RECENT DEVELOPMENTS IN CLASS ACTIONS

A COMPARATIVE STUDY OF FOUR JURISDICTIONS:

CANADA, AUSTRALIA, THE UNITED KINGDOM AND THE UNITED STATES

A Report to
Program Planning and Development Division
Marketing Practices Branch
Consumer and Corporate Affairs Canada

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INTRODUCTION

1. Terms of Reference

The terms of reference for this project require that we provide Consumer and Corporate Affairs Canada with an overview survey of the status of the class action remedy in four jurisdictions, Canada, Australia, the United Kingdom and the United States. The precise terms of reference as set out in the Statement of Work are as follows:

> "To complete a review of the recent literature dealing with the class action remedies that are available under the anti-trust and consumer protection laws that are presently in place in the Provinces of Canada, Australia, the United Kingdom and the United States;
>
> And submit to the Director of Investigation and Research a report describing the nature and extent of the class action remedies in the four jurisdictions, and in particular, advising on the following:
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> - "The extent to which an anti-trust or consumer protection class action remedy exists or has been proposed in bill form or in a government study;
> - The main reasons for its adoption or non-adoption in the jurisdiction in question;
> - The experience to date with respect to the class action remedy in the jurisdiction in question."

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2. Organization of this Report

This report is organized in accordance with this mandate. Part I review developments at the provincial level in Canada; Part II considers developments in class action reform in Australia; Part III reviews developments in the United Kingdom; and Part IV deals with the developments in the United States. We have attempted to organize each of these Parts in accordance with the specific questions posed in the terms of reference, namely the extent to which class action remedies already exist in the jurisdiction under review, the main reasons for their adoption or non-adoption, and the general experience to date.

We trust that this Report will be of assistance to Consumer and Corporate Affairs Canada in its deliberations as to what directions if any should be taken at the federal level with regard to the class action remedy.

This Report is the product of a number of individuals working as a team. I conclude by gratefully acknowledging the excellent research assistance provided by the four members of the research team that worked under my supervision, Don Eady, Soraya Farha, Rob Healey and Tom Malyszko, all of Gowling & Henderson, Toronto.

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PART I

CLASS ACTIONS IN CANADA

While calls for class action reform at the provincial level in Canada have been frequent, only Quebec has enacted comprehensive class action legislation. In all other Canadian jurisdictions, class actions are available but only under the traditional rules of civil procedure or in a limited form within the framework of a particular statute. Most commentators agree that the traditional class action rule is inadequate and that some sort of reform to allow for class actions is both desirable and necessary.

The most complete study of class action reform in Canada is the Ontario Law Reform Commission's 1982 Report on Class Actions. The report surveys the present law of class actions in Canada, the United States, England and Australia, examines existing procedural alternatives to class actions, assesses the costs and benefits of class actions and concludes with a discussion of the components of an effective class action remedy. Appended to the Report is a "Draft Act respecting Class

Actions" which incorporates the findings of the Report. As yet, the recommendations contained in the Ontario Law Reform Commission Report have not been enacted.

On the other hand, Quebec enacted a comprehensive class action remedy in 1979. Thus, the Quebec experience provides a useful guide for legislators wishing to examine how a class action remedy works in practice. The unique feature of the Quebec legislation is the provision of public financing for class actions through the "Fonds d'aide aux recours collectif".

This part of the report will begin with a discussion of the traditional rules of civil procedure governing class actions in Canada. The O.L.R.C. Report will then be examined and discussed. Finally, the Quebec class action remedy will be analyzed with a view to determining what lessons can be learned from the Quebec experience.

TRADITIONAL CLASS ACTION REMEDIES IN CANADA

i) RULES OF CIVIL PROCEDURE

All of the provinces and the federal government have enacted rules of civil procedure which allow for class

actions in courts over which the respective governments have jurisdiction. Rule 12 of the Ontario Rules of Civil Procedure is representative of the other Canadian Rules governing class actions. Rule 12 states that:

> Where there are numerous persons having the same interest, one or more of them may bring or defend a proceeding on behalf of or for the benefit of all, or may be authorized by the Court to do so.

While the rule may seem relatively neutral on its face, the Courts have interpreted it in an extremely narrow fashion. The leading Canadian case interpreting traditional class action rules is Naken v. General Motors of Canada (1983), 144 D.L.R. (3d) 385 (S.C.C.). The effect of Naken and other decisions of Canadian Courts is to virtually foreclose any possibility of using the traditional Rules of Civil Procedure to initiate a class action. Indeed, Estey J. who wrote the unanimous judgment of the Supreme Court of Canada in Naken, stated that with respect to Rule 75 of the Ontario Rules (the virtually identical predecessor to the current Rule 12):

> It is my conclusion that the rule, consisting as it does of one sentence of some thirty words, is totally inadequate for employment as the base from which to launch an action of the

complexity and uncertainty of this one.[1]

Virtually all commentators on the subject of class action reform agree that the traditional Rules of Civil Procedure are a wholly inadequate vehicle for launching class actions.[2]

ii STATUTORY CLASS ACTIONS

In addition to the limited class action remedies provided for in the various Rules of Civil Procedure, a number of Canadian jurisdictions have enacted legislation

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1 144 D.L.R. (3d) at 410. In Naken, a class action was brought by four individuals representing a class of approximately 4,600 purchasers of Firenzas, a make of automobile manufactured by the defendants.

2 See for example, Ontario Law Reform Commission, Report on Class Action (1982) p.76, J. Bankier, "The Future of Class Actions in Canada: Cases, Courts and Confusion" (1984) 9. C.B.L.J., 259-279, W.A. Bogart, "Naken, The Supreme Court and What Are Our Courts For?" (1984) 9. C.B.L.J. 280-308, A. Roman "Class Actions in Canada: The Path to Reform", (1988) The Advocates' Society Journal (August), 28-33.

Even commentators who are not convinced that class action reform is either necessary or desirable agree that the traditional rules virtually foreclose the possibility of successfully launching a class action. See for example, W.A. Macdonald Q.C. and J.W. Rowley Q.C., "Ontario Class Action Reform : Business and Justice System Impacts - A Comment" (1984) 9. C.B.L.J. 351-366 and H.P. Glenn, "Class Actions in Ontario and Quebec", (1984) 62 Can. Bar. Rev. 247.

which authorizes different types of representative or derivative actions.[3]

However, as the Ontario Law Reform Commission points out in its Report these are not true class action procedures since they either authorize a public servant to bring an action on behalf of a class of plaintiffs who do not have any control over the action or the statutory class action rights can only be exercised within the narrow framework of the particular statute.[4]

In 1977 the federal government introduced two bills (Bills C-42 and C-13) which were designed to allow a class action procedure to enforce anti-trust provisions in the Combines Investigation Act. Both of these bills died on the order paper. The Ontario Law Reform Commission cited two problems with a class action anti-trust remedy. Firstly, there are significant doubts as to the constitutional validity of such a class action civil remedy

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3 In Ontario see: Assignment and Preferences Act, R.S.O. 1980, c.33, s.12(3), Business Corporations Act, R.S.O. 1980, c.54, s.97, Condominium Act, R.S.O. 1980, c.84, s.14, Insurance Act, R.S.O. 1980, c.218, s.226(1), Municipal Act, R.S.O. 1980, c.302, s.177(2). In B.C. see Insurance Act, R.S.B.C. 1979, c.200, s.252(1), Municipal Act, R.S.B.C. 1979, c.406, s.18.

4 O.L.R.C. Report, p.48-50.

given that provincial legislatures have exclusive jurisdiction with respect to civil liability unless such a scheme is ancillary to the valid exercise of federal jurisdiction. Secondly, the O.L.R.C. suggests that certain types of competition law violations are more amenable to class actions (i.e. allegations of price fixing) than others (i.e. merger and monopoly violations).[5]

Thus with the exception of the legislation in Quebec, no Canadian jurisdiction has adopted comprehensive class action legislation. An examination of the O.L.R.C. class action proposals and the Quebec legislation will suggest reasons why class action procedures have not been adopted in Canada, why such procedures have been adopted in Quebec and why they should be adopted in the rest of Canada.

ONTARIO LAW REFORM COMMISSION PROPOSALS

The O.L.R.C. Report on Class Actions is the most comprehensive Canadian study of all aspects of class actions. The Report and its recommendations have elicited much comment and

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5 Ibid., pp.244-250.

some criticism.[6] However, none of the O.L.R.C.'s recommendations have been enacted in Ontario or any other Canadian common law jurisdiction.

The O.L.R.C. recommends a class action procedure which is based on the American procedure under Rule 23.[7] The procedure has four stages: initiation, certification, trial of common issues, and determination of individual issues.

The action is commenced by a representative plaintiff who is a member of a given class of persons (s.2, Draft Act). The representative plaintiff must notify the Attorney-General in writing of the commencement of the action (s.2(3)).

Next the representative plaintiff must apply to a court for certification (s.3). Section 3 sets out five tests which the representative plaintiff must pass before a court will certify the action. The five tests are:

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6 See "Symposium: Class Action Reform in Canada" (1984) 9 C.B.L.J. 260-366 for a series of articles commenting on the O.L.R.C. Report and T.A. Cromwell, "An Examination of the Ontario Law Reform Commission Report on Class Actions" (1983) 15 Ottawa Law Review, 587-598, Benjamin Du Val, Jr. "Book Review of the O.L.R.C. Report on Class Actions" (1983) 3 Windsor Yearbook of Access to Justice, 411-436. H.P. Glenn, "Class Actions in Ontario and Quebec", (1984) 62 Can. Bar. Rev., 246-277.

7 O.L.R.C., Class Actions Report, pp.861-78 (hereinafter cited as O.L.R.C. Draft Act).

a) the action is brought in good faith and there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class;

b) the class is numerous;

c) there are questions of fact or law common to the class;

d) a class action would be superior to other available methods for the fair and efficient resolution of the controversy; and

e) the representative plaintiff would fairly and adequately protect the interests of the class.

Tests b), c) and e) are fairly straightforward. Tests a) and d) are more difficult. Test a) involves a preliminary evaluation of the merits of the action which goes beyond the test in regular civil procedure which is that the plaintiff need only prove a good cause of action assuming that the facts alleged are true.

Test d), the "superiority test", means that the plaintiff must prove that a class action is superior to other available methods such as joinder, individual actions etc. Section 4 of the Draft Act sets out what the court must consider in deciding whether a class action is superior.

If the plaintiff passes all five of the tests outlined above there is a yet another hurdle before certification is

granted. Section 6 allows the court to refuse to certify a class action

> "if, in the opinion of the court, the adverse effects of the proceedings upon the class, the courts on the public would outweigh the benefits to the class, the courts on the public that might be secured if the action were certified"

Section 6(2) places the onus of proof on the defendant, although the plaintiff bears the onus of proof with respect to the other certification tests mentioned above.

This section has attracted some criticism because it involves a comparison of matters which are not readily quantified and because it is likely to involve lengthy judicial inquiry.[8]

If the action is certified by the court then a trial of the common issues takes place in front of a judge other than the judge who certified the class action (s.51). Once the trial of common issues has taken place, individual proceedings may take place to determine issues such as damages, contributory negligence etc. (s.31).

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8 J.R.S. Prichard, "Class Action Reform: Some General Comments", (1984) 9. C.B.L.J. 309 at 316.

There are a number of features of the O.L.R.C. Draft Act which merit special attention.

First, the question of costs is crucial to the success of class action legislation. If traditional cost rules were applied in a class action situation then if the representative plaintiff lost and had costs awarded against him or her, the representative plaintiff would be liable for his or her costs as well as the defendant's costs and there is no mechanism available to allow the plaintiff to force other members of the class to pay their share of the costs. Obviously, if traditional cost rules were applied in a class action they would act as an extremely powerful disincentive to the launching of class actions.

To solve this problem the O.L.R.C. proposed a number of solutions.[9] First, the O.L.R.C. proposed a "no-way" cost rule by which each side bears their own costs. Secondly, the representative plaintiff's costs would constitute a "first charge, payable on a proportional basis, against any amount awarded to the members of the class" (s.45(1)). Thirdly, the O.L.R.C. proposed a contingency fee system whereby plaintiff's counsel would be compensated only if the action succeeded

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[9] See Draft Act, ss.41-48.

(s.42(1)). The court has the power to determine the amount of solicitor's fees including a risk premium for agreeing to undertake the action (s.42(4)).

These cost provisions mark a radical departure from cost rules in traditional litigation. However, as one commentator has pointed out:

> Absent substantial modification of the existing rules on costs, class action reform will simply not be effective.[10]

The second major issue arising out of the O.L.R.C. proposals is the ability of individual members of the class to opt out of the class action. The Draft Act presumes that all members of the class are included in the class unless they indicate otherwise (s.34). However, by virtue of s.20 the court "shall determine whether some or all of the members of the class should be permitted to exclude themselves from a class action". These "opt-out" provisions are closely tied to the provisions governing notice which must be given to members of the class once a class action has been certified (ss.16-19) since if members of the class are given the right to opt-out they must also be given

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10 Prichard, supra., note 8, p.318.

notice of the class action. Given that individual notice may be prohibitively expensive, the court is able to assess what type of notice is required and consider whether certain individual plaintiffs should be allowed to opt-out. Thus if a particular certified class action is likely to be controversial the court can weigh the type of notice required (from newspaper advertisements to written personal notice) and decide whether individuals so notified should be allowed to opt-out. As one American expert on class actions has pointed out:

> The Commission's proposal on this point is likely to have substantial practical effects. The proposal removes one major economic obstacle, the cost of notice, to maintaining class actions in cases involving small claims. It also eliminates the risk that exists whenever the defendant and the members of class have an ongoing economic relationship, that the class will be decimated by exclusions that result from pressure applied by the defendant.[11]

The third issue raised by the O.L.R.C. Draft Act concerns the role of the Attorney-General. The Draft Act requires that the Attorney-General be given notice of any class action (s.2(3)), gives the Attorney-General the right to intervene in any class action (s.12(2)), and most

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[11] B. Du Val, Jr. "Book Review of the O.L.R.C. Report on Class Actions", (1983), 3 Windsor Yearbook of Access to Justice, 411, at 415.

controversially, the Attorney-General can apply to replace the representative plaintiff and, with leave of the court, can become the representative plaintiff (s.14). This last provision is controversial because one can imagine certain type of class actions where the government may be a defendant or be otherwise adverse in interest to the class of plaintiffs or the particular representative plaintiff.

