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CLASS ACTIONS AND THE NEED FOR LEGISLATIVE REAPPRAISAL

I. Introduction

Rule 23 of the Federal Rules of Civil Procedure, which authorizes the use of class actions in federal courts, was substantially amended in 1966. Since its amendment there has been a continuing controversy regarding class actions maintained pursuant to Rule 23. In its 1973-74 term the Supreme Court decided two significant cases involving Rule 23. In *Zahn v. International Paper Company*[1] the Court held that all plaintiffs in class actions based on diversity must individually satisfy the $10,000 jurisdictional amount requirement of 28 U.S.C. § 1332. In *Eisen v. Carlisle & Jacquelin*[2] the Court held that due process requires that all identifiable class members who would be affected by an action brought pursuant to Rule 23(b)(3) must be given individual notice of the pendency of the suit. The result is that even if all plaintiffs in a class action satisfy the jurisdictional amount requirements of § 1332, the cost of individual notice to all identifiable class members will frustrate class suits with large numbers of plaintiffs whose individual damage claims are modest.

Congress authorized class actions to provide a procedural vehicle for the efficient adjudication of injuries suffered by large groups of individuals, and to encourage private enforcement of federal statutes. These goals have been severely curtailed by the Supreme Court's decisions in *Zahn* and *Eisen*. Makeshift procedures designed to circumvent the Court's decisions in these two cases will not give full effect to the legislative goals underlying class actions. As a result, if the Congress sincerely wishes its established goals to be realized, it may have to legislate more precise means.

II. Rule 23

Both *Zahn* and *Eisen* were brought pursuant to section (b) (3) of Rule 23. Section (b) (3) authorizes a court to certify a suit as a class action when it finds that the questions of law or fact common to the members of a class predominate over questions affecting only individual members, and that a class action is more likely than other available methods to result in a fair and efficient adjudication of the controversy.[3]

Before a court may certify a suit as a class action it must decide that: (1) the proposed class is so large that joinder of all members is impractical, (2) the suit involves 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.[4]

1 414 U.S. 291 (1973).
2 — U.S. —, 94 S. Ct. 2140 (1974).
3 Fed. R. Civ. P. 23(b)(3).
4 Fed. R. Civ. P. 23(a).

III. Class Actions in Federal Courts

Before a suit may be brought in a federal court the parties must satisfy certain jurisdictional requirements. One requirement is that in civil actions the matter in controversy must exceed the sum or value of $10,000.[5] Few plaintiffs in consumer and environmental actions suffer individual damages in excess of $10,000. For this reason, they are denied access to federal courts to prosecute their damage claims.

A. Zahn v. International Paper Co.

This case involved a class suit brought as a diversity action by property owners in Vermont, who sought to represent a class of approximately 200 persons, against a New York corporation for allegedly polluting Vermont waterways. The claim of each of the named plaintiffs was found to satisfy the $10,000 jurisdictional amount, but the district court dismissed the class action because it was convinced "to a legal certainty" that not every individual member of the class had suffered damages in excess of $10,000.[6] In support of its decision the district court cited *Snyder v. Harris*,[7] in which no member of the plaintiff class had alleged damages in excess of $10,000. The petitioners in *Snyder* had argued that the 1966 amendments to Rule 23 permitted aggregation of separate claims in order to comply with the amount in controversy requirement of § 1332. In rejecting the petitioners claim, the Supreme Court held that aggregation of claims was impermissible, and that the federal courts were without jurisdiction where none of the plaintiffs presented a claim of the requisite amount.[8]

Prior to the amendment of Rule 23, the majority of courts held that only named plaintiffs who intervened were bound by the result of a spurious class action. As amended, Rule 23 provides that all individuals whom the court finds to be members of the class will have their claims adjudicated and be bound by a final judgment, regardless of whether the judgment is favorable to the class. Therefore, it was only after the 1966 amendments to Rule 23 that the issue arose of whether all unnamed plaintiffs are required to independently meet the jurisdictional requirements of § 1332. The plaintiffs in *Zahn* argued that if some members of the class met the amount in controversy requirement of § 1332, a court could adjudicate the claims of all the other class members by utilizing ancillary jurisdiction.

