss class actions. To the *Eisen* court, Rule 23 provides "an excellent and workable procedure in cases where the number of members is not too large."[47] The effect of their decision in *Eisen* is to limit the availability of Rule 23 to just this type of case. The wronged masses will have to find another method to protect and assert their rights.

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41. Daar v. Yellow Cab Co., 67 Cal. 2d 695, 63 Cal. Rptr. 724, 433 P.2d 732 (1967) (California class action statute governing).
42. 479 F.2d at 1018.
43. Statement by Benjamin Kaplan, quoted in Frankel, *Amended Rule 23 from a Judge's Point of View*, 32 ANTITRUST L.J. 295, 299 (1966). *See also* Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. Ind. & Com. L. REV. 501 (1969).
44. Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 BUS. LAWYER 1259 (1970).
45. Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COL. L. REV. 1 (1971).
46. *Id.* at 9.
47. 479 F.2d at 1019.