The fourth area of interest in the O.L.R.C. proposals concerns the treatment of damages. The Draft Act states that where the court finds in favour of the class, it can:

1) order judgment against the defendant payable to the class of plaintiffs;

2) order that any money not distributed as per 1) above can be "applied in a manner that may reasonably be expected to benefit some or all members of the class" (s.27) - cy-près distribution), for example by ordering a defendant to reduce the price of its product for a period of time; or

3) if money still remains, the court can order the money be forfeited to the Crown or returned unconditionally to the defendant (s.28).

Obviously 2) and 3) above are a marked departure from damage awards in traditional litigation. Interestingly, the Chairman of the O.L.R.C. dissented from the report on a number of issues, one of which was the cy-près and forfeiture provisions of

the Draft Act.[12]

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12 Chairman's Reservations, O.L.R.C. Report, pp.851-4.

REASONS FOR NON-ADOPTION

Given that most commentators agree both that the O.L.R.C. report is a well-researched and exhaustive study of the class action remedy and that class action reform is necessary and desirable, why were the O.L.R.C.'s recommendations not adopted?

While definitive reasons for the non-adoption of the O.L.R.C. proposals are difficult to discern, it is possible to speculate.

First, since a class action remedy makes it cheaper and easier to commence legal proceedings one can expect that potential defendants such as corporations and their insurers, polluters, and indeed governments, would oppose the introduction of such legislation. A government which proposed class action legislation would find itself opposed by a vocal and powerful lobby while the beneficiaries of such legislation would have less to gain and would tend to be unorganized in the political arena.

Secondly, it is evident from the above discussion of the O.L.R.C. proposals that any class action legislation is necessarily complex and would necessitate fairly dramatic changes to the judicial and legal process (for example, the modification of the cost rules).

Thirdly, the O.L.R.C. proposals have themselves been attacked as exceedingly complex and costly to prospective plaintiffs.[13] Furthermore, the Chairman of the O.L.R.C., Professor Mendes da Costa, had a number of specific and significant reservations about the O.L.R.C.'s final recommendations.[14] Thus it would seem that even these advocates of class action reform were not solidly behind the O.L.R.C. proposals. It would be safe to say that a government considering reform would be less likely to do so when faced with significant dissent within the ranks of the reformers themselves.

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13 Report of a joint committee of the Canadian Bar Association and the Public Interest Research Centre, Report on Class Actions (1983) and Andrew J. Roman, "Class Actions in Canada: The Path to Reform", (1988) Advocates Society Journal (Aug.).

14 See note 12 and MacDonald and Rowley, "Ontario Class Action Reform: Business and Justice System Impacts", (1984) 9 C.B.L.J. 351-366.

CLASS ACTIONS IN QUEBEC

The province of Quebec enacted class action legislation in 1979.[15] The Quebec legislation is based on the American experience, particularly Rule 23 of the U.S. Federal Rules of Civil Procedure and Articles 900-909 of the New York State Civil Practice Law.[16] The Quebec legislation is also similar to the O.L.R.C. proposals.

Like the O.L.R.C. Draft Act, a class action must be certified by a court before it can proceed. There are four conditions which the representative plaintiff must meet.

Art.1003 (a) the recourses of the members raise identical, similar, or related questions of law or fact.

(b) the facts alleged seem to justify the conclusions sought.

(c) the composition of the group makes the application of article 59 or 67 difficult or impracticable (i.e. that the class action procedure is superior to other types of actions); and

(d) the member to whom the court intends to ascribe the status of representative is in a position to

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15 An Act Respecting Class Action, L.R.Q., c.R-2.1, modified by L.Q. 1982, c.37, art.20-25. See also Quebec Code of Civil Procedure, L.R.Q. c.C-25, art.999-1051. All bracketed references in the text refer to the Code of Civil Procedure.

16 M. Beaumier, "Le recours collectif au Quebec et aux Etats-Unis", (1987) 18 R.G.D.775-800, at 778.

represent the members adequately.

The Quebec legislation gives the court broad powers to determine appropriate notice provisions to the potential members of the class (art.1005, 1006). Unlike the O.L.R.C. proposals however, the Quebec legislation allows members of the class to opt-out of the class action as of right and they are not bound by the judgment rendered in the class action (art.1007).

With respect to monetary relief, the court can award damages to the individual members of the class, award a cy-près distribution or "carry out a reparatory measure it deems appropriate" (art.1032).

It is evident, therefore, that in most respects the Quebec legislation is similar to the American class action rules and the O.L.R.C. proposals.

However, it is with respect to the question of costs and the funding of class actions that the Quebec legislation differs and breaks new ground. Firstly, Quebec has, with some restrictions, maintained the traditional "loser pays" cost rule in its class action legislation. To reduce the potential cost liability to the unsuccessful plaintiff, there is a provision which limits the defendant's ability to recover costs

(art.1050.1).[17] There are also no specific allowances for contingency fees in the Quebec legislation although contingency fees are allowed in Quebec.[18]

Quebec has, however, broken new ground by setting up an administrative agency - Fonds d'aide aux recours collectif - to fund class actions. The Fund has a mandate to fund class actions in accordance with certain rules.

A plaintiff may apply to the Fund for financing and the Fund makes a decision whether to finance the action based on two criteria contained in the Act. The first criterion is financial need. The second criterion involves the Fund assessing the legal merits of the claim.[19] The Fund can finance any stage of the proceeding, including the initial certification stage, and can, at its discretion, fund any appeals. If the Fund grants assistance, then the plaintiff is entitled to financing for Attorney's fees, expenses, notice costs, etc. In the event that the action is successful, the Fund is reimbursed for its costs

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17 See N.P. Glenn, "Class Actions in Ontario and Quebec", (1984) 62 Can. Bar Rev. 247 at 258.

18 See Tariff of certain extra-judicial fees of advocates, R.R.Q., c.B-1, s.14, art.3.

19 Class Action Act, supra. note 15, s.23.

prior to the plaintiffs receiving any monetary relief. If the Fund denies financial assistance, there is a right of appeal.

Thus the crucial difference between the Quebec class action procedures on the one hand, and the American rules and O.L.R.C. proposals on the other, is Quebec's public financing of class actions.

EXPERIENCE TO DATE IN QUEBEC

Quebec has had class action legislation in place for 10 years and therefore the Quebec experience is a useful guide for the rest of Canada if and when the various jurisdictions choose to implement class action reforms.

As of March 1988, 205 certification proceedings have been brought in the Quebec courts. Of these 54 have been certified while 77 have been denied certification. 37 are awaiting final determination, 6 have been settled out of court and 31 have been withdrawn.

52 cases have been certified and have proceeded to the merit stage. Of these, 21 are awaiting trial, 17 have settled out of court, 3 were unsuccessful at trial (2 of these are presently before the Quebec Court of Appeal), 10 were successful

at trial (1 of these was unsuccessfully appealed), and 1 was withdrawn.[20]

Also noteworthy is the fact that approximately 64% of the 205 class actions received at least some financial assistance from the Fund.[21]

Since 1978, the Fund has received 399 applications for assistance (there may be more than one person applying for assistance in a given class action). 220 applications have been accepted while 58 were rejected by the Fund. 87 have been accepted in part, 5 have been given temporary assistance, 4 have temporarily been refused, 12 are awaiting a decision, 3 are "suspended" and 10 have been withdrawn. Only 2 of the 58 rejections have been successfully appealed (out of 8 appeals) which may indicate that the courts have been giving the Fund significant curial deference.[22]

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20 The statistics are taken from the most recent Rapport Annuel 1987-88, Fonds d'aide aux recours collectif, p.22

21 Ibid, p.22.

22 Ibid, p.23.

The types of actions which have been brought under the Quebec legislation vary widely. There have been a number of consumer related actions against auto dealers for hidden defects (all unsuccessful), against fitness clubs (6 were successful), against airlines for flight delays (6 were successful) and against travel agencies (2 were successful).[23]

There have been a number of civil rights class actions brought under the federal and provincial Charters of Rights and Freedoms. Types of cases include: actions against the police for unlawful fingerprinting, an action brought by prisoners of Archambault Prison for injuries stemming from a riot, and an action challenging age limits on welfare benefits.[24]

Other types of actions include actions against unions for illegal strikes, and environmental claims, in particular, an action has been commenced with respect to the recent PCB fire in Quebec.

Reviews of the 10 years of class action legislation in Quebec have been decidedly mixed. A number of commentators have

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23 Michael Cochrane, "Class Action Discussion Paper", Proceedings of the Uniform Law Conference, August 1988, p.3.

24 Ibid, p.3-4.

mentioned that a negative judicial attitude towards the class action procedure has hampered what is generally perceived to be good legislation.[25]

Indeed one analyst, a past Director of the Quebec Fund, was moved to comment:

> This judicial attitude in Quebec leads one to the same conclusions made by Professors Bankier and Bogart in their papers about the judicial role in English Canada. Without a change in this attitude, the future of class actions in Quebec is not better than the future of class actions in Canada after the Naken case. The Quebec experience shows that a comprehensive Class Action Act is nothing more than a declaration of principle if the courts don't take their full responsibility to apply it to its fullest potential. For this reason, I think that any reform should not only emphasize the quality of the legislation but also find some method to encourage a favourable judicial reception.[26]

Whether this judicial hostility to class actions will fade as the judiciary becomes more comfortable with the legislation remains to be seen. One can expect, however, and

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[25] Andrew J. Roman, supra. note 2, p.28, H.P. Glenn, supra., note 2, pp. 259, 268-270, Beaumier, supra. note 16. Yves Lauzon, "Le Recours Collectif Québécois: Description et Bilan" (1984) 9 C.B.L.J. 324 at 350.

[26] Lauzon, supra., note 25, 350 (author's translation).

there is some support for this proposition is recent caselaw, that the judiciary will interpret new class action provisions conservatively until they gain experience in dealing with the relatively new class action procedure.[27]

One of the most common arguments against a class action procedure is the fear that it will open the "floodgates" and swamp the judicial system with large numbers of small and sometimes frivolous claims. This fear is not borne out by the Quebec experience. In fact, given the statistics cited above, it appears that class actions have not been resorted to with any great frequency in Quebec. It may be that it also takes time for the public to realize that such a procedure exists and that there exists a remedy available which has not, in the past, been a realistic option.

Overall, it would be fair to say that a class action procedure is better than none at all which is, in effect, the state of affairs in the rest of Canada. Thus, despite a slightly more complicated set of procedures than is the case with traditional litigation and despite judicial conservatism, at least citizens of Quebec have a chance to get their day in court.

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[27] Beaumier, supra. note 16, at 800.

SUMMARY AND CONCLUSIONS

1. Only Quebec has enacted class action legislation. The Ontario Law Reform Commission's Report represents the major Canadian study on class actions. Jurisdictions like B.C., Alberta, Manitoba and New Brunswick have discussed the possibility of class action reform but it has not gone beyond the discussion stage in any of these jurisdictions. The federal government did propose two bills in 1977 dealing with anti-trust class actions but these bills died on the order paper.

2. The main reasons for non-adoption seem to be the complexity of any class action reform and a need to substantially rework how litigation is conducted (i.e. the certification procedure and the cost rules). Furthermore, there seems to be a lack of political will on the part of the governments in question. It is unclear whether this is due to opposition from the class of potential defendants, the complexity of the legislation, or a lack of powerful interests in favour of such legislation.

3. The experience to date in Quebec has been mixed. The legislation has been praised by most commentators but

judicial conservatism has limited the legislation's effectiveness in increasing access to justice for potential classes of plaintiffs. Perhaps given more time, the judiciary will become more comfortable with the class action remedy and the situation in Quebec with respect to class actions will improve.

PART II

CLASS ACTIONS IN AUSTRALIA

1. THE EXTENT TO WHICH AN ANTI-TRUST OR CONSUMER PROTECTION CLASS ACTION EXISTS OR HAS BEEN PROPOSED IN BILL FORM OR IN A GOVERNMENT STUDY

i) INTRODUCTION

A form of class action, the representative action, is available at the federal level in Australia. However, there has been very little use of the procedure in Australia due to the restrictive interpretation imposed by the courts on such actions. In the case of Markt & Co. Ltd. v. Knight Steamship (1910), 2 K.B. 1021, it was held that no damages are obtainable under the representative action, and representative actions cannot be brought where the plaintiff class relies on a series of individual contracts with the defendant.

Recent amendments to the federal Trade Practices Act 1974 provide for representative proceedings. However a number of problems have been identified with the proceedings available under the Act. As will be discussed further below, the amendments do not provide a real solution to the effective absence of the class action remedy in Australia.

Extensive reforms have very recently been proposed by the Australian Law Reform Commission (ALRC).[1] The Commission in its 1988 Report recommends the adoption of a form of class action in Australia which it terms group proceedings, and has drafted a bill to that end. These proposals will be discussed in detail below.

With respect to the Australian states, Victoria and South Australia have made some procedural reforms enabling representative actions to be initiated. There is some doubt as to their effectiveness, as will be explored further below.

ii) TRADE PRACTICES ACT 1974

In 1986 the Trade Practices Act was amended to empower the Trade Practices Commission to bring a representative proceeding on behalf of consumers who suffer loss or damage due to the conduct of a corporation or persons in breach of the consumer protection provisions of Part V of the Act. Orders may be obtained by the Trade Practices Commission on behalf of those who have suffered or are likely to suffer loss or damage as a result of the breach, and who have given written consent to the Trade Practices Commission to make such application on their

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1 Australia, The Law Reform Commission, Grouped Proceedings in the Federal Court, Report No. 46, Australian Government Publishing Service, Canberra, 1988. [hereinafter ALRC Report No. 46]

behalf. Under the Act the remedies can be declaratory, injunctive or monetary.