A federal court may assert ancillary jurisdiction over third party claims when those claims arise out of the same transaction as an action over which the court has original jurisdiction. Ancillary jurisdiction may be asserted over third

5 The district courts have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 and is between (1) citizens of different states; (2) citizens of a state, and foreign states or citizens or subjects thereof; and (3) citizens of different states and in which foreign states or citizens or subjects thereof are additional parties. 28 U.S.C. § 1332 (1964).

6 53 F.R.D. 430 (Vt. 1971).

7 394 U.S. 332, 335-36 (1969).

8 394 U.S. at 336-37.

party claims regardless of the citizenship of the parties or the amount in controversy.[9]

On appeal, the Second Circuit noted that *Snyder* did not squarely hold that every unnamed member of a class must individually satisfy the jurisdictional amount requirement of § 1332.[10] However, the court found "persuasive internal evidence" in *Snyder* that the Supreme Court did not narrowly limit the rule of that case to the facts before it.[11] The Second Circuit sought to resolve the issue in *Zahn* by determining the congressional purpose underlying the amount in controversy requirement of § 1332. The court construed the amount in controversy requirement as an attempt to check the rising caseloads of the federal courts. Consequently, it concluded that only by dismissing this suit as a class action could the congressional purpose be served.[12]

B. Zahn *and the Supreme Court*

On review, the Supreme Court noted that since 1832 the established rule has been that plaintiffs with separate and distinct claims must each satisfy the jurisdictional amount requirement in order to maintain a suit in the federal courts.[13] The Court held that the meaning of the amount in controversy requirement as it applied to Rule 23 had been determined in *Snyder,* which it declined to overrule.[14] Instead the Court extended the holding of *Snyder* to require that any plaintiff in a class action who does not meet the amount in controversy requirement must be dismissed from the suit even though other plaintiffs allege jurisdictionally sufficient claims. In support of its decisions in both *Snyder* and *Zahn,* the Court noted the "underlying purpose and intent of Congress in providing that plaintiffs in diversity cases must present claims in excess of the specified jurisdictional amount."[15]

C. *Alternatives to § 1332*

The petitioners in *Zahn* did not request the Court to expand its established jurisdiction. Ancillary jurisdiction has been used previously to adjudicate claims that could not be fitted within the aggregation rules established by the Court. However, the majority opinion in *Zahn* did not consider the petitioners argument that class actions under Rule 23(b)(3) were appropriate for such treatment. The use of ancillary jurisdiction in class action situations was discussed by Justice Brennan in his dissenting opinion in *Zahn.* Brennan noted that the Court had sustained the use of ancillary jurisdiction over compulsary counterclaims under Rule 13(a), and also upheld its use when a party's intervention is

9 Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959).
10 Zahn v. International Paper Company, 469 F.2d 1033, 1034-35 (2d Cir. 1972), *cert. granted,* 410 U.S. 925, *aff'd.* 414 U.S. 291 (1973).
11 *Id.*
12 469 F.2d at 1035-36.
13 Zahn v. International Paper Company, 414 U.S. 291, 294-95 (1973).
14 *Id.* at 301.
15 *Id.*

a matter of right.[16] He argued that class actions under Rule 23(b)(3) are equally appropriate for such treatment.[17]

The effect of the Court's denial of ancillary jurisdiction will be to impose a greater burden on state and federal courts as a whole, and will frustrate the ability of prospective class members to assert their claims. State class action devices were suggested by Justice Brennan in his dissent to circumvent the minimum amount in controversy requirements for federal jurisdiction.[18] The California experience with class actions is worth noting as an example of how state courts can effectively try class actions.[19]

Section 382 of the California Code of Civil Procedure provides that "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."[20] There are no statewide rules of court similar to Federal Rule 23 in California, but the California Supreme Court in *Vasquez v. Superior Court*[21] ruled that "in the event of a hiatus [in California law] Rule 23 of the Federal Rules of Civil Procedure prescribes procedural devices which a trial court may find useful."[22] In *Vasquez,* which is the leading California case on class actions, Justice Mosk exhaustively reviewed and analyzed current class action litigation and concluded for the majority:

> If the class action is to prove a useful tool to the litigants and the court, pragmatic procedural devices will be required to simplify the potentially complex litigation while at the same time protecting the rights of all the parties. . . .[23]