However, it has been argued that the provisions of the Trade Practices Act do not obviate the need for class action reform. A number of problems have been identified with the procedure available under the Trade Practices Act. The remedies under the Act can only be sought if the Trade Practices Commission has established a contravention of Part V. There is also a precondition that the proceeding be instituted by the Commission or by the Attorney General. The aggrieved consumers must be identified in the application and must consent in writing to the Trade Practices Commission acting on their behalf. As the Australian Law Reform Commission Report maintains, this can create administrative and financial difficulties, especially where large numbers of consumers have each been defrauded of relatively small amounts.[2] The proceedings cannot be brought by an individual on behalf of a class or group but must be initiated by the Commission, or by the Minister. Finally, as Butcher observes, the majority of cases under the Act have been brought by business competitors, not by consumers.[3]

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2 ALRC, Report No. 46, supra note 1, at 15-16.

3 Butcher, "Representative Applications Under the Trade Practices Act: Do They Obviate a Need for the Consumer Class Action for Damages", (1987) 15 Australian Business Law Review 354.

For the above-noted factors, the Australian Law Reform Commission has concluded in its recent report that these provisions are inadequate in assisting individuals to obtain a remedy in cases of multiple wrongs.[4] Additionally the Commission notes that the focus of the provisions is regulatory, to ensure compliance with fair trade practices law and to deter contravention of the legislation by providing effective enforcement procedures and sanctions; the aim of the Act is not to provide an individual or a group with a means of initiating private action to obtain legal remedies.[5]

iii) VICTORIA AND SOUTH AUSTRALIA

In 1986 amendments were made to the Supreme Court Act (Victoria) to allow damages to be claimed in a representative procedure. Proceedings may be brought by one person on behalf of the group. The requirements for the institution of the procedure are as follows: (i) there must be three or more people each of whom has consented to the proceedings and is named; (ii) the

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4 ALRC, Report No. 46, supra note 1, at 15-16.

5 ALRC, Report No. 46, supra note 1, at 16.

person must have a right to the same or substantially the same relief; (iii) a common question of law or fact must arise; and (iv) the right to relieve need not arise from the same transaction or series of transactions.[6] The respondent may apply to the court to argue that the proceedings should not be brought in a representative form.

The South Australia Law Reform Committee in 1977 published a report recommending the adoption of a United States type class action rule.[7] A rule for bringing representative actions came into force on January 1, 1987, and allow a person to commence an action on behalf of a group of persons where there is a 'common question of fact or law requiring adjudication'.[8] There are provisions made for court control of the proceeding at a number of stages. For example, r.34.02 requires the representative parties to apply for an order authorizing the

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6 Supreme Court Act 1986 (Vic), s.34, 35. Victoria initially made amendments permitting representative actions in 1984, however the have been superceded by the 1986 reforms. For a discussion of the 1984 reforms, see Pinos, "Class Actions in Victoria", (1984) 58 Law Institute Journal 955. Pinos, a member of the Ontario Bar and a lecturer in law at Monash University discusses the 1986 reforms in "Class Actions revisited?" (1987), 61 Law Institute Journal 448.

7 Law Reform Committee of South Australia, Thirty-South Report Relating to Class Actions, 1977.

8 Supreme Court Rules (South Australia), r.34.01. For an outline of the South Australia amendments, see Australia, The Law Reform Commission, Report No. 46, at 19-20, and 197-198.

action to be maintained as a representative action and for directions as to the conduct of the action. The South Australia rule expressly eliminates the common law restrictions preventing damages being claimed in representative proceedings. Finally, the members of the group need not consent to the commencement of the proceedings in order to be bound.

iv) PROPOSALS FOR REFORM AT THE FEDERAL LEVEL

1. Introduction

The Australian Law Reform Commission has been examining the issue of class actions since the late 1970s. In 1977, it released a discussion paper recommending the development of a legal procedure to enable a large number of persons to combine in one lawsuit to recover damages, and raised a number of issues for future discussion.[9] In June 1988, the Commission released a draft bill, the Federal Court (Grouped Proceedings)

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[9] Australia, The Law Reform Commission, Discussion Paper No. 11: Access to the Courts - II Class Actions, 1979. Bruce Debelle, the Commissioner in charge of the Law Reform Commission's Reference, "Access to the Courts", wrote a paper shortly after the publication of the Discussion Paper, urging that the representative action which exists currently in Australia is not commensurate with the class action. In "Class Actions for Australia? Do They Already Exist", (1980) 54 Australia Law Journal 508, Debelle argues that given the very strict requirement of common interest in the representative action and the unavailability of damages through the representative action, class actions do not exist in Australia, and should be instituted.

Bill 1988.[10] Since then it has released a full report on class actions, or group proceedings, as the ALRC terms the procedure, and has released an amended version of the June 1988 Bill.[11]

There are several features of the Commission's recommendations which are very different than the class action procedures available in the United States and Quebec. The following is a review of the key elements of the Australian Law Reform Commission's Report and draft legislation.

2. "Group" Proceedings

The procedure recommended by the Commission involves each person with a relevant and related claim being made a party to a separate proceeding, rather than being represented by one of their number in a single proceeding. The proceeding is commenced for each member of the group even if they have different causes of action, claim different relief or rely on different bases of jurisdiction.[12] All these proceedings are

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10 Australian Law Reform Commission, Federal Court (Grouped Proceedings) Bill, June 1988.

11 The Law Reform Commission Report No. 46, supra note 1, contains the latest version of the draft legislation.

12 Grouped Proceedings Bill, Cl.9, 11.

then 'bundled together' and conducted by one of the group together with his or her own proceeding. That person is called a principal applicant and his or her proceeding the principal proceeding. The other applicants are called group members and their proceedings are termed group members proceedings. There would be as many separate proceedings as there are group members plus the principal applicant's proceeding. The use of the procedure is confined to the Federal Court, and the claim of the principal applicant must include a claim in respect of a federal or territorial matter, although the jurisdiction of the federal court is extended to cover these claims, but only where the group procedure is invoked. The claims of the group members must be in respect of that federal or territorial matter or must relate to it.[13]

3. Criteria for Commencement of Proceedings

To commence a group proceeding, there must be at least seven group members and a principal applicant. The material facts giving rise to each claim for relief in a group members proceeding must be the same, although the proceedings need not be for the same relief. Each group members proceeding must contain at least one question of law or fact that is common to the

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[13] ibid, cl.11.

proceeding of each other group member and the principal applicant.[14]

4. No Consent Requirement

The consent of group members is not required under the draft legislation.[15] The Commission observes that where damages are individually non-recoverable, the ability to commence proceedings on behalf of members of the group without first identifying them and seeking their consent is a significant factor in ensuring that they have access to a legal remedy. Without this possibility, maintains the Commission, there may be no practicable means of having their claims heard and determined.[16]

It is the ALRC's position that the goal of individual choice whether or not to pursue the remedy can be achieved if the decision for the group member is whether to continue proceedings

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14 ibid, cl.12.

15 ibid, cl.8.

16 ALRC Report, No. 46, supra note 1, at 49-50.

rather than commence them.[17] Accordingly, the draft legislation has extensive provisions requiring notice to be given to group members, advising them of the commencement of the proceedings and of the ways in which they may assume conduct of their proceedings, including by opting out.[18] The draft legislation states that notice should be given of a proposed settlement a reasonable time before the application to approve the settlement is heard, as well as for the approval of a fee agreement, the bringing of money into court, and in other situations.[19] In clause 18(5) of the draft legislation, the court is given considerable scope to order that notice be given to a group member under a variety of circumstances.

The court order may provide that notice be given by press advertisement or by radio or television broadcast, however it is stipulated that the court shall not order that notice be given personally to each group member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so (clause 18(7)).

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17 ibid, at 50.

18 ibid, at 80f.
Grouped Proceedings Bill, cl.18.

19 Grouped Proceedings Bill, cl.18.

5. No Certification Hearing

The Law Reform Commission proposal makes no provision for any initial court screening mechanism (such as a certification hearing) other than those which generally apply to any proceeding in the Federal Court of Australia, such as the directions hearing.[20] It is the position of the Law Reform Commission that notice, rather than certification, protects group members.[21] The Report points to the expenses involved in certification hearings, and suggests that given the delays and costs such hearings discourage the use of the class action procedure.[22] The Commission has therefore determined that there is no need to go to the expense of a special hearing to determine that the requirements have been complied with as long as the respondent has a right to challenge the validity of the procedure

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20 All proceedings commenced in the Federal Court come under judicial scrutiny at an early stage in the proceedings through the device of the directions hearing. At this procedural hearing a time-table for the matter is prepared under the supervision of a judge or registrar, and issues of a broadly procedural nature are dealt with. The appropriateness of a group proceeding continuing as a group proceeding could be discussed at the directions hearing. The office of the Attorney General of Ontario in its 1988 Class Action Discussion Paper has commented that the combination of the directions hearing and the general power to apply to strike-out, may well play the same role of the preliminary screening mechanism.

21 ALRC Report, No. 46, supra note 1, at 63.

22 ibid, at 63.

at any time, which in fact they may do. The Report points to several procedures available under the Rules of the Federal Court that act as protection against the potential abuse of the group proceedings mechanism, such as to the general right of parties to apply for the dismissal of vexatious or frivolous proceedings, or to apply to have the proceedings struck out on the basis that they disclose no reasonable cause of action.[23] The Commission urges that any legislation adopted make express reference to the court power to stay, dismiss or strike out proceedings on the grounds suggested above (see Clause 6(1) of the draft bill).

The Commission makes several other recommendations with the aim of protecting against abuse, within the context of a scheme that does not require certification hearings. For example, where the court is unable to deal with the grouped claims economically as compared with individual proceedings, the draft legislation provides that the proceedings should be separated. The proceedings would remain on foot but each group member would become responsible for conducting his or her own claim.[24] Further, the Commission Report and draft legislation provide that there should be provision that where the costs of

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23 ibid, at 63.

24 Grouped Proceedings Bill, cl.20.

identifying group members, and distributing any monetary relief (being costs that would be borne by the respondent) would be excessive having regard to the total monetary relief likely to be ordered to be paid, the court should have the option of separating, staying, or dismissing the proceedings, while preserving the right of individual group members to bring their own proceedings.[25] Clause 14 of the draft legislation provides that the respondent and any potential group member should be given the opportunity to apply for the inclusion of further group members in the proceedings, after the initial proceedings have been commenced. Finally, the Commission recommends that on application by any party, or by a potential group member, the court should be able to amend the application to commence further group members proceedings on causes of action that accrued after the principal proceeding was commenced.[26]

Mr. Andrew Roman, the Director of the Canadian Public Interest Advocacy Centre, one of the key advisers to the Australian Law Reform Commission in the preparation of its 1988 Report and draft legislation argues that the absence of certification hearings in the class action process does not

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25 ibid, cl.25.

26 ibid, cl.15.

jeopardize any party's interest in the class action.[27] He asserts that the purpose of certification seems to be to "force the plaintiff to commence the action on bended knee; before the case even begins he or she is put on the defensive".[28] If the defendant feels that the class action is inappropriate, the normal procedure of moving to strike it out may be invoked, and the onus is on the defendant to show the action should not be tried in a group or class format rather than on the plaintiff to show that it should. Roman observes further that the Australian Reforms recognize the need to protect absentee members of the class, for example through the notice and of those provisions.[29]

6. Costs

With respect to costs, the Commission considered a number of alternatives.[30] Generally, in Australia the common law rule as to cost is applied so that, in the absence of any unusual or countervailing circumstances, the loser pays the winner's

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27 Andrew Roman, "Class Actions in Canada: The Path to Reform?" (August 1985), The Advocates' Society Journal 28.

28 ibid, at 31.

29 ibid.

30 ALRC Report, No. 46, supra note 1, at 106f.

costs. Costs are usually awarded on a party-party basis so that a successful party will only receive those costs which are considered necessary or proper for the attainment of justice or for maintaining or defending his or her rights. The successful party is still liable for the difference between the party and party costs received and the total professional costs and disbursements payable to his or her solicitor (solicitor-client costs). The Commission considered but rejected a one-way cost rule, whereby an award of costs could be made against the respondent but not against the applicant. The Commission also considered a no cost rule which would have the effect of requiring each party to bear their own costs regardless of the outcome of the proceedings. While acknowledging the advantages of a no cost rule, the Commission concludes that such a scheme means a successful party has no prospect of financial compensation for the cost of vindicating his or her rights, unmeritorious cases may not be deterred unless the plaintiff has the threat of the payment of the respondent's costs, and therefore the Commission concludes that a no cost rule should not be adopted for group proceedings. The Commission also considered and rejected a no cost election, and a discretionary no cost rule. Apparently the majority of submissions received by the Commission on the question of costs favoured retention of the existing rules, and ultimately the Commission recommended no

change to the party and party cost rule.[31]

With respect to solicitor-client costs, the Commission does make some recommendations for reform. In its report the ALRC recognizes the deterrent facing a potential principal applicant who will be liable for solicitor-client and party-party cost in an unsuccessful case, and the balance of solicitor-client costs not covered by the respondent's payment of party-party costs in a successful case.[32] The Commission therefore recommends that contingent fees be permitted, and that provision be made for group members to contribute to costs in successful cases.[33]

Clause 33 of the draft legislation provides that the court may, at any stage of proceedings to which the Act applies, on application, approve an agreement concerning the remuneration to be paid to a legal practitioner in relation to the proceedings. Clause 33(2) provides that the court shall not approve an agreement that provides for the amount of the remuneration to be ascertained by reference to the amount

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31 ibid, at 113.

32 ibid.

33 For the Report's discussion of fee agreements, see p.113f.

recovered, or ordered to be paid, in the proceedings. The Commission envisages that fee agreements may also provide a means by which group members may be required to contribute to solicitor-client costs. The Report recommends that notice be given of the fee agreement to the group members before the application is determined, enabling group members receiving notice to appear before the court and to argue against approval. The draft legislation[34] provides explicitly that the fee agreement is not to be based on a percentage of the amount recovered or ordered to be paid. The Report suggests that the following circumstances of the case be considered in determining whether a fee agreement is reasonable: the nature and complicity of the proceedings; the nature of the legal work involved; the time required of lawyers and others involved in the conduct of the proceedings; out of pocket expenses and other expenditures incurred or likely to be incurred by lawyers conducting the proceedings; and the financial risks to the lawyers.[35]

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34 Grouped Proceedings Bill, cl.33(2).

35 ALRC Report No. 46, supra note 1, at 121.

7. Grouped Proceedings Assistance Fund

The Report considers existing models of special funds set up to finance group proceedings or class actions (for example, the Quebec Class Actions Assistance Fund), and recommends that a special fund should be established, perhaps by the Grouped Proceedings Bill, to provide for the costs of parties involved in group proceedings.[36] The Report recommends that the focus of any special fund should be to provide financing based on merit, not on means. However, the Commission does not include in the draft legislation a provision concerning the establishment of the special fund.

8. Foreign Class Action Models

The Commission in its Report makes it very explicit that it considers overseas models, and in particular the experience of class actions in the United States, to be of limited relevance for Australia. The Commission maintains the procedure it has recommended does not have the scope for abuse or the potential for high cost which exists in the United States. The Report asserts that one of the key differences is that the Australian group proceedings as the Commission has recommended

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36 ibid, at 126-127.

them are designed to compensate individuals rather than to punish respondents.[37]

9. Response to the ALRC Report

Since the Law Reform Commission Report and draft legislation have just been completed in 1988 and distributed in January 1989, there is no commentary on the proposals. In fact, there is very little commentary on the 1977 discussion paper and the draft bill which was released in June, 1988. As mentioned above, Andrew Roman is very supportive of the thrust of the Australian Law Reform Commission's recommendations, particularly its avoidance of certification hearings. Professor Neil Williams, Professor of Law at the University of Melbourne, and the foremost expert on civil procedure in Australia, has advised us that very little in the way of academic literature exists on the issue. Further, he advises that there has been a very negative reaction from Australian business interests, but indicates that nothing scholarly has been written in support of those interests.[38]

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37 ibid, at 132.

38 Conversations with Professor Neil Williams, University of Melbourne, January 9 and 12, 1989.

2. THE MAIN REASONS FOR ADOPTION OR NON-ADOPTION

With respect to the ALRC proposals, Professor John Goldring, a Commissioner of the Australia Law Reform Commission has advised us that there is little likelihood that the reform proposals will be adopted, at least not in the near future.[39] The issue of group proceedings or class actions has become a 'political hot potato', according to Commissioner Goldring. The business community has created a political crisis, or attempted to create such a crisis with respect to class actions, charging that the invocation of the ALRC proposals would mean the end of business in Australia. The Government's response to the charges of the business interests in Australia is that most of the actions will be against the Government, and not against commercial interests. Commissioner Goldring states that the business groups have not been able to capture popular opinion, but given their considerable political power, he speculates that it is unlikely that the proposals will be implemented in the short-term.

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39 Conversation with Professor John Goldring, Commissioner of the Australian Law Reform Commission, January 25, 1989.

3. THE EXPERIENCE TO DATE WITH RESPECT TO THE CLASS ACTION REMEDY

According to the 1988 Law Reform Commission Report, the new South Australia rules have not yet been used.[40] The South Australia rule does not use a same interest test but rather adopts numerosity and commonality as the two primary considerations in determining whether representative actions may be commenced. While the rule requires authorization by the court, it provides little in the way of guidance as to factors that the court should take into consideration, and as the ALRC report notes, provides little guidance with respect to the future conduct of such matters.[41] It is suggested therefore, that one may properly anticipate that there will be problems with the implementation of the South Australia rule.

With respect to the Victoria reforms, it has been noted that there are some crucial problems that remain with

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40 ALRC Report, No. 46, at 20.

41 ad, at 197-198.

the scheme adopted in the state.[42] Firstly, the issue of how the court will interpret the requirement that the members of the group have the right to the same or substantially the same relief against the same person is an important one. As Timothy Pinos maintains, if the requirement is strictly interpreted, the new law will be ineffectual. He does note, however, that courts outside Victoria have adopted a pragmatic approach to the question, and have rejected a demanding level of similarity. Pinos argues further, quite convincingly, that the requirement of consent and of naming group members is fatal to the handling of mass wrongs. Finally, he notes that courts in Victoria continue to regard dispute resolution as just a single episode between plaintiff and defendant.

Jewson v. Rural Water Commission (unreported, March 1986: 1986/21) is the first use of the Victorian class action mechanism. However the class action failed on the merits, for the court found that there was no cause of action against the statutory authority and that there were no damages provable.[43]

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42 For a critical evaluation of the Victoria reforms, see Pinos, "Class Actions Revisited", supra note 6.

43 For a report on Jewson, see July 1986, Law Institute Journal 718.

4. CONCLUSION

In sum, at least two of the states of Australia have recognised that reforms are necessary in order to give effect to the representative actions that already existed under the state procedural rules. Unfortunately, in the cases of both Victoria and South Australia, it would appear at this earlier stage in the development of the rules that they simply do not go far enough; either the requirements are too stringent for the initiation of representative or class actions, or there is virtually no procedural guidance.

The Law Reform Commission proposals are promising in several respect. They recognize the need to adopt a scheme that responds to the particular circumstances of the Australian legal scene. Further, they abandon the certification requirement, minimising the obstacles in the course of potential plaintiffs, while protecting both defendants, through the ability to strike out actions, and other group members through the notice and opt out provisions. The main hurdle currently facing the Australian Government is to convince the powerful business interests that they will not be the sole or even primary target of the group proceedings scheme. Additionally, perhaps a more

concrete proposal for the establishment of the special fund could be added to the draft legislation, because a concern remains about the potentially prohibitive costs confronting the principal applicant.

PART III

CLASS ACTIONS

IN THE UNITED KINGDOM

1. INTRODUCTION

As in Australia and Canada, the topic of class action legislation continues to receive a great deal of attention from academics, public advocacy groups and government in the United Kingdom.[1] Interest in legislative reform has exploded since the English Court of Appeal handed down its decision in the notorious Opren case.[2] This decision confirmed that the class action, as it is known in the United States and other jurisdictions, does not exist in British jurisprudence.[3]

Chief among the flurry of critical writing prompted by the Opren case is the study recently released by the National

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[1] See: "CITCOM: A Familiar Plot", New Law Journal, May 27, 1988; "Opren refuseniks' lack of choice", New Law Journal, July 1, 1988; "The beginning of a debate", New Law Journal, July 22, 1988; "Flexible system for disaster litigation", New Law Journal, October 7, 1988.

[2] Davies (Joseph Owen) v. Eli Lilly & Co. and others, [1987] 3 ALL ER 94 (CA).

[3] Ibid., 96.

which would create procedures for mass claims as well as a means of funding such actions. While it is expected that the issue of class actions will attract commentary and debate throughout the foreseeable future, virtually all concerned parties agree with the NCC that some kind of legislative initiative is urgently needed.

CLASS ACTIONS IN THE U.K. TO DATE

Access to class or representative actions in England and Wales is governed by Order 15 Rule 12 of the Rules of the Supreme Court:

> Where numerous persons have the same interest in any proceedings....the proceedings may be begun and, unless the Court otherwise orders, continued by or against any one or more of them as representing all or as representing all except one or more of them.

The original version of this rule appeared as Rule 10 of the first set of procedural rules following the fusion of equity and the common law in 1873.[5] The seminal judicial interpretation of

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[5] Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66 (U.K.).

Rule 10 is contained in the Duke of Bedford decision[6] which set down the following three-part test:

> Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.[7]

Access to a proceeding under Rule 10 was further restricted by the decision in Markt[8] which held that a representative action for damages cannot be maintained by a class:

> Damages are personal only. To my mind no representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases.[9]

The decision in Markt continues to govern the application of Order 15 Rule 12. Consequently, leading academics argue that the

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6 Duke of Bedford v. Ellis, [1900-03] All ER 694 (HL).

7 Ibid.

8 Markt & Co. v. Knight Steamship Co., [1910] 2 KB 1021.

9 Ibid.

current state of civil procedure in England fails to provide sufficient protection of plaintiffs involved in group actions.[10]

Among judicial efforts to mitigate the harsh effect of the Markt case, the decision of Vinelott J. in the Newman[11] case is noteworthy. This decision held that plaintiffs seeking damages arising from a common cause of action could obtain a declaration stating the defendant's liability and could then seek damages individually. However, this approach has been followed in only one subsequent decision.[12]

In another case,[13] the Court of Appeal granted an injunction against a representative defendant although the effect was to bind individuals who were not parties to the action. This decision was disallowed in a subsequent unreported case.[14]

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[10] See: J.A. Jolowicz, "Protection of Diffuse, Fragmented and Collective Interests in Civil Litigation : English Law" (1983) 42 Cambridge L.J. 222; K. Uff, "Class, Representative and Shareholders' Derivative Actions in English Law" (1984) 5 Civil Justice Quarterly 50.

[11] Prudential Assurance Co. Ltd. v. Newman Industries, [1979] 3 All ER 507 (Ch.).

[12] EMI Records Limited v. Riley, [1981] 1 WLR 923

[13] M. Michaels (Furriers) Limited v. Askew (1983), 127 SJ 597 (CA).

[14] New International Ltd. v. SOGAT, (unreported)

It is suggested that the British courts have advanced the common law as far as possible toward recognizing the class or representative action. The need for legislative reform was therefore apparent by the time that the Opren case was argued.

THE OPREN CASE

The Opren case involved claims by some 1500 plaintiffs against a pharmaceutical company and related defendants. The NCC study notes that problems arose in two ways.[15]

First, it was determined that the litigation should proceed by way of leading case. This entailed the selection of one plaintiff whose name would appear alone on the record although the litigation was undertaken for the benefit of the group. The multi-faceted nature of the litigation immediately spawned numerous lengthy interlocutory issues. Initially, it appeared that the representative plaintiff would be responsible for all costs incurred. This arrangement would punish a representative plaintiff paying her own costs but it would also prejudice any representative plaintiff funded by the legal aid plan in England. Under this plan, a successful plaintiff is required to reimburse the fund from any damages received. If

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[15] National Consumer Council, Group Actions: Learning from Opren (a paper published in January, 1989).

costs become exorbitant, the amount of damages must likewise be very high before the representative plaintiff would herself receive any of the proceeds.

Secondly, the various issues raised by the litigation gave rise to some 20 "lead" or representative actions. Each lead action impacted on the entire group but the costs for each would be borne by a representative plaintiff. Selection of the representative plaintiff sparked debate. The defendants opposed the suggestion that only those plaintiffs receiving legal aid should be representative plaintiffs because the legal aid legislation prevented costs being awarded to a successful defendant against a plaintiff receiving legal aid.

As a result, the presiding Judge decided that costs should be share equally by the plaintiffs. The Court of Appeal upheld this decision.[16] Consequently, most of the plaintiffs who were not funded by legal aid seemed likely to drop their claims. However, most of the 1500 plaintiffs eventually accepted a settlement offer.

The Opren litigation received a great deal of publicity and attracted a great deal of academic commentary. Much of the

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[16] See footnote 1.

commentary emphasized the need for new legislation and some proffered positive recommendations. Significantly, the annual Civil Justice Review[17] called for the Lord Chancellor[18] to study the extension of the availability of representative or class actions and related procedures, including funding. The NCC has conducted the most thorough study to date commendations will influence the material eventually prepared for the Lord Chancellor as a prelude to legislation.

PROPOSALS FOR REFORM

When a parliamentary committee was formed to study legislative changes to the existing legal aid legislation, both the Law Society and the NCC proposed amendments including some pertaining to class actions.[19] Suggestions for reform have also been forwarded from other sources. The following is a summary of some of the key proposals:

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[17] The recommendations of the Civil Justice Review were published int he June 10, 1988 issue of the New Law Journal. See paragraph 270, section 27 for the recommendation regarding class actions.

[18] Comparable to the Attorney General in Canada.

[19] "Legal Aid Bill Committed", New Law Journal, January 22, 1988.

(a) certification

The Law Society recommended a procedure by which a judge could grant to a group of litigants a certificate authorizing them to proceed as a class. This certificate would entitle the class to legal aid. Further, the successful defendant would be entitled to costs regardless of its financial situation.[20]

(b) non-means tested legal aid for product liability cases

The NCC proposed an amendment pertaining to product liability cases. The proposal would grant legal aid, without a means test, to consumers challenging a "development risks" defence since such a challenge, without legal aid, usually entails highly technical and therefore prohibitively expensive litigation.

(c) provision of counsel for multi-plaintiff actions

In the course of debate on the legal aid bill, the Lord Chancellor also proposed amendments. These included a plan by which the legal aid authorities would contract with a law firm

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[20] Whether a successful defendant should receive costs is a matter of some debate. For instance, the Scottish Consumer Council has recommended that a defendant should receive costs only at the discretion of the Court, as an exception to the general rule.

to handle multi-plaintiff litigation. The Lord Chancellor took the view that the advantage of such a scheme would be the equal apportioning of costs among all plaintiffs. However, the NCC has pointed out some weaknesses in this proposal:

i) as seen in the Opren case, the prospect of being liable for even a fraction of the possibly astronomical costs of a product liability case will deter plaintiffs from proceeding with an action;

ii) plaintiffs may be denied access to willing and possibly more able counsel;

iii) the scheme may place a ceiling on the legal fees payable, stalling the litigation;

iv) the allocation of certain types of claims may confine the development of expertise to one group of lawyers, eventually limiting the available pool of talent;

v) if a law firm is to be chosen on the basis of lowest tender, the successful firm may be tempted to cut corners on investigation and preparation.