While class actions in state courts do have merit, there are drawbacks associated with their use. Currently there are class actions involving the same issue and the same defendant in the courts of both California and Arizona.[24] This type of duplication of judicial time and resources could be avoided by having one consolidated suit in the federal courts. In class actions similar to *Zahn,* the plaintiff class may be unable to effect jurisdiction over foreign corporations in state proceedings and, therefore, may be compelled to initiate an action in the

16 *Id.* at 306.
17 *Id.*
18 414 U.S. at 308.
19 *See, e.g.,* 2 *Class Action Reports* No. 3, 2rd Qtr. 1973, which assigns a leadership role in class actions to California courts.
20 CAL. CODE CIV. PROC. § 382 (West 1972).
21 4 Cal. 3rd 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971). An example of the innovative judicial attitude towards class actions in California is the creation of a special department for class actions by the Superior Court for the County of Los Angeles. The special department has drafted a manual for the conduct of pretrial hearings on class action issues. Certain procedures in the manual were drawn from Rule 23. The use of pretrial hearings in class actions at the federal court level has been severely curtailed as a result of the *Eisen* decision.
22 *Id.* at 821, 484 P.2d at 977, 94 Cal. Rptr. at 809.
23 *Id.* at 820, 484 P.2d at 977, 94 Cal. Rptr. at 809.
24 In the case of Bizer v. General Motors Corporation (No. C226435 pending in the Superior Court of the State of Arizona for the County of Maricopa) defendant General Motors Corporation obtained a stay of Arizona proceedings based upon a previously filed California class action, *Anthony and Lockerbie v. General Motors Corporation* (Case No. 959058 in the Superior Court of the State of California for the County of Los Angeles).

federal courts. Furthermore, the most fundamental argument against bringing large class actions in state courts is that the issues raised by such suits usually involve nationwide policy questions and for this reason should be decided in federal courts.

The dissent in *Zahn* acknowledged a new dilemma which confronts courts in class actions brought pursuant to Rule 23. After ruling that ancillary jurisdiction could not be exercised, the district court in *Zahn* had to determine which of the class members did meet the jurisdictional requirement. Such a determination is necessary since Rule 23 requires a court to issue notice of the pending suit to all class members.[25] In *Zahn* the district court ruled that based on the record it was not possible to determine which of the approximately 200 class members met the jurisdictional requirements of § 1332 and denied class action status to all the plaintiffs.[26]

The problem of identifying which class members meet the jurisdictional requirements of the federal courts gives rise to several complex questions. To what extent may the court examine the complaint to determine if jurisdiction exists? May the court go beyond the complaint to the merits? Must the court assume the truthfulness of the complaint? In his dissent in *Zahn,* Justice Brennan notes that few Rule 23(b)(3) class actions on the basis of their pleadings will lend themselves to a determination of which class members meet the amount in controversy requirement.[27]

IV. Due Process and the Notice Requirement of Rule 23

Even if a court does have jurisdiction over all the prospective class members, there are additional problems which may frustrate the adjudication of large class actions. The case of *Eisen v. Carlisle & Jacquelin* raised issues common to all large class actions. As the *Eisen* case history developed, two key issues evolved: the manageability of the suit as a class action and the amount of notice required by due process and Rule 23.

Eisen alleged that the defendant brokerage firms, Carlisle & Jacquelin and Decappet & Doremus, had conspired to monopolize off-lot trading on the New York Stock Exchange and had fixed the odd-lot differential at an excessive amount in violation of the Sherman Act.[28] Consequently, the plaintiff brought a class action suit seeking injunctive relief and damages on behalf of purchasers and sellers of odd-lots on the New York Stock Exchange from May 1962 through June 1966.[29] The class Eisen sought to represent included approximately 6,000,000 members of which 2,000,000 were identifiable. The damages sought to be recovered were estimated at $120,000,000, with the damages of the average class member estimated at $5.90.[30]

25 FED. R. CIV. P. 23(c)(2).
26 53 F.R.D. at 433-34.
27 414 U.S. at 312.
28 Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147, 148 (S.D.N.Y. 1966). An odd lot is a term used to designate securities transactions involving less than 100 shares. The cost to an investor who deals in odd lots includes both a standard commission payable to the brokerage firm, and an odd-lot differential which is received by the odd-lot dealers.
29 *Id.*
30 Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 257 (S.D.N.Y. 1971).