(d) formalization of lead action procedure

The NCC suggests amendments to Order 15 Rule 12 of the Rules of the Supreme Court providing for a preliminary certification hearing at which the court would issue directions regarding the issues to be tried, notice, criteria for inclusion in the class and other details. Further, the litigation would be guided by a set of "master" pleadings so that individual claims would need only to provide details. Issues would be framed to resolve matters common to all plaintiffs but not questions of individual damages. Essentially, the NCC proposal would codify the approach taken in the Opren case.

Related to these proposals, the NCC suggests that legal aid be provided to all plaintiffs in a certified action with liability for reimbursement limited to a fixed reasonable amount. This approach is offered as a compromise between full funding by the state and the present requirement that successful plaintiffs carry all costs.

(e) consumer claims

The NCC notes that consumer claims raise a variety of issues such as the opt-out procedure and the calculation of damages. While not addressing these issues, the study refers to

the study of the Australian Law Reform Commission and calls for a similar effort in the United Kingdom.

(f) class action fund

The Scottish Consumer Council, in a study on class actions published in 1982, makes a series of recommendations largely similar to those discussed in the NCC study. However, the SCC also suggested the creation of a Class Action Fund which would be administered by an independent body. Eventually, the fund would be self-supporting by claiming a percentage of the proceeds won by successful plaintiffs.

(g) group actions in France and Germany

Of interest is the attention paid in the United Kingdom to group action procedures in European jurisdictions, especially France and Germany.[21] While the reforms contemplated by the Law Society, the Lord Chancellor and the NCC reflect an incremental and pragmatic approach, academics such as Professor Jolowicz of Cambridge University point to the possibility of adopting

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[21] See: R.H.S. Tur, "Litigation and the consumer interest: the class action and beyond" (1982) 2 Legal Studies 135. As well, Professor Jolowicz recommends: W.B. Fisch, "European Analogues to the Class Action: Group Action in France and Germany" (1979) 27 American Journal of Comparative Law 51.

European models. This possibility was also raised by the Scottish Consumer Council.[22]

In France and Germany, public interest groups are permitted by statute "to seek injunctive and declarative relief against actual or threatened conduct harmful to the consumer interest." These groups could be specifically named by statute or could qualify by application to a court based on statutory criteria. These groups could be accorded standing to seek relief in matters ranging from straightforward product liability cases to broader consumer interests such as appeals from the decisions of administrative bodies.[23]

CONCLUSIONS

The above summary of the most current information on the state of class actions in the United Kingdom supports the following general statements:

1. No anti-trust or consumer protection class action remedy exists in the United Kingdom. The remedy has been proposed in bill form only indirectly in the context of a bill

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[22] Scottish Consumer Council, Class Actions in the Scottish Courts: A new way for consumers to obtain redress?, published in 1982.

[23] Scottish Consumer Council, op.cit., 46-51.

pertaining to legal aid. Although the Lord Chancellor has addressed the issue, also in the context of the legal aid bill, no formal government study has yet been undertaken. However, the National Consumer Council, a non-government organization for the protection of consumer interests, has very recently released a study paper that may lead to a law reform commission report.[24]

2. The reasons for the current state of the law pertaining to class actions in the U.K. involves lack of political will to date. However, the controversial Opren case focussed attention on the need for new legislation. Academics and public advocacy groups have provided suggestions on which Parliament may act soon.

3. The Opren decision fully and finally demonstrated the inadequacy of the common law in dealing with multi-plaintiff claims in the age of mass production of goods and services. It remains for legislators to choose from among a range of possible procedural reforms.

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[24] The Scottish Law Commission has recently undertaken a study of class actions with a view to making recommendations for legislation: "Feasibility of class actions in court", International Legal Practitioner, December 1988.

PART IV

CLASS ACTIONS

IN THE UNITED STATES

1. INTRODUCTION

Paralleling 19th century developments in England, class actions in the United States find their infancy in the compulsory joinder rule used in courts of equity. Unfortunately, as class actions developed, the binding effect of class action judgments on those on whose behalf such actions were brought was unclear.[1]

The uncertainty persisted until 1938 when class actions entered the modern era in the United States with the adoption of Rule 23 of the Federal Rules of Civil Procedure.[2] This Rule (referred to as "Rules 23 (1938)") was to guide the courts in choosing the type of action it should be applied to. The courts eventually developed 3 types of class actions:

(a) the "true" class action, involving rights enjoyed jointly by the parties;

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1 Report on Class Actions, Ontario Law Reform Commission, 1982, p.8. Also, Christopher v. Brusselback, 302 U.S. 500 (1938).

2 Thomas A. Dickerson, Class Actions: The Law of 50 States, 1988, Law Journal Seminars Press, p.1-5.

(b) the "hybrid" class action, involving individual, as opposed to joint, rights to specific property; and

(c) the "spurious" class action, involving individual rights - unrelated to specific property - which raised a common question of law or fact.

The need to fit a class action into such categories proved to be unsatisfactory and, indeed, "baffling".[3] Coupled with other deficiencies in Rule 23 (1938)[4], it was amended in 1966 (the new rule will be referred to as "Rule 23 (1966)" or simply as "Rule 23"), thereby discarding the 3 categories of class actions, clarifying the binding nature of judgments, and providing several features to adequately safeguard the rights of class members.[5]

Before discussing the application of Rule 23 and the general approach to class actions in state courts, it would be

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3 OLRC (f.n.1), p.9.

4 OLRC (f.n.1), p.9.

5 OLRC (f.n.1), p.9.
383 U.S. 1029 (1966).

useful to briefly describe the distinctions between the two court systems in the United States.

Analogous to the structure in the Canadian court system, the United States has a federal court system as well as a system of state courts. Rules 23 governs class actions at the federal level, whereas each state has its own class action procedure.

The differences between the jurisdictions of both systems dictate where a particular type of class action which may be brought. The federal courts are of limited jurisdiction, hearing only those cases authorized by article III of the United States Constitution.[6] On the other hand, state courts are of general jurisdiction, hearing any cases which do not fit the limited federal jurisdiction.[7] State courts also have concurrent jurisdiction over matters which are not the exclusive jurisdiction of the federal courts.[8]

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6 Wright, Law of Federal Courts (3rd ed. 1976). See section 2 of article III for a listing of the type of cases to be heard.

7 James and Hazard, Civil Procedure (2nd ed., 1977).

8 Wright (f.n.6) : federal courts have exclusive jurisdiction over admiralty, antitrust, bankruptcy, copyright, patent and some security matters.

The federal courts have jurisdiction in cases involving litigation between states, in cases where the United States is a party, in cases arising under the United States Constitution or laws passed by the federal government (a.k.a. "federal question" cases)[9], and in "diversity suits" - where a dispute exists between citizens of different states and between citizens of a state and aliens.[10] These latter Diversity suits and "federal question" cases must satisfy the federal courts' minimum monetary jurisdiction of $10,000.[11] Therefore, the amount in dispute for each class member in an action must exceed $10,000.[12] This onerous requirement is fortunately subject to statutory exceptions, for instance in antitrust law.[13] Because diversity suit and "federal question" cases are not under exclusive federal jurisdiction, jurisdiction is shared with the state courts.

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9 See OLRC (f.n.1), p.52 of note 268 : included under this heading are antitrust class actions brought under the clayton Act, 15 U.S.C. s.12-27.

10 28 U.S.C. s.1332.

11 See Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, s.2, 94 Stat. 2369, amending 28 U.S.C. s.1331; 28 U.S.C. s.1332.

12 Snyder v. Harris, 394 U.S. 332 (1969).
Zahn v. International Paper Co., 414 U.S. 156 (1974).

13 Clayton Act, 15 U.S.C. s.15.

2. U.S. MODEL - FEDERAL RULE 23

The initiation and conduct of all class actions brought in federal court is controlled by Rule 23 of the Federal Rules of Civil Procedure.[14] It is a rule of procedure of general

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[14] Rule 23:

"(a) Prerequisites to a Class Action. One or more members of 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, ad 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 individual 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 may, if he desires, enter an appearance through his counsel.

"(3) The judgment i 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 ad 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 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 of 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 procedure 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.

application which, with exceptions, applies to proceedings with causes of action founded in substantive law coming within the jurisdiction of the United States federal courts.[15]

The initiation of a class action, termed "certification", is, in terms of the dynamics and economics of class actions, the single most important issue of a case from both the parties' and the judge's perspective.[16] The burden of establishing the prerequisites for certification rests with the party seeking class action treatment. Unless all the prerequisites are provides by the class representative (who must be a member of the class), there can be no class action.

The prerequisites are found in the first two, of five, subsections of Rule 23:

"(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."

As amended February 28, 1966, eff. July 1, 1966, (383 U.S. 1047 (1966)).

15 OLRC (f.n.1), p.52-53.

16 Arthur R. Miller, "The Class Action - American Style", (1983) Cambridge Lecture, 192.

Rule 23(a): The party seeking class action treatment must satisfy the court that:

(i) joinder is precluded due to the number of claimants constituting the class; (NUMEROSITY)

(ii) there are common questions of fact or law to be tried; (COMMONALITY)

(iii) the claims and defenses of the representative party are typical of the class; (TYPICALITY)

(iv) the class representative will adequately represent the class. (ADEQUACY OF REPRESENTATION).

The numerosity requirement usually creates a simple numbers game. However, courts have also considered the geographical dispersion of the class and the size of the individual class members' claims; joinder is most impracticable when class members with small claims are widely dispersed.[17]

The purpose of the commonality and typicality requirements is to preserve a desirable level of judicial efficiency and economy. Courts have experienced very little difficulty with these prerequisites.[18]

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17 Miller (f.n.1), p.52-53.

18 Miller (f.n.16), p.197.

Adequacy of representation has received the most attention of the four prerequisites and is perhaps the most important of the prerequisites.[19] It is seen as embodying the constitutional due process requirement. The judiciary is sensitive to the principle that every person is entitled to his day in court on any particular matter. If this principle is to be somewhat scarified for the sake of efficiency, economy and good practice in rendering a judgment or order that binds everyone in a class that has not appeared before the court, then the court must be satisfied that these absent individuals have been properly represented. And furthermore, if the representation is less than adequate, then the judgment could be vulnerable to an attack on constitutional grounds over that failure to satisfy the due process requirement.[20]

The two basic factors courts look for to fulfil this prerequisite are absence of potential conflict and assurance of a vigorous prosecution.[21] Some courts consider the financial ability of the representative class member to bear the costs of

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19 Miller (f.n.16), p.197. It is the most heavily litigated of the a prerequisites. Defense lawyers, in an attempt to block certification, often vigorously question the competency of counsel for the class representative.

20 Miller (f.n. 16), p.198.

21 Eisen v. Carlisle & Jacqueline (Eisen II), 391 F 2d 555 at 562 (2d Cir. 1968).

litigation a factor in determining the adequacy of representation in antitrust suits.[22] The representative's awareness of an willingness to pay these costs may be enough to satisfy this requirement,[23] or the requirement may simply be irrelevant.[24]

The general prerequisites of Rule 23(a) must be established by all class actions. A class action must then fit within one of three categories provided in Rule 23(b).

> Rule 23(b): A class action may be brought:
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> (1) if some prejudice would occur to either the members of the class or to the party opposing the class action were the claims pursued in a series of individual actions (the "PREJUDICE' class action); or
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> (2) if the class seeks appropriate injunctive or declaratory relief (the "SPECIAL RELIEF" class action): or

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22 See, for example:

National Auto Brokers Corp. v. General Motors Corp, 376 F Supp. 620 (SDNY 1974) (plaintiff's financial condition was examined and found to be inadequate to maintain class action):

Spain Equip. Co. v. Nissan Motor Corp. in USA, 22 Fed. R. Serv. 937 (MD Ala 1980)(bankrupt plaintiff not an adequate representative).

23 In re South Cent. States Bakery Products Antitrust Litig., 86 FRD 407 (MD La 1980).

24 Sanderson v. Winner, 507 F 2d 477 (10th Cir 1974).

(3) if the class seeks monetary damages (the "DAMAGE" class action). However the class representative must then prove that:

(i) common questions of law or fact predominate over any individual questions; (the "PREDOMINANCE" requirement)

(ii) the proposed class action is superior to other methods of adjudicating the matter (the "SUPERIORITY" requirement);

(iii) individual class members have little or no interest in pursuing individual actions;

(iv) few, if any, actions have been initiated, or are pending, over the matter in question;

(v) the selected forum is the most convenient one; and

(vi) the difficulties of managing the class action will be minor (the "MANAGEABILITY" requirement).

The "prejudice" and "special relief" class actions are the more "traditional and natural" class actions,[25] whereas the "damage" class actions, under which category most class suits seeking damages are brought, has attracted much more attention and criticism.[26]

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[25] Miller (f.n.16), p.199.

[26] The "manageability" prerequisite has attracted the most attention.

The "damage" class action is essentially an elaborate joinder mechanism bringing together parties whose only common element is that they have been injured in apparently the same manner. Hence, Rule 23(b)(3) imposes stringent procedural prerequisites which do not exist for the first 2 categories to safeguard, among other considerations, the previously mentioned principle of "efficiency and economy". The "common questions" and "superiority" requirements are designed to allow the court to discard class actions where the common questions are insignificant relative to individual questions raised in the claim, such matters being more effectively handled by alternate methods with greater practical advantages.[27]

"Damage" class actions satisfying the prerequisites of Rule 2(b)(3) must, unlike the "prejudice" and "specific relief" classes, also satisfy the notice requirements of Rule 23(c).

> Rule 23(c): A motion to obtain class certification must be made as soon as possible after the action is started. Any such order may be altered or amended by the court at any time. In the case of "damage" class actions, the representative party must give notice of class certification to all class members. The notice must inform each member that:

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27 Advisory Committee on Civil Rules, "Proposed Amendments to the Rules of Civil Procedure for the United States District Courts", 39 F.R.D. 69 (1966).

(i) he may opt-out of the class;

(ii) he will be bound by the judgment if he does not opt-out; and

(iii) he may intervene in the class proceedings if desired.

The judgment in all 3 categories of class actions will bind all members of the class except, in the case of "damage" class actions only, those who have opted-out.

A class action may be certified respecting particular issues ("split trials") or as a subclass.

The question of how to give notice in class actions has been very problematic in the United States. On the one hand, the notice requirement is viewed as embodying the constitutional requirement of due process, and therefore every member of a class is entitled to reasonable notice of the action's commencement. On the other hand, notice not seen as a "mandatory" matter because other procedural safeguards, such as the "adequacy of representation" prerequisite, protect the absent class members' constitutional due process requirement.[28]

The latter argument is thought to be least persuasive with respect to "damage" class actions because, in comparison to the other two categories of class actions, class members are the least "cohesive". This is reflected in Rule 23(c) which

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[28] See Miller (f.n.16), p.200 for a more detailed discussion of this issue.

requires a formal notice in "damage" class actions only.[29] The United States Supreme Court held in Eisen[30] that, using literal interpretation of Rule 23, individual notice to identifiable class members is mandatory in "damage" class actions; and, the full cost of such notice must be borne by the class representative.[31] This places an extremely onerous financial burden on class representatives, effectively stiffling or discouraging many large group class actions, [32] and poses the most severe threat to class actions.[33]

This threat does not fully apply to the notice requirement under Rule 23(e). This rule specifies the necessity for court approval and for notice to absent class members of any dismissal, compromise or settlement of class action. The aim of

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29 A judge has the discretion of ordering notice in "prejudice" and "specific relief" cases - Rule 23(d)(2).

30 Eisen v. Carlisle and Jaqueline, 417 U.S. 156 (1974). See also Philips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). For a state response to these cases, see s.III, in fra.

31 See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978) : enumerating factors permitting the shifting of certain costs of notice process to defendants; see also Irving Trust Co. v. Nationwide Leisure Corp., 95 F.R.D. 51 (S.D.N.Y. 1982).

32 In Eisen itself, the potential $315,000 price tag for notice to the approximately two million identifiable absent class members ended the suit.

33 OLRC (f.n.1), p.61.

the rule is simply to prevent representative class members from obtaining a personal benefit at the expense of the rest of the class by entering into a settlement or by consenting to a dismissal such that the interests of the class as a whole are prejudice.

Rule 23(d) allows the court to make any appropriate order during the course of the class action proceedings, enabling the trial judge to effectively supervise such proceedings.

3. CLASS ACTIONS IN STATE COURTS

Although the bulk of class action litigation is brought at the federal level due to the interstate nature of group wrongs[34] such litigation is gaining in popularity at the state level as a result of a policy decision by the United States Supreme Court to discourage federally instituted class actions unless federal law was at issue.[35] The Court's policy is reflected in decisions where:

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[34] Newberg, Newberg on Class Actions, 2nd ed. (1985), Vol. 3, ch. 13.

[35] See Dickerson, f.n.2, at s.1.02[3].

(i) aggregation of claims to meet the Court's minimum monetary jurisdiction of $10,000 in diversity suits was disallowed;[36]

(ii) the cost of notice to all absent class members in federal class actions must be borne by the class representative;[37]

(iii) state courts were held to be competent to handle actions involving nationwide marketing and delivery of goods and services.[38]

In response to this policy, many states began to modernize their class action statutes by improving on Federal Rule 23 or incorporating elements of the Uniform Class Actions Rule (1976). In some states which did not modernize, the courts took it upon themselves to alter and create their own decisional rules, incorporation elements of Rule 23, the Uniform Class Actions Rule

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36 Snyder & Zahn cases, f.n.12. (Most states no longer require such aggregation, but some still do: Kentucky, Maryland & Rhode Island, for example.)

37 Eisen, f.n.25.

38 Phillips Petroleum, f.n.25; see Note, "Civil Procedure - Class Action Jurisdiction Over Non-Resident Plaintiffs," 33 U. Kan. L. Rev. 525 (1985).

(1976), or the rules of other states.[39]

In analyzing state class actions, it is generally accepted that the class action rules of any one state are related, in very general terms, to one or more of the following models[40]:

(1) the common law (or no formal rule);

(2) the New York Field Code (1849);

(3) Rule 23 (1938);

(4) Rule 23 (1966); and

(5) the Uniform Law Commissioners' Model Class Actions Rule.

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39 Dickerson, f.n.2, at s.1.02[3]. The state courts to do so were:

California: see Richmond v. Dart Industries, Inc., 174 Cal. Rptr. 515 (Cal. Sup. 1981).

Louisiana: see Millet v. Rollins Environmental Services, 428 So. 2d 1075 (La. App. 1983).

New Hampshire: see State Employees Association v. Belkup County, 448 A. 2d 969 (M.H. Sup. 1982).

North Carolina: see Crow v. Citicorp Acceptance Co., Inc. 319 M.C. 274 (1987).

West Virgina: see Burks v. Wymer, 307 S.E. 2d 54 (W. Va. Sup. 1979).

40 Newberg, f.n.29.
OLRC (f.n.1), p.64.

(1) Common Law

As previously described, class actions developed from the compulsory joinder rule used in the courts of equity. Only two states have refused to adopt any formal rules and continue to follow the restrictive approach of the common law: Mississippi and Virginia.[41]

(2) New York Field Code

The New York Field Code, amended in 1849, was a state code of civil procedure which provided[42]:

> [W]hen the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

Only three states continue to follow the Code: California, Nebraska and Wisconsin.[43]

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41 Mississippi: no formal rule, but see s.11-53-37 (1942) which addresses costs and attorney's fees in successful class actions.

Virginia: class actions only in equity.

42 N.Y. Session Laws 1848, c.379, as amended by N.Y. Session Law 1849, c.438, s.119.

43 California: Cal. Code Civ. Pro., s.382, 1024.5.

Nebraska: Neb. Rev. Stat. (1943), s.25-319.

It must be noted that California courts, although apparently subject to the Field Code, have judicially adopted a very liberal version of Rule 23[44] - this amply evidenced by the expansive rules the courts have set down respecting class action notice.

(3) Rule 23 (1938)

Alaska, Georgia, Louisiana, North Carolina, Rhode Island and West Virginia still follow Rule 23 (1938) in one form or another:[45] Rhode Island and North Carolina have done away with the "true", "hybrid" and "spurious" class action categories; Georgia simply omits "spurious" class

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Wisconsin: Wis. Stat. (1976), s.25-319.

Although New Mexico has adopted Rule 23 (1938), it has never repealed its former rule based on the Field Code: NM Stat. Ann. (1938), s.21.1-1.

44 Adopted in Daar v. Yellow Cab Co., 67 Cal. 2d 695 (Sup. Ct. 1967) and Vasquez v. Superior Court, 4 Cal. 3d 800 (1971).

45 Alaska: Alaska R. Civ. P.23.

Georgia: Ga. Code (Supp. 1967), s.9-11-23.

Louisianna: La. Code Civ. Pro. Ann. Arts. (west 1960), s.591-597.

North Carolina: N.C. Gen. Stat. s.1A-1, R.Civ. P.23 (1969).

West Virginia: W. Va. R. Civ. P.23 (1959).

Rule 23 (1938) is also followed in Puerto Rico: P.R.R. Civ. P. 20.1, 20.2 (1958).

actions; Louisiana allows only "true" class actions; and Louisiana and Rhode Island have altered their rules to authorize their courts to "manage" class actions (analogous to Rule 23 (1966).

(4) Rule 23 (1966)

Of the 41 states that have followed Rule 23 (1966), only 16 states have adopted it without alteration.[46] The remaining 25 states have modified their rules, introducing amendments such as:

(i) the institution of a flexible approach to post-certification notice;[47]

(ii) the elimination of the 3 categories of Rule 23(b)[48]; and

(iii) the inclusion of a "costs" provision.[49]

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[46] See p.68 or RA.

[47] Arkansas, Illinois, Massachusetts, New Jersey, New York, Oklahoma ad Pennsylvania.

[48] Arkansas, Illinois, Massachusetts, New York and Oklahoma.

[49] New York, Oklahoma and Pennsylvania.

(5) Uniform Law Commissioners' Model Class Actions Rule

The Uniform Law Commissioners' Model Class Actions Rule (the "Uniform Rule") is the amended version (amended in 1987) of the Uniform Class Actions Act originally adopted in 1976[50] at the National Conference of Commissioners on Uniform State Laws, whose mandate is to promote uniformity in state laws where desireable and practicable. The Uniform Rule is based on Rule 23 (1966), and incorporates 10 years of case law (1966 to 1976) pertaining to Rule 23 (1966). Therefore, the Uniform Rule attempts to address many of the deficiencies and omissions inherent in Rule 23 (1966):

(i) Section 4 explicitly allows appeals of orders granting or denying certification;

(ii) Courts are given discretion over the appropriate form a certification notice is to take;

(iii) Section 9(a)(4) provides for participation by a state attorney general;

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50 National Conference of Commissioners on Uniform State Laws, Uniform State Laws, Uniform Laws Ann. (1975), Vol. 12. The full text of the amended Act (1987) is contained in appendix B of Dickerson, f.n.2.

(iv) Discoveries are specifically dealt with in Section 10;

(v) Section 15 is unique because it governs the distribution of monetary relief to the class.

(vi) The payment of attorney's fees from any monetary award is subject to a court order (section 16); and

(vii) The application of any statute of limitation is clarified in section 18.

Dickerson[51] notes that few states have adopted the Uniform Rule, enacting instead a modified form of Rule 23 (1966),[52] and that the Uniform Rule has provided some authority for state courts in lieu of federal case law.[53]

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51 Dickerson, f.n.2, at section 1.04[2][b].

52 Only Iowa (Iowa R. Civ. P. 42.1-42.20, adopted 1980) and North Dakota (ND. R. Civ. P. 23 (1977)) have adopted the Uniform Rule. See Notes, "The Iowa Uniform Class Actions Rule: Intended Effects and Probable Results," 66 Iowa L. Rev. 1241 (1981).

53 For example:

McCastle v. Rollins Environmental Services of Louisiana, Inc., 456 So. 2d 612 (La. App. 1984); Grigg v. Michigan National Bank, 405 Mich. 148 (1979); Roger v. State, 394 A. 21d 828 (N.H. Sup. 1978). Burks v. Wymer, 307 S.E. 2d 647 (W. Va. 1983).

Certification Notice at the State Level

In recognition of the "notice" issue at the federal level, it is useful to briefly survey notice requirements at the state level.

In general, state class action provisions respecting notice to absent class litigants either follow the restrictive approach of Federal Rule 23 (and Eisen[54]) or allow the trial judge discretion in deciding what type of notice is reasonable under the circumstances.[55] Hence, litigants hoping to sue in

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54 417 U.S. 156 (1974), see f.n.25.

55 The following states require notice in all types of class actions: Florida, Iowa, Louisiana, Massachusetts (see Mass. Consumer Protection Act, s.9(2)), Michigan, Montana, New Hampshire, North Carolina, North Dakota, Pennsylvania, Texas, West Virginia.

The following states require notice in "damage" class actions only: Alabama, Alaska, California (see Frazier case, 184 Cal. App. 3d 1491 (1986)), Georgia, Idako, Indiana, New Jersey, New York, Wisconsin.

Some states leave notice requirements entirely in the court's discretion: Arkansas, California (Cal. Consumer Legal Remedies Act, s.1781(d)), Connecticut, Illinois, Massachusetts (Mass. Rules of Civil Procedure, R. 23(d)), Michigan (Mich. Comp, L., s.445.911(5)), Missouri, Nebraska, New Mexico, Rhode Island, South Carolina.

See Dickerson, f.n.2, sect. 7.02[2].

state courts to avoid the restrictive federal level practice may be banned from state courts too by notice provisions which are just as restrictive. This has prompted state legislative and judicial action to ameliorate the situation, but the response does not demonstrate any clear trends.

Courts in Alabama[56] and California[57], for example, have foregone notice requirements where monetary damages were not the "primary objectives" or were sought "additionally" to injunctive and declaratory relief.

There have also been some specific legislative responses to Eisen. In Wisconsin, for instance, federal Rule 23 procedures have been adopted respecting notice.[58] Yet in the consumer context under the Wisconsin Consumer Act[59] courts have the discretion to give the best notice practicable under the circumstances. California consumer class action statutes provide

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56 First Alabama Bank of Montgomery v. Martin, 425 So. 2d 415 (Ala. Sup. 1983).

57 Reyes v. San Diego County Board of Supervisors, 242 Cal. Rptr. 339 (Cal. App. 1987).

58 Schlosser v. Allis-Chalmers Corp., 86 Wis. 2d 226 (1978).

59 Wis. Stat. Ann., s.426.110(8) (West 1974). See Note, "Finding a Forum for the Class Action: Issues of Federalism Raised by Recet Limitations on Use of Federal Courts", 28 Syracuse L. Rev. 1009 (1977).

some of the most liberal notice provisions in the United States, allowing for notice by publication, for instance.[60] And some states have simply altered their rules of procedure for class action; New York rules do not specifically require notice to individual class members[61] in claims for injunctive relief, although notice in suits for damages remains mandatory.

4. CLASS ACTION REMEDIES - THE SUBSTANTIVE LAWS

> As noted by the Ontario Law Reform Commission:
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> "Generally speaking, in the United States, at least in relation to actions in the federal courts, the vast majority of class suits are based upon statutory causes of action, either express or implied. Certainly, this statement is correct with respect to civil rights, securities and antitrust suits. Even at the state level, there is an increasing member of statutory causes of action, certain of which specifically authorize class actions."[62]

i) ANTITRUST

The United States Congress has placed a heavy reliance on private litigants to enforce antitrust legislation; as well,

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60 See Cal. Civ. Code, s.1781(d) (West 1973).