A. *Lower Court History*

The district court held that the suit could not be maintained as a class action because the plaintiff failed to demonstrate that he would be able to fairly and adequately protect the interests of the class, that the notice required by due process and Rule 23(c)(2) would not be given, and that questions common to the class did not predominate over questions affecting individual members.[31]

On review, the Second Circuit ruled that dismissal of a suit as a class action was justified only after a proper appraisal of all factors enumerated in Rule 23. The court was concerned that summary dismissals of class actions would deprive small claimants of any effective means to recover damages.[32] The Second Circuit reversed the lower court order dismissing the suit, retained jurisdiction, and remanded the case 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.[33]

On remand, the district court determined that the suit could be maintained as a class action and attempted to solve the problems of manageability of the suit and notice to the parties.[34]

Problems of manageability would have arisen if the plaintiff class were ultimately successful. If each individual plaintiff was required to prove his damages separately, the entire recovery could be exhausted in administering such a procedure.[35] In view of the impecunious nature of the average damage claim, the district court felt that few eligible class members would file claims against any ultimate recovery.[36] Dispensing any unclaimed damages would also be a problem confronting the court if the plaintiff class was successful.

The greatest obstacle to permitting the suit to proceed as a class action was the inability to decide what action would satisfy the notice requirement of Rule 23. In any class action maintained under subdivision (b)(3), the court is instructed to direct to the members of the class the "best notice practicable" under the circumstances, including individual notice to all members of the class who can be identified through "reasonable effort."[37] This notice serves to advise the class members that the court will exclude them from the class if so requested; that the judgment, whether favorable or not, will include all members who do not request exclusion; and that any class member who does not request exclusion may enter an appearance through counsel of his own choice.[38]

The district court attempted to resolve these problems by utilizing innovative devices to effect a compromise between the requirements of Rule 23 and the particular circumstances in the *Eisen* case.

The district court attempted to circumvent the manageability problems by ruling that if the plaintiff class were successful the damages recoverable from

31 41 F.R.D. at 147.
32 Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968).
33 *Id.* at 570.
34 52 F.R.D. at 253.
35 *Id.* at 261-62.
36 *Id.* at 262-65.
37 FED. R. CIV. P. 23(c)(2).
38 *Id.*

the defendant could be determined in gross, based on the defendant's records and industry reports.[39] To facilitate the distribution of any surplus damages recovered after the claims filed by individual class members were satisfied, the court decided to utilize a scheme based on a fluid recovery concept.[40]

The district court felt that the interests of the class were adequately represented and could be protected by combining individual notice to a segment of the identifiable class members and directing notice by publication to unascertainable members of the class.[41] If the defendant's liability were ultimately established, a second notice would have been sent to all identifiable class members.

The court's improvised scheme of notice to only a segment of the identifiable class members was costly. The plaintiff informed the court that he could not afford to pay the cost of the initial notice to the class members. This prompted the court to decide that the cost of notice could be apportioned between the parties.[42] This decision was most unusual; the plaintiff usually is required to pay the cost of notice as an expense of maintaining his suit. The court conducted a preliminary hearing on the merits to determine in what proportions the costs of notice should be apportioned. Based on the evidence presented at this hearing the court concluded that the plaintiff class would probably recover and ordered the defendants to pay ninety percent of the costs of the notice.[43]

The defendant appealed the district court's interlocutory orders regarding notice and manageability. In analyzing the district court's rulings regarding manageability, the Second Circuit held that Rule 23 did not expressly authorize the use of a fluid recovery concept and that the use of such a procedure violated due process.[44] The appellate court also held that the plaintiff was required not only to give actual notice to all members of the class whose identities could be ascertained with reasonable effort, but also to furnish notice to the class at his own expense.[45] Additionally, the court banned the use of preliminary hearings to determine whether a suit may be maintained as a class action.[46]

B. Eisen *and the Supreme Court*

The plaintiff argued that the court of appeals did not have jurisdiction to

39 52 F.R.D. at 262.

40 *Id.* at 262-65. This concept of damage distribution had been utilized by several courts as an efficient and economical means of distributing damages to large unidentifiable classes resulting from voluntary settlements of class suits. Under this theory distribution of damages is to the class a whole, rather than an inflexible mode of recovery running to specific class members. The District Court in *Eisen* sanctioned the establishment of a fund equivalent to the amount of unclaimed damages, for the purpose of reducing the odd-lot differential (in an amount determined reasonable by the Court) until such time as the fund was depleted. *Id.* at 265. This method of distribution was first utilized in West Virginia v. Chas. Pfizer & Co., Inc., 314 F. Supp. 710 (S.D.N.Y. 1970). Judge Wyatt's approval of the settlement was affirmed by the Court of Appeals for the Second Circuit, 440 F.2d 1079 (1971).