61 N.Y. Civ. Prac. Law, ss.901-909 (McKinney 1976).

62 OLRC (f.n.1), p.215.

the Supreme Court recognizes the importance of private civil actions in antitrust enforcement.[63] This reliance is readily apparent in the numerous federal statutes with antitrust provisions.[64] In particular, section 4 of the Clayton Act[65] permits:

> "that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (emphasis added)

Three principle elements must be proved under s.4 of the Clayton Act to establish an antitrust violation:

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63 See Newberg (f.n.29) at s.18.01.

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969).

64 Three of the most important statutes are:

(i) Clayton Act, 15 U.S.C. ss.12-27;
(ii) Sherman Act, 15 U.S.C. ss.1-7;
(iii) Wilson Tariff Act, 15 U.S.C. ss.8-11.

See also Reiter v. Sonotone Corp., 99 S. Ct. 2326 (1979).

65 Section 4 of 15 U.S.C., s.15.

(1) an injury to a business;

(2) such injury resulting from a violation of antitrust laws; and

(3) such injury resulting in damages.

Because parties bringing class actions under antitrust laws invariably claim treble damages, they therefore rely almost exclusively on the Rule 23(b)(3) category, which requires satisfaction of superiority and predominance tests, among others.[66] As discussed earlier, it is imperative that questions common to the class predominate over questions affecting individual members - the rationale being that where common questions predominate, economies can be achieves through use of class actions. In antitrust matters in particular, damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions.[67] Certain antitrust violations, by their very nature,

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[66] See Newberg (f.n.29) at s.18.26.

Antitrust class actions are rare under Rule 23(b)(1) and (b)(2) categories, although certification of classes under both categories have occurred. Nonetheless, Rule 23 has emerged as a significant weapon for antitrust enforcement.

[67] Newberg (f.n.29) at s.18.26.

easily satisfy this requirement; others do not.

Common liability issues such as conspiracy, monopolization, and conspiracy to monopolize have generally been held to involve questions of a "central" or "overriding" nature, therefore satisfying the predominance (over individual issues) requirement.[68]

The most common type of antitrust class action suit deals with allegations of conspiracy to fix prices. In the majority of cases such an allegation is sufficient for certification because class-wide injury may be presumed upon proof of the allegation.[69] Such a presumption is not as forthcoming where the product is "commercially unique"[70] because proof of injury to each member of the class requires evidence of the competitive price for each product in every distinct market.

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68 Osborn v. Pennsylvania - Delaware Service Station Dealers Assn., 94 FRD 23 (D. Del. 1981); Alabama v. Blue Bird Body Co., 71 FRD 606 (MD Ala 1976) & 573 F 2d 309 (5th Cir. 1978); but see Jackshaw Pontiac, Inc. v. Cleveland Press Publishing Co., 102 FRD 183 (ND Ohio 1984)(Where a "plethora" of advertising rates precluded the finding of predominance of common questions).

69 See Brown v. Central Liquor Co., 32 Fed R Serv. 2d 1197 (WD Okla 1980); and Minnesota v. United Steel Corp., 44 FRD 559 (D Minn 1968) (proof of the conspiracy will present predominant questions of both law and fact).

70 Commercial uniqueness occurs when a product's price varies according to its quality or its market - see Swiatlowski, "The Predominance Requirement: Antitrust Class Actions and the 'Commercially Unique' Product" (1976), 27 Syracuse L. Rev. 1257.

Hence, it is virtually impossible for the common question - the actual violation of the antitrust law - to predominate.[71]

Analogous considerations arise in cases charging tying violations. The source of controversy arises over the need to prove use of economic power to enforce the tie-in, or "coercion".[72] Some courts have held that coercion is necessarily an individual issue, especially when the violation hinges on the individual relationship between the buyer and seller rather than on a uniform purchase contract,[73] thereby denying certification. Other courts have held that coercion is capable of common proof when the tie-in is the product of an express provision in standardized agreements,[74] or evidence of an incessant policy of tie-ins and class wide adherence to such policy due to a

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71 Swiatlowski (f.b.65).

72 Newberg (f.n.29), section 18.31,

73 Chase Parkway Garage, Inc. v. Subaru of New England, Inc., 94 FRD 330 (D. Mass 1982).

74 Sandles v. Ruben, 89 FRD 635 (SD Fla 1981) (predominance shown in an arrangement tying the execution of a 99 years lease for recreational property to the purchase of condominium units); Jennings Oil Co. v. Mobil Oil Corp., 80 FRD 124 (SDNY 1978); and Bogosian v. Gulf Oil Corp., 561 F 2d 434 (3d Cir 1977), certification denied, 434 U.S. 1086 (1978).

franchisor's market power, for instance.[75]

Suits brought under the Robertson-Patman Act face some of the same problems discussed above. Actions under the Act have generally not been able to establish predominance of common questions because the statute requires the proof of individual competitive injury.[76]

Antitrust class actions also raise a "standing" issue. Class certification is sometimes denied on the basis of inadequate or improper representation when a class representative's status in relation to the defendant is significantly different from that of the class. Professor Newberg suggests that regardless whether the result is correct or not, it is reached for the wrong reason. The proper analysis should not be based on Rule 23 but rather on whether the class representative has individual standing to bring the suit.[77]

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75 Krehl v. Baskin-Robbins Ice Cream Co., 78 FRD 108, 118-19 (CD Cal 1978) ("100% franchisee adherence") : New York ex. rel. Abrams v. Anheaser-Busch, Inc., 117 FRD 349 (EDNY 1987) (certif. denied).

76 In Re Piper Aircraft Distribution System Antitrust Litig., 23 Fed. R. Serv. 2d 282 (WD Mo 1976) ("in commerce" requirement presented predominant individual questions); Kelly v. G.M. Corp. 425 F. Supp. 13 (ED Pa 1977) (The Act's price discrimination are "manifestly ill suited" to class action treatment because of need to prove each claim individually).

77 Newberg (f.n.29), s.18.16.

This issue is encountered when a plaintiff has ended a relationship with a defendant and then endeavours to represent a class whose members continue to maintain the relationship.[78] Professor Newberg suggests a constructive approach which focuses on the status of the parties at the time of the alleged injury:

> "If for example, the plaintiff, a former franchisee, brings an action against its franchisor, claiming that it was injured by the defendant's antitrust violation during the franchise relationship, the mere fact that the franchise relationship has been terminated does not indicate that representation of the class of former and present franchisees seeking damages for the defendant's antitrust violations during that period is inadequate. On the other hand, if the same terminated franchisee sought solely injunctive relief relating to the ongoing franchise relationship, it would lack individual standing to raise new issues dealing with current franchise relationships which pertain to practices which were not in use before the former franchisee's business terminated. A more difficult question arises whether a former franchisee may seek present or future injunctive relief based on common and continuing illegal activities on the part of the franchisor, which were also in effect before the plaintiff's franchise terminated. The question is clearly an individual

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78 Cases of ex-franchisees seeking to represent existing franchisees illustrate this point:

Aamco Automatic Transmissions, Inc. v. Tayloe, 407 F Supp. 430 (Ed Pa. 1976) (former franchisee not an adequate class rep.);

CF Vasilow Co. v. Anheuser-Busch, Inc., 117 FRD 345 (EDNY 1987) (horizontal conspiracy involving independent's (ex-) franchised beer wholesalers/certified).

> standing question and not a class issue. Rule 23 does not require all class members to seek common relief, as was true in spurious class actions under former Rule 23. Courts have recognised the distinction between individual standing issues and class action considerations."[79]

Courts grapple over the standing issue when it comes to consumer's who have apparently suffered injury to "business or property" (s.4, Clayton Act). The Supreme Court in Illinois Brick Co. v. Illinois[80] disallowed "indirect" purchasers from maintaining an action against retailers because the middleman merely passed on the full amount of an overcharge. On the other hand, the Court has in other respects interpreted the Clayton Act liberally so as not to discourage consumer class actions. In Reiter v. Sonotone Corp.[81] the Supreme Court granted standing to consumers who had paid higher prices for goods purchased for personal use, holding that injury to property is not limited to business or commercial loss. It did not see its decision as opening the flood gates for consumer antitrust class actions, thereby creating administrative chaos, as long as the courts

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79 Newberg (f.n.29), s.18.16.

80 431 U.S. 720 (1977). Some states now expressly permit such indirect purchaser claims: Alabama, California, Hawaii, Illinois, Mississippi, New Mexico, South Dakota and Wisconsin (Newberg, s.13.02).

81 442 U.S. 330 (1979); see also Arizona v. Shamrock Foods Co. 729 F2d 1208 (9th Cir 1984).

continued to exercise proper discretion in dealing with Rule 23.[82]

Until 1980, section 5(a) of the Clayton Act[83] prevented the use of offensive collateral estoppel by providing that an antitrust judgment obtained by the United States against a defendant would be given prima facie consideration in subsequent proceedings brought by new parties against that same defendant. A 1980 amendment removed the words "prima facie" from the section.[84] Therefore, once an issue has been "fully and

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82 OLRC (f.n.1) p.242; the Court refused to exclude consumer class actions in the absence of express language in s.4 of the Clayton Act to do so.

83 15 U.S.C. s.16(a).

84 Section 5(a) now reads:

"A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, that this section shall not apply to consent judgments or decrees entered before any testimony has been taken. Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel, except that, in any action or proceedings, brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under section 45 of this title which could give rise to a claim for relief under the antitrust laws."

See Newberg (f.n.29), s.18.45.

fairly"[85] litigated and judgment rendered on the merits, the loosing defendant can not relitigate the issue in subsequent proceeding.

The Clayton Act further facilitates the commencement and prosecution of class actions for impecunious consumers where individual damage claims are small:

(1) Section 4 does away with the $10,000 minimum monetary requirement per claimant in federal courts; and

(2) Section 4 provides for recovery of the costs of the class suit as well as reasonable attorney's fees.

Prior to 1976 parens patriae antitrust class actions brought by state attorneys general on behalf of all state citizens were shunned by the judiciary.[86] To facilitate such actions, the Hart-Scott-Rodino Antitrust Improvements Act (1976)[87] was passed, authorizing state attorneys general to bring treble damage actions on behalf of its citizens concerning

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[85] See Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (U.S. Supreme Court decision allowing offensive use of collateral estoppel).

[86] California v. Frito-Lay Inc., 412 U.S. 908 (1973).

[87] 15 U.S.C. ss,15c-15h.

violations of the Sherman Act, as well as to seek both injunctive and monetary relief under the Clayton Act. It therefore provided a practical alternative to potentially unmanageable class suits involving numerous individuals.[88]

ii) CONSUMER PROTECTION

The term "consumer protection" encompasses products liability, consumer credit and consumer fraud legislation, and other trade practices not addressed by competition law.

Federal

Consumer class actions account for a small fraction of all class action suits brought in federal courts.[89] This is primarily attributable to the minimum monetary requirement of $10,000 per individual class member - few consumer oriented claims can satisfy such a prerequisite. Although exceptions exist to this monetary requirement, such as provisions in the

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88 Newberg (f.n.28), s.18-56;

Massachusetts v. Stover, 541 F. Supp 143 (D. Mass. 1982).

89 Hinds, "To Right Mass Wrongs : A Federal Consumer Class Action Act" (1976), 13 Harv. J. Leg. 776.

Clayton Act for antitrust suits discussed earlier, it does limit consumer access to potential remedies under such legislation as the Consumer Product Safety Act,[90] for instance.

Sources of class action litigation in the consumer protection area include actions under the Equal Credit Opportunity Act[91], Fair Credit Billing Act,[92] Fair Credit Reporting Act,[93] Fair Debt Collection Practices Act,[94] National Bank Act,[95] Racketeer Influenced and Corrupt Organizations Act[96], Uniform Consumer Credit Code,[97] Truth in Lending Act

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90 15 U.S.C. ss.2051-2081, as amended by Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, s.3.

The C.P.S. Act, designed to enhance product safety, (s.1072) "provides a cause of action for damages to persons who sustain injury by reason of any knowing violation of a consumer product safety rule promulgated under the Act by the Consumer Product Safety Commission" (see OLRC (f.n.1) at p. , note 227).

91 15 U.S.C. ss.1691-1691e (Oct. 28, 1974) (under which up to $10,000 of actual damages are recoverable by individual claimants).

92 15 U.S.C. s.1666 et seq.

93 15 U.S.C. s.1681.

94 15 U.S.C. s. 1692 et seq.

95 12 U.S.C. s.85.

96 18 U.S.C. ss.1961-1968 (a.k.a. RICO).

(TILA)[98] and Magnuson-Moss Warranty Act.[99] The last two statutes are of particular importance and are discussed below.

The Truth in Lending Act deals with disclosure of consumer credit information and is the "most voluminous source" of class actions in the consumer credit area.[100] Until its amendment in 1974, courts were reluctant to certify class actions for TILA violations because of the potential for devastating damage awards based on the statutes required minimum recovery of $100 (plus attorneys' fees) for individual claims.[101] The 1974 and 1976 amendments imposed a ceiling on class action recoveries

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97 See Circle v. Jim Walker Homes, 654 F2d 688 (10th Cir. 1976).

98 15 U.S.C. s.1601 et seq.

99 15 U.S.C. ss.1301-2312.