41 52 F.R.D. at 266.

42 The district court may have relied on the language of another Second Circuit opinion, Green v. Wolf Corp., 406 F.2d 291, 301 (2d Cir. 1968), *cert. denied,* 395 U.S. 977 (1969).

43 54 F.R.D. at 573.

44 Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1018 (2d Cir. 1973), *cert. granted,* 414 U.S. 908 (1973).

45 *Id.* at 1009.

46 *Id.* at 1015. The court held that neither Rule 23 nor any other federal rule provided for a "mini hearing" to decide the merits of a case for the purpose of deciding a collateral matter, and that such a hearing could be extremely prejudicial.

review the district court's order which permitted the suit to proceed as a class action. The defendants argued that the district court's resolution of the notice issue constituted a final order within the meaning of 28 U.S.C. § 1291 and was therefore appealable as a matter of right. The defendants also argued that the court of appeals had expressly retained jurisdiction and consequently no new jurisdictional basis was necessary.

On review, the Supreme Court held that appellate jurisdiction did exist under § 1291 and therefore it did not consider the propriety of the Second Circuit's retained jurisdiction procedure or the scope of review permissible under it.[47] As a result, the Supreme Court limited the review in *Eisen* to the notice questions raised by the district court's final order and did not consider whether the court of appeals correctly resolved the issues of manageability and fluid class recovery.[48]

The petitioner argued that the requirement of notice should be dispensed with in *Eisen* due to the unique facts of the case. First, the high cost of providing notice to 2,500,000 class members would end the suit as a class action and frustrate the petitioner's attempt to vindicate the policies underlying the antitrust laws. Second, individual notice was unnecessary because no prospective class member had a large enough stake in the matter to justify litigation of his individual claim, and for this reason members would lack any incentive to opt out of the class action even if notified. Therefore, petitioner argued that adequate representation, rather than notice, satisfied due process and Rule 23 in this case.[49]

The Supreme Court dismissed these arguments, reasoning that if petitioner's theory was followed it could be concluded that no notice at all, published or otherwise, would have been required in this case. The Court narrowly construed the notice requirements of Rule 23 and held that individual notice must be sent to all class members whose names and addresses can be ascertained with reasonable effort.[50]

The Court affirmed the Second Circuit's determination that the plaintiff be required to pay the cost of notice. The Court also upheld the lower court's ban on the use of preliminary hearings to determine whether a suit may be maintained as a class action.[51]

As authority for its holding that individual notice must be sent to all identifiable class members the court cited *Mullane v. Central Hanover Bank and Trust Co.*[52] and *Schroeder v. City of New York.*[53]

The *Mullane* decision involved a challenge to the adequacy of the notice requirement incorporated in a New York banking statute. The statute allowed banks to mingle the assets of trust funds and required accountings to be submitted

47 94 S. Ct. at 2149. The Court's action in limiting its scope of review in *Eisen* was probably intended to permit the accumulation of more experience with large class actions in the lower federal courts. By avoiding a ruling on the merits of manageability and damage distribution schemes the Court's decision may encourage more experimentation in this area.
48 *Id.* at 2150 n.10.
49 *Id.* at 2151-52.
50 *Id.* at 2152.
51 *Id.*
52 339 U.S. 306 (1950).
53 371 U.S. 208 (1962).

for court approval. Notice by publication to the beneficiaries of the trusts was required preceding an accounting. The issue in *Mullane* was whether this form of notice satisfied due process. The Supreme Court found notice by publication to be insufficient where the names of the parties to a judicial proceeding are known and required that individual notice be sent to all beneficiaries whose names and addresses were known.[54]

The Supreme Court in *Mullane* did approve notice by publication to unknown and unidentifiable beneficiaries, although it recognized that such notice was unlikely to be effective.[55] The Court utilized a balancing test to weigh the expense required to discover the names and addresses of the unknown beneficiaries in *Mullane* against the character of the proceedings and the nature of the interests involved, and concluded that the burden of notifying unknown beneficiaries would outweigh the benefits of the common trust fund device: "A construction of the due process clause which would place impossible or impractical obstacles in the way [of judicially settling the accounts] could not be justified."[56]

The Supreme Court in *Eisen* cited *Schroeder* for the general rule that notice by publication is not sufficient with respect to a person whose name and address is known or easily ascertainable.[57] In *Schroeder,* the City of New York instituted proceedings to acquire the right to divert a portion of a river upstream from the plaintiff's property. The plaintiff's name and address were ascertainable from deed records and tax rolls, but the defendant made no effort to notify the plaintiff except by publication in newspapers and by posting notices. The plaintiff alleged that she had no actual knowledge of the proceedings until after the statutory period for filing damage claims had expired. Under these circumstances the Court held that newspaper publication did not measure up to the quality of notice which the Due Process Clause of the 14th amendment requires, and that the city was constitutionally obliged to make at least a good faith effort to notify the plaintiff that she had a right to be heard on a claim for compensation.[58]

The *Schroeder* case appears to be inapposite to *Eisen* and *Mullane* on its facts; it involved neither a class action nor a large group of identifiable individuals. The Court's holding in *Schroeder* went beyond its position in *Mullane* by stating that notice by publication is never enough when an individual's name or address are known. It is submitted that the *Eisen* Court's reliance on the *Schroeder* decision was unwarranted in view of the dissimilarity of the interests involved in the two cases.

C. *Analysis of the* Eisen *Decision*

The Supreme Court's decision in *Mullane* was referred to by the Federal Rules Advisory Committee which drafted amended Rule 23 to explain the incorporation of due process standards in the amended rule.[59] The district court

54 339 U.S. at 318.
55 *Id.* at 315.
56 *Id.* at 313-14.
57 94 S. Ct. at 2151, quoting Schroeder v. City of New York, 371 U.S. 208, 212-13 (1962).
58 371 U.S. at 214.
59 Advisory Comm. Note, 39 F.R.D. at 107 (1966).

in *Eisen* attempted to balance the requirements of due process and the nature of the interests of the class members in determining what form of notice was sufficient. This action by the district court was consistent with the Supreme Court's position in *Mullane*. In *Mullane*, the Supreme Court, alluding to the policy reasons underlying the basic constitutional rule of due process which requires notice, concluded that practical considerations made it impossible to draft a standard definition of constitutionally adequate notice to be applied in every situation.[60] As noted earlier, the Court in *Mullane* balanced the expense of notice against the nature of the proceedings and interests involved; it considered the similarity of the interests of all the beneficiaries involved to determine whether notice to some would adequately protect the interests of the entire group.[61]

In *Eisen*, the Supreme Court did not apply a balancing test to determine the adequacy of the district court's notice scheme. Rather, it mechanically applied a narrow interpretation of Rule 23, stating that "quite apart from what due process may require, . . . Rule 23(c)(2) requires that individual notice be sent to all class members who can be identified with reasonable effort."[62]

The Court's decision in *Eisen* clearly puts form over substance; the requirements of due process, designed to protect the interests of individuals, are used to deny effective judicial relief to the members of the plaintiff class. The Court's failure to weigh the policy considerations behind Rule 23 and the antitrust laws against the established due process standards is not consistent with its decision in *Mullane*.

If the Supreme Court had thoroughly reviewed the history of Rule 23, it is doubtful that it would have so severely restricted the discretionary powers of trial court judges in class actions. As amended, Rule 23 is designed to furnish trial court judges with sufficient flexibility to adjust the class action requirements according to the dictates of justice and fairness on a case-by-case basis. Though Rule 23 was amended in 1966, only a small number of large class actions have reached final judgment. The complex nature of class actions usually requires lengthy trials which may last a number of years. *Eisen* is significant in that it is one of the first large class actions to reach the Supreme Court. The Court's refusal to sanction pragmatic notice procedures will sharply curtail the effectiveness of class actions by small claimants.