100 Newberg (f.n.29) s.21.01.

101 Newberg (f.n.19) s.21.01.

The pre-1974 version of TILA also limited the maximum actual damages for individual claims to $1,000 and did not address the issue of class actions. Notwithstanding the $1,000 cap on damages, it was the $100 minimum recovery per individual which caused judicial anxiety over the prospect of rendering multimillion dollar awards in large TILA class actions for violations of a technical nature: Ratner v. Chemical Bank N.Y. Trust Co., 54 FRD 412 (SDNY 1972): see also Gerlach v. Allstate Ins. Co., 338 F. Supp. 642 (S.D. Fla. 1972) where potential damages amounting to $1 billion for mere technical violations threatened the existence of the defendant credit card company.

of $500,000 or 1% net worth of the defendant and confirmed the propriety of class actions in accordance with Rule 23.[102]

TILA recovery provisions lead to interesting considerations respecting the fulfillment of the "adequacy of representation" prerequisite of Rule 23. Courts have found a representative class member's representation inadequate when a disparity arises because the representative will obtain a lesser potential recovery from a class action distribution due to the class size and the statutory monetary ceiling on a class recovery as compared to the potential recovery available if the representative chose to proceed individually. The courts view this disparity as an antagonism or conflict between the representative and the class, and question the representative's motives for accepting a lower individual damage award in order to proceed with the class action. Professor Newberg thinks that such considerations ought not to play a role in a determination of adequacy of representation because the representative's motives are likely based on the realities of litigation:

(i) economic reality likely dictates that the suite will proceed as a class action or not at all;

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[102] ibid (f.n. 96).

(ii) competent counsel will likely not be willing to litigate a small claim (under $1,000) without the incentive of an enhanced fee potential of a class action; and

(iii) TILA's aim is to encourage class actions.[103]

Plaintiffs in TILA actions often append additional claims under state laws (which raise additional or alternative relief or measure of damages), both claims being based on related circumstances. When a class is upheld for the federal claim, the court will usually uphold the class for any closely related pendant claim.[104]

The Magnuson-Moss Warranty-Federal Trade Commission Improvement Act[105] expressly authorizes actions in federal or state courts against warrantors, suppliers or service contractors for breaches of obligations under the Act, of written or implied

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103 Newberg (f.n.29), s.21.06.

104 Newberg (f.n.29), s.21.22;

It is not unusual to see antitrust claims and pendant causes of action under state deceptive trade practices: Kamanski v. Shawmut Credit Union, 416 F. Supp. 119 (D. Mass. 1976) (class certified under TILA and state consumer protection act).

105 15 U.S.C. ss.2301-12.

warranties, or of service contracts. Although it expands the remedies available under the Uniform Commercial Code and allows the recovery of costs, expenses and attorneys' fees - thereby encouraging federal litigation - there have been few suits under the Act because it requires a class to be constituted of at least 100 named plaintiffs with a minimum aggregate claim of $50,000 (excluding any claim for punative damages).[106] These requirements apply to suits brought in federal court only, thus creating an incentive to seek redress at the state level.

State

In terms of substantive remedies for consumers, nearly every state has consumer protection legislation prohibiting false advertising and/or unfair and deceptive trade practices, and creating private rights of action:[107]

Alabama: Ala. Code §§ 8-19.1 - 8-19.5.

Alaska: Alaska Stat. §§ 45-50-471 et seq.

Arizona: Ariz. Rev. Stat. Ann. §§ 44-1521 - 44-1534.

Arkansas: Ark. Stat. Ann. §§ 70-901 - 70-929.

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106 The 100 plaintiff/$50,000 claim requirements apply to actions in federal courts only - 15 U.S.C. s.2310(d)(3)(c). See Newberg (f.n.19), s.21.29.

107 Dickerson (f.n.2) s.6.04[4].

California: Cal. Civ. Code §§ 1750-1784.

Connecticut: Conn. Gen. Stat. Ann. §§42-110a - 42-110g. (Conn. Unfair Trade Practices Act)

Colorado: Col. Rev. Stat. §§ 6-1-101 - 6-1-114.

Delaware: 6 Del. Code Ann. §§ 2511-2537.

District of Columbia: D.C. Code Ann. §§ 28-3801 - 28-3819.

Florida: Fla. Stat. Ann. §§ 501.201-501.213

Georgia: Ga. Code Ann. §§ 10-1 - 10-370.

Hawaii: Hawaii Rev. L. §§ 480-1 - 480-24.

Idaho: Idaho Code §§ 48-601 - 48-619.

Illinois: III. Ann. Stat., Ch. 121 1/2, §§ 26 - 262.311-317.

Indiana: Ind. Code §§ 24-5-0.5-1 - 24-5-0.5-9.

Iowa: Iowa Code § 714.16 (no private right of action)

Kansas: Kan. Gen. Stat. Ann. §§ 50-623 - 5-644.

Kentucky: Ky. Rev. Stat. Ann. §§ 367.110-367.990.

Louisiana: La. Rev. Stat. Ann. §§ 13:1401-13:1418.

Maine: 10 Me. Rev. Stat. Ann. §§206-214.

Maryland: Md. Code Ann. §§ 13-101 - 13-501.

Massachusetts: Mass. Gen. L. Ann., Ch. 93A, §§ 1-11.

Michigan: MIch. Comp. L. §§ 445.901-445.992.

Minnesota: Minn. Stat. Ann. §§ 325D.09-325D.16.

Mississippi: Miss. Code Ann. §§ 75-24-1 - 75-24-61.

Missouri: Mo. Ann. Stat. §§407.010-407.701.

Montana: Mont. Rev. Code Ann. §§ 30-14-101 - 30-14-224.

Nebraska: Neb. Rev. Code §§ 59-1501 - 59-1623.

Nevada: Nev. Rev. Stat. §§ 590A.010-590A.280.

New Hampshire: N.H. Rev. Stat. An. § 358-A:10-a (19755)

New Jersey: N.J. Stat. Ann. §§ 56:8-1 - 56:8-24.

New Mexico: N.M. Stat. Ann. § 57-12-10.

New York: N.Y. Gen. Bus. L. §§ 349-350.

North Carolina: N.C. Gen. Stat. §§ 75-1 - 75-56.

North Dakota: N.D. Cent. Code §§ 51-15-01 - 51-15-11. (no private right of action)

Ohio: Ohio Rev. Code Ann. § 1345-09.

Oklahoma: 15 Okla. Stat. §§ 751-789.

Oregon: Ore. Rev. Stat. §§ 646.605-646.642.

Pennsylvania: 73 Pa. Stat. § 201 et seq.

Rhode Island: R.I. Rev. L. Ann. §§ 6-13.1-1 - 6-13.1-11.

South Carolina: S.C. Code Ann. §§ 39-5-10 - 39.5-160.

South Dakota: S.D. Comp. L. §§ 37-24-1 - 37-24-35.

Tennessee: Tenn. Code Ann. §§ 47-18-101 - 47-18-116.

Texas: Tex. Rev. Civ. Stat. §§ 17.41 - 17.63.

Utah: Utah Code Ann. § 13-11-19.

Vermont: 8 Vt. Stat. Ann. §§ 2451-2462.

Washington: Wash. Rev. Code §§ 19.86.020, 19.86.030, 19.86.040, 19.86.050, 19.86.065, 19.86.090.

West Virginia: W. Va. Code Ann. §§ 46A-6-101 - 46A-6-108.

Wisconsin: Wis. Stat. Ann. § 100.18.

Wyoming: Wyo, Stat. An. §§ 40-12-101 - 40-12-112.

At least 18 of these states have specific provision for class actions based on Rule 23 in their consumer statutes[108]:

> Alaska, California, Connecticut, Florida, Indiana, Kansas, Louisiana, Massachusetts, Missouri, New Hampshire, New York, Ohio, Oregon, Rhode Island, Texas, Utah, Wisconsin and Wyoming.

Eleven states and one territory[109] have adopted the Uniform Consumer Credit Code[110] (UCCC) (it addresses violations of disclosure provisions), which closely, parallels the pre-1974 civil liability provisions of the federal Truth in Lending Act. Hence, unfortunately, the UCCC is also silent about class actions.

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108 OLRC (f.n.1), p.215, note 12; Newberg, app.13-2.

109 Colorado, Indiana, Oklahoma, South Carolina, Utah, Wisconsin, Wyoming and Guam adopted the UCCC (1968); Idaho, Iowa, Kansas and Main adopted UCCC (1974). See also Newberg (f.n. 29) s.21-27.

110 Approved by the National Conference of Commissioners on Uniform State Laws on July 30, 1968. Another example of uniform consumer protection model is the Uniform Consumer Sales Practices Act (ULA) which provides for class actions for declaratory or injunctive relief, or for all actual damages suffered.

A cause of action based on any of the above state consumer protection statutes may be claimed in conjunction with, or in place of, a cause of action based on common law fraud. The advantage of basing a claim under such a statute, however, is that in certain states - California and New York for instance- consumer reliance is not necessary for purposes of showing common questions of law or fact.[111]

In closing, a quote from the OLRC Report respecting class actions in California and products liability class actions is worth noting.

> "Notwithstanding the enactment in recent years of legislation designed to facilitate consumer class actions, there does not appear to have been a proliferation of such actions at the state level. The notable exception in this regard is California, where the Consumers Legal Remedies Act specifically provides a class action procedure to redress violations of that Act. In that jurisdiction, the opportunity for, and the utilization of, class actions in the consumer area has been increased significantly by a number of developments. First, judicial decisions with respect to the substantive law have facilitated, for example, proof of fraudulent misrepresentation in consumer class actions. Secondly, decisions regarding the class mechanism itself, with respect to matters such as notice and novel methods of calculation and distribution of damages, have facilitated the bringing of class actions. In other jurisdictions, however, at least in

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[111] Dickerson (f.n.2) s.6.04[4].

some areas of the law, consumer class actions have met with mixed success. This is particularly the case with respect to products liability class actions, in which damages are sought for injuries resulting from the use of a defective product.

Whether a products liability class action claiming damages is brought in the federal courts pursuant to Rule 23, or at the state level under a class action procedure equivalent to Rule 23, common questions must predominate over those of an individual nature before the action may proceed as a class action. For the most part, although common questions relating to the existence and nature of the defect are usually involved in products liability cases, courts have been reluctant to certify such cases on the basis that the presence of significant individual issues concerning conduct subsequent to purchase, proximate cause, assumption of risk, and contributory negligence predominate over the common questions.

There are, however, indications that this restrictive view of products liability class actions is not universally held. The position of the courts has been criticized by commentators, who argue that common questions relating to proof of the existence and nature of the product defect are most appropriate for class treatment and, accordingly, that partial certification of the class action should be granted under Federal Rule 23(c)(4)(A), and matters of an individual nature, such as causation and damages, deferred to subsequent individual proceedings."

5. EXPERIENCE TO DATE

Many controversies in the class action area stem from issues which Rule 23 does not address. These issues (some of which have been touched upon earlier) include:

(i) the assessment and distribution of monetary relief:

(ii) the class representative's liability for costs and attorney's fees;

(iii) certification orders and their appealability;

(iv) the applicability of discovery procedures to class actions; and

(v) the running of limitation periods during certification proceedings.

Apart from the Uniform Law Commissioner's Model Class Actions Rule discussed earlier, reform proposals of class action procedures relating to the above issues were initiated by the U.S. Department of Justice in the late 1970s.[112]

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[112] A Bill to provide for the reform of class action litigation procedures, U.S. Department of Justice, Office of Improvements in the Administration of Justice, Bill s.3475, 95th Cong. 2d Sess. (1978), and Small Business Judicial Access Act

Some commentators, such as Canadian Andrew Roman, think that class action reform proposals in the United States amount to no more than a "tinkering with the wording of particular requirements for certification".[113] He feels that the real question to be addressed is whether, for instance, there is a need for certification in the first place:

> "The preliminary matter of certification, intended to be a mini-hearing, usually turns into a maxi-hearing. It can quite often be more complex than the trial of the substantive issues (if the case ever proceeds that far) and, as there is so much discretion involved, there are often several appeals. The result in the United States and Quebec has been that certification serves as a chilling deterrent to the use of class actions. There has been a steady decline in the number of class actions at the same time that litigation in general would appear to be increasing modestly, ...
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> The process of certification denies a fundamental interest: the interest of a prospective plaintiff in bringing his or her

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of 1979, U.S. Department of Justice, Office for Improvements in the Administration of Justice Bill H.R. 5103, 96th Cong., 1st Sess. (1979). For an overview of the proposals in these Bills, see OLRC Report, p.691-694.

113 Andrew Roman, "Class Actions in Canada: The Path to Reform?". The Advocates Society Journal, Aug. 1988, p.28, citing articles by September Berry, "Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action" (1980), 80 Col. L. Rev. 299; Arthur Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the Class Action Problem" (1979), 92 Harv. L. Rev. 664; "The Proposed Uniform Class Actions Act" (1981), 4 C.A.R. 181; John E. Kennedy, "Federal Class Actions: A Need for Legislative Reform (1979), 32 Southwestern L.J. 1209.

> dispute before the court in the most efficient and effective manner, in the judgment of that plaintiff's counsel.
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> ... The notion that one doesn't need anyone's permission to commence a class action may sound horrifying to those who were nursed on FRCP Rule 23. However, in England, Australia, and Canada (except for Quebec), certification is not a requirement at present. If a defendant feels that a class action is inappropriate, the normal procedure is to more to strike it out, with the onus being on the defendant to show the action should not be tried that way rather than on the plaintiff to show that it should."[114]

Finally, the comments of Professor Miller are appropriate ones upon which to conclude this report. In his view the so-called "class action problem" is a convenient scapegoat for grievances against the civil litigation system and prevailing attitudes in American society.[115] Class action procedure itself (e.g. Federal Rule 23) can not be blamed for increased burdens related to new patterns of complex litigation. Rather, we should look to the major new substantive changes-including those changes prima facie unrelated to class actions which have nonetheless affected its utilization - and the judicial activism or restraint in recognizing these new substantive rights. Therefore, many "class action problems" are

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[114] Roman (f.n.113), p.29-31.

[115] Miller, p.194-196.

really "a function of forces set in motion by Congress, the Supreme Court, other appellate courts, societal changes, and the evolving structure of the legal profession" rather than being due to any one procedural class action rule.[116]

The debate about the appropriate design and content of a class action remedy should not be a surrogate for unstated assumptions or hidden agendas. The value of class action reform should not be discussed in the context of procedural reform and law enforcement strategy generally, but on the merits, directly and forthrightly.

We trust that this comparative study will assist CCAC in these discussions.

January 31, 1989

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[116] Miller, ibid.