D. *Subclasses: An Alternative Method of Managing Class Actions*

The use of subclasses was suggested by Justice Douglas in his dissenting opinion in *Eisen*.[63] He suggests that some of the due process and manageability problems which plagued the *Eisen* case could be lessened by utilizing subclasses created pursuant to Rule 23(c)(4).[64] Individual notice could be given to identi-

60 339 U.S. at 314.
61 *Id.* at 317-18.
62 94 S. Ct. at 2152.
63 94 S. Ct. at 2153-54.
64 *Id.* Harrison E. Hall, et al. v. Union Oil Company of California, Defendant, currently pending in the United States District Court, Central District of California, No. 69-331-ALS, is a class action now before the courts in which subclasses are effectively used. This suit

fiable class members less expensively and distribution of recovery problems would be much less complex. As noted by Justice Douglas, while some of the questions regarding the use of subclasses and their effect on the rights of the remainder of the class are not yet answered, these unresolved questions should not be regarded as insurmountable.[65]

As a practical matter, however, there are drawbacks to the use of subclasses. If the subclass is too small it is doubtful that the suit will have any meaningful effect. If one subclass is unsuccessful, other plaintiff class members would not be precluded by application of res judicata from bringing suits of their own; but it is doubtful that other class members would initiate suits when the amount of recovery claimed is less than the expense of prosecuting a questionable claim.

The most significant objection to encouraging subclasses is that they undermine one of the most important goals of Rule 23: to permit a substantial savings of judicial resources by the aggregation of a large number of individual actions for damages into one lawsuit.[66]

V. The Future of Class Actions

Before the Supreme Court can resolve the complex issues raised in large class actions, it must make the determination whether it is desirable for the federal courts to expand their jurisdiction into traditionally legislative areas. The jurisdiction of the federal courts has traditionally been structured to adjudicate individual claims of a substantial nature, not to provide a forum for attempts to change the social order. Because of this structure, access to the federal courts by plaintiffs in large antitrust class actions is severely limited and it is denied totally to plaintiffs in large consumer class actions. A study on class actions brought pursuant to Rule 23 was recently released by the Senate Commerce Committee.[67] The study concluded that cases involving large classes and small individual claims may be impossible to adjudicate by courts utilizing Rule 23,[68] a conclusion which the study indicates should be a matter of serious concern to legislators and consumer advocates.

The original legislative goals in approving class actions were fourfold: compensation of the named plaintiffs, compensation of the unnamed plaintiffs, prevention of unjust enrichment, and deterrence. The Supreme Court's decision in *Eisen* requiring notice to individual class members is designed to protect the interests of all class members. However, the effect of the decision is to frustrate the goals of prevention of unjust enrichment and deterrence. If Congress desires these goals to be implemented, it must establish procedures specifically designed to meet the problems inherent in large class actions. In establishing such proce-

involves an oil spill off the California coast. Although there are common issues of fact and law in the case, many issues are dissimilar. The plaintiff class includes home owners, commercial businesses, and fisheries. The suit is proceeding under Rule 23 with numerous subclasses. Without the use of subclasses it is doubtful if the suit could proceed without prejudicing the rights of one of the diverse groups involved.

65 *Id.* at 2154-55.

66 359 F.R.D. at 102-03.

67 STAFF OF SENATE COMMERCE COMM., 92D CONG., 1ST SESS., *Class Action Study*, ANTITRUST & TRADE REGULATION REPORT (No. 674 July 2, 1974) G-1.

68 *Id.* at G-9.

dures, the Congress should balance the policy considerations in support of individual recovery against those in support of the prevention of unjust enrichment and deterrence.

The Congressional study on class actions released by the Senate Commerce Committee recommends several legislative remedies that could make class actions more effective in adjudicating large suits. The study recommends drafting a statute which would allow an action to proceed under alternative procedures even though it is not possible for it to proceed under Rule 23(b)(3). Among the significant recommendations of the proposed statute is one which would give the court discretion to make notice waivable if it determines that the representation of the class is adequate.[69] Another feature of the proposed act is a suggestion that the court have authority to divide the plaintiff class into subclasses and direct notice by publication or individual notice, or require no notice at all to the various subclasses.[70] If the court finds that proof of individual damages and compensation to individual class members is not feasible, the proposed act would grant the court discretion to dispense with traditional notice procedures.[71]

These proposed solutions would grant the federal courts the discretionary authority they need to efficiently adjudicate class actions. It is submitted that this type of legislative imagination will be necessary to counterbalance the Supreme Court's decisions in *Eisen* and *Zahn* and make the class action an effective remedy as originally contemplated by Congress.

Thomas G. Foley, Jr.

69 *Id.* at G-10.
70 *Id.*
71 *Id